JONES OIL COMPANY, INC. 1627 WEST HIGHLAND AVENUE SELMA, AL 36701,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. MISC. 05-1084
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Jones Oil Company, Inc. ("Taxpayer") for the wholesale oil license tax levied at Code of Ala. 1975, §40-17-174 for October 2000 through September 2003. 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 24, 2006. Dean Mooty represented the Taxpayer. Assistant Counsel David Avery represented the Department.

The Taxpayer is a motor fuel distributor located in Selma, Alabama. The Taxpayer purchased dyed diesel fuel at wholesale from Hunt Refining Company in Tuscaloosa, Alabama during the period in issue. Hunt had manufactured the product before selling it to the Taxpayer. The Taxpayer subsequently sold the diesel at wholesale to Demopolis Yacht Basin, which resold it at retail for exempt off-road purposes.

The Taxpayer did not report and pay the wholesale oil license tax on the subject fuel because its wholesale sales to the Demopolis Yacht Basin were not the first wholesale sales of the fuel in Alabama. As discussed below, §40-17-174 specifies that the tax applies only to the first wholesale sale of the product in Alabama.

The Department, relying on the Alabama Supreme Court's holding in *State v. Coastal Petroleum Corp.*, 198 So. 610 (1940), determined that Hunt Refining was not in the

business of selling at wholesale, and thus not subject to the §174 tax. The Department consequently determined that the Taxpayer was liable for the §174 tax on its subsequent wholesale sales to the Demopolis Yacht Basin.

Section 40-17-174 levies a privilege tax on every person "selling illuminating, lubricating, or fuel oils at wholesale in quantities of 25 gallons or more, . . ." The tax applies only to wholesale sales in Alabama. *State v. Pan-Am S. Corp.*, 89 So.2d 747 (1956).

Before 1996, §40-17-174 was construed so that if the same fuel product was sold at wholesale multiple times in Alabama, each wholesale seller would be required to report and pay the §174 tax on the product. See generally, *State v. Bama Blenders, Inc.*, Misc. 89-228 (Admin. Law Div. 4/3/90). Section 40-17-174 was amended by Act 96-521 in 1996 to provide as follows:

> The tax shall be paid on the first, and only the first, wholesale sales transaction of the oils sold in this state. The initial wholesale transaction shall be the only point at which the wholesale oil license fee is imposed on the oils sold in this state, the intent being that the tax shall be paid to the state but once.

The Taxpayer argues that the first wholesale sale of the dyed diesel fuel in issue was the wholesale sale by Hunt Refining to the Taxpayer. The Taxpayer thus asserts that Hunt Refining should be liable for the tax, and that based on the language added by the 1996 amendment, the tax cannot be imposed on the second wholesale sale from the Taxpayer to the Demopolis Yacht Basin. The Taxpayer also claims that it would be a denial of due process and patently unfair to assess it for the tax in issue because the Department failed to properly notify the Taxpayer and other oil distributors that wholesale sales by refiners were not subject to the §174 tax.

As indicated, the Department's position is based on the Alabama Supreme Court's

holding in *Coastal Petroleum*. Coastal Petroleum manufactured crude oil into gasoline and other petroleum products, including illuminating oil and fuel oil, at its refinery in Alabama. It subsequently sold the products at wholesale in Alabama in quantities of 25 gallons or more. Coastal Petroleum did not maintain a place of business in Alabama separate from its refinery, and did not sell any petroleum products other than those manufactured at its refinery in Alabama.

The State Tax Commission, the predecessor of the Revenue Department, assessed Coastal for the wholesale oil license tax currently levied at §40-17-174. The Supreme Court held that Coastal was not subject to the tax because it was a manufacturer only, and was not in the business of selling the petroleum products at wholesale.

> Under the agreed statement of facts, "The Coastal Petroleum Corporation does not maintain a place of business separate and apart from its refinery, where any of its products are sold at wholesale, that is to say, in quantities of twenty-five gallons or more, or in any other fashion, and every product manufactured by the Coastal Petroleum Corporation is sold from its manufacturing plant or refinery in Mobile County, Alabama, and was so sold during the periods mentioned in the complaint.
>
> Considering the statutes here involved in connection with the subsequent passage of the gross receipt tax of 1936-1937, and weighting them all in the light of the external historical facts which led to their enactment, we hold that the tax here involved does not apply to person, firms or corporations engaged solely in manufacturing, whether their products are sold in large or small quantities. The incidents of manufacture, as such, consist of the acquisition of material and the disposal of the product. 38 Corpus Juris 989, section 62. Of course a manufacturer may deal as a wholesaler or retailer if he manufactures his stock in trade and offers it for sale as a merchant, dealer, wholesaler or retailer.

Coastal Petroleum, 198 So. at 613.

The Department argues that based on the rationale of *Coastal Petroleum*, Hunt

Refining was not in the business of selling the diesel at wholesale, and thus was not subject to the §174 tax. Consequently, the Department contends that the first wholesale sales within the purview of the statute were the sales by the Taxpayer to the Demopolis Yacht Basin, in which case the Taxpayer is liable for the §174 tax on those sales.

To begin, I apparently commented at the January 24 hearing that I did not understand the *Coastal Petroleum* case. See, Department's Brief at 6. If I made that comment, I misspoke. I understand what the Court held in *Coastal Petroleum*. What I should have said (if I did not) is that I respectfully disagree with the Court's rationale in the case.

