

EXXON MOBIL CORPORATION  
PO BOX 4541  
HOUSTON, TX 77210-4541,

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§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NOS. S. 05-457  
S. 05-471

v.

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

### FINAL ORDER

The Revenue Department assessed Exxon Mobil Corporation (“Exxon”) for sales tax and use tax for December 1998 through June 2001. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. The cases were consolidated, and a hearing was conducted on December 13, 2005. Carla Gilmore represented the Taxpayer. Margaret McNeill represented the Department.

This is a penalty case. The Department audited Exxon for the period in issue and determined that Exxon had underpaid both sales and use tax during the period. Exxon paid the tax due, plus interest. The Department subsequently assessed Exxon for the 5 percent negligence penalty concerning both sales tax and use tax. Exxon appealed.

Code of Ala. 1975, §40-2A-11(c) levies a 5 percent negligence penalty, as follows:

If any part of any underpayment of tax