

MCPHERSON OIL COMPANY, INC.
2340 Woodcrest Place, Suite 175
Birmingham, Alabama 35209-1304,

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

DOCKET NO. MISC. 99-474

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed wholesale oil license tax against McPherson Oil Company, Inc. (ATaxpayer@) for October 1995 through September 1998. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, '40-2A-7(b)(5)a. A hearing was conducted on January 19, 2000. Donna Byrd represented the Taxpayer. Assistant Counsel John Breckenridge represented the Department.

The Taxpayer purchased various oil products at wholesale from Castrol North American Automotive, Inc. (ACastrol@) from October 1995 through September 1998. Castrol's facilities are located outside of Alabama. The Taxpayer subsequently resold the products at wholesale in Alabama.

The wholesale oil license tax is on the first, and only the first, wholesale sale of oil products in Alabama. Code of Ala. 1975, '40-17-174. The issue in this case is whether the sales by Castrol to the Taxpayer occurred in Alabama. If so, the Castrol sales were the first wholesale sales in Alabama, and the Taxpayer is not liable for the tax in issue.

If the sales by Castrol occurred outside of Alabama, the Taxpayer's sales to its customers were the first wholesale sales in Alabama, and the Taxpayer is liable for the tax.

The Taxpayer is a licensed motor fuel wholesaler in Alabama. As indicated, the Taxpayer purchased various oil products at wholesale from Castrol during the subject period. Castrol has facilities in Louisiana and other states, but does not have any facilities or employees in Alabama.

Castrol periodically mails a "Distributor Price List" to its various customers, including the Taxpayer. The list states the current prices for Castrol's products. It also includes other conditions of the sale, including "FOB Origin, Freight Prepaid."

The Taxpayer ordered products from Castrol during the subject period via the telephone. The products were shipped to the Taxpayer by common carrier. Castrol arranged for and paid the common carriers, and also insured the products during transit. Castrol refused to allow the Taxpayer to pick up the products at the Castrol facility. If a problem arose during delivery, Castrol would "interface with the freight company to work out the problem..." (Dept. Exhibit 3, p. 2, para. 8).

The Taxpayer resold the products at wholesale to customers in Alabama. The Taxpayer failed to report those sales on its annual wholesale oil license tax return filed with the Department. As indicated, the wholesale oil license tax is levied on the first, and only the first, wholesale sale of oil products in Alabama. Section 40-17-174.

The Department audited the Taxpayer and determined that the Castrol sales occurred outside of Alabama. Consequently, the Department determined that the Taxpayer's sale of the products to its Alabama customers was the first wholesale sale in Alabama. The Department assessed the Taxpayer accordingly. The Taxpayer appealed.

Did the wholesale sales by Castrol to the Taxpayer occur in Alabama?

Alabama's oil, gasoline, and motor fuels tax statutes are contained in Chapter 17, Title 40, Code of Ala. 1975. Chapter 17 does not include a provision specifying when a sale occurs for purposes of the taxes levied therein. The Alabama sales tax law does define a sale, and also specifies when a sale is closed. Code of Ala. 1975, ' 40-23-1(a)(5). However, the ' 40-23-1(a)(5) definition applies only to sales tax, and thus does not apply in this case.

Because the Alabama Revenue Code does not specify when a sale occurs for purposes of the wholesale oil license tax, the general Alabama law on the subject, the Uniform Commercial Code (UCC), Title 7, Code of Ala. 1975, must control, and specifically Chapter 2 of Title 7, entitled Sales.

The UCC defines a sale as the passing of title from the seller to the buyer for a price. Code of Ala. 1975, ' 7-2-106(1). Unless otherwise explicitly agreed, title passes to the buyer when the seller completes his performance with reference to the physical delivery of the goods. . . Code of Ala. 1975, ' 7-2-401(2). The issue thus is when did Castrol complete its required performance concerning delivery of the oil products.

FOB is a delivery term. If a sale is FOB origin or place of shipment, the sale occurs when the seller delivers the goods for shipment to the carrier. Code of Ala. 1975, ' 7-2-319(1)(a); Oxmoor Press, Inc. v. State, 500 So.2d 1098 (1986); State v. Delta Air Lines, Inc., 356 So.2d 1205 (1978). Consequently, if the FOB origin designation on the Castrol price list was part of the sales agreement between Castrol and the Taxpayer, the sales occurred outside of Alabama.

When Castrol distributed the price list to the Taxpayer, Castrol was in substance making an offer for the Taxpayer to purchase its products at the listed price, and subject to the other terms on the price list, including the FOB origin delivery terms. When the Taxpayer ordered the products from Castrol, it accepted and acquiesced in the terms of the offer. The sales were thus FOB origin, and closed outside of Alabama when Castrol delivered the products to the common carrier.

The Taxpayer argues that the intent of the parties, as manifested by Castrol paying the freight and insurance and handling all problems during delivery, was that Castrol would retain title until the products were delivered to the Taxpayer in Alabama. However, the intent of the parties no longer controls in determining when a sale is closed in Alabama.

Before Alabama adopted the UCC, the Alabama law governing when a sale was closed was found in Title 57, ' ' 23 through 46, Code 1958. Section 24 provided that title passed ~~A~~at such times as the parties to the contract intend it to be transferred.[@] Section 25 was titled ~~A~~Rules for Ascertaining Intent,[@] and contained guidelines for determining the intent of the parties. However, the Legislature repealed Title 57, ' ' 23 through 46 and simultaneously enacted the UCC by Acts 1965, No. 549, effective midnight December 31, 1966. As indicated, under the UCC, a sale is closed when the seller completes performance concerning the physical delivery of the goods. The unexpressed intent of the parties is no longer relevant.

The Taxpayer argues that the sales were in substance FOB destination because Castrol paid the freight and insurance and handled any problems during delivery. Those facts, however, do not alter the legal effect of the FOB origin designation. Concerning

FOB origin sales, the seller's legal obligation with respect to delivery is completed when the goods are delivered to the carrier. Castrol was obligated to prepay the freight because the price list terms included "Freight Prepaid." Castrol was not, however, legally obligated to insure the goods or to handle all problems that might arise during transit. The fact that Castrol did those things does not alter when title transferred. Further, there is no evidence that a problem ever arose concerning a shipment from Castrol to the Taxpayer that required Castrol to intervene.

Finally, the Taxpayer argues that Castrol bore the risk of loss during delivery. I disagree. As shown, Castrol's legal obligation concerning the products ended when it delivered the products to the carrier. Castrol's legal risk of loss ended at that time, even though Castrol prepaid the freight and insurance¹, and presumably would have worked with the carrier if any problems arose during delivery.

Because the Taxpayer's sales to its customers were the first wholesale sales in Alabama, the Department correctly assessed the Taxpayer for the tax in issue. The final assessment is affirmed. Judgment is entered against the Taxpayer for wholesale oil license excise tax and interest of \$12,405.09, plus applicable interest from the date of entry of the final assessment, September 1, 1999.

This Final Order may be appealed to circuit court within 30 days pursuant to Code

¹There is no evidence as to whether Castrol or the Taxpayer would have received the insurance proceeds had the products been lost or damaged during shipment.

of Ala. 1975, ' 40-2A-9(g).

Entered February 11, 2000.

BILL THOMPSON
Chief Administrative Law Judge

BT:dr

cc: John J. Breckenridge, Esq.
Donna Knotts Byrd, Esq.
Floyd Atkins