The §174 tax is levied on persons, entities, etc. that sell fuel oils at wholesale. The Supreme Court held in *Coastal Petroleum* that for the tax to apply, the seller must be in the business of selling at wholesale. I agree. However, I disagree that an entity that manufactures fuel products and then sells the products at wholesale is not also in the business of selling the products at wholesale.

The §174 tax is levied on the privilege of selling fuel products at wholesale. Coastal Petroleum was selling its products at wholesale, and thus fit squarely within that levy. Section 174 does not distinguish between fuel oils sold at wholesale by the manufacturer thereof and fuel oils sold at wholesale by a seller that had previously purchased the product at wholesale from the manufacturer or another wholesaler. In either case, the seller is in the business of selling at wholesale.

The Court emphasized in *Coastal Petroleum* that Coastal did not have a place of business separate from its refinery at which it sold the manufactured products at wholesale. The Court also conceded that "a manufacturer may deal as a wholesaler or retailer if he

manufactures his stock in trade and offers it for sale as a merchant, dealer, wholesaler or retailer." *Coastal Petroleum*, 198 So. at 613. That is what Coastal Petroleum did. It offered its manufactured product for sale at wholesale. It is irrelevant that it sold the product at its refinery and not at a separate wholesale outlet. I see no substantive distinction between a manufacturer that sells its manufactured product at wholesale from its refinery, and a manufacturer that sells the product from a separate wholesale outlet away from the refinery. In both cases, the manufacturer is in the business of selling the manufactured product at wholesale, and in both cases the wholesale sales fall squarely within the purview of §40-17-174.

In its brief, the Department compares manufacturers of oil products that sell at wholesale to farmers that sell their produce at wholesale. "Farmers are in the business of farming." Department's Brief at 6, n. 7. However, when a farmer subsequently sells his harvested produce, either at wholesale or retail, the farmer is also in the business of selling at wholesale or retail. The retail sale of fruit and other agricultural products by the farmer that grew the products is subject to sales tax in Alabama, but such sales are specifically exempted by Code of Ala. 1975, §40-23-4(a)(44). It follows that a farmer that sells his own produce must be in the business of selling produce because sales tax only applies if the seller is "in the business of selling at retail." Code of Ala. 1975, §40-23-2(1). Also, if sales by farmers were not initially subject to sales tax, there would have been no need to exempt such sales pursuant to §40-23-4(a)(44). It is presumed that the Legislature did not take an unnecessary action. *Druid City Hospital Board v. Epperson*, 378 So.2d 696 (Ala. 1979). Consequently, while farmers are obviously in the business of farming, they are also in the business of selling the produce they grow. Likewise, motor fuel manufacturers are in the

business of selling their products when they sell them at wholesale or retail, regardless of whether the sale is at the refinery or elsewhere.

Notwithstanding my disagreement with the Court's rationale in *Coastal Petroleum*, it must be followed. Consequently, if Hunt Refining only sold its manufactured fuel products at wholesale from its refinery during the period in issue, *Coastal Petroleum* applies and the final assessment in issue must be affirmed. [1] However, the Taxpayer's representative indicated at the January 24 hearing, and also in his post-hearing brief, that Hunt Refining is engaged in all aspects of the distribution system. If Hunt Refining had a separate facility or outlet during the subject period at which it sold fuel products at wholesale, it was in the business of selling at wholesale and the rationale of *Coastal Petroleum* would not apply.

The Department attorney is correct that statements by the Taxpayer's representative concerning Hunt Refining's business activities in Alabama cannot be relied on as evidence. See, Department's Brief at 1, n. 1. The Taxpayer is allowed until April 7, 2006 to notify the Administrative Law Division if it has evidence establishing that Hunt Refining was selling fuel products at wholesale in Alabama during the subject period other than at its refinery in Alabama. If so, a hearing will be scheduled at which the evidence can be offered.[2]

---

[1] It could be argued that the language added to §40-17-174 by the 1996 amendment provides an exemption concerning all subsequent wholesale sales of fuel in Alabama after the first such sale. In that case, it would be irrelevant whether the first wholesale seller, Hunt Refining in this case, was in the business of making wholesale sales. But the 1996 amendment also clearly specifies that the tax must be paid once on fuel sold at wholesale in Alabama. Consequently, the language added in 1996 cannot be construed as exempting all subsequent wholesale sales because under the *Coastal Petroleum* rationale, no tax would be paid if the initial wholesale sale was by the manufacturer that otherwise was not in the business of selling at wholesale.

[2] Code of Ala. 1975, §40-2A-9(d) specifies that the administrative law judge may "reopen the hearing for the taking of additional evidence as deemed necessary for a fair, efficient,

The Taxpayer also asserts that the Department failed to properly notify taxpayers that manufacturers of oil products are not subject to the §174 tax. The Department is correct, however, that it cannot be estopped from assessing and collecting a tax that is legally due. *Community Action Agency of Huntsville, Madison County, Inc. v. State*, 406 So.2d 890 (Ala. 1981); *State v. Maddox Tractor & Equipment Co.*, 69 So.2d 426 (1953). In the above cases, the Department misinformed the taxpayers concerning the applicability of the taxes in issue. If the Department cannot be estopped in those cases, certainly it cannot be estopped because it may not have fully notified or informed the Taxpayer and other oil distributors that manufacturers are not subject to the §174 tax.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered March 20, 2006.

_____
BILL THOMPSON
Chief Administrative Law Judge

---

and complete resolution of the matter or matters in dispute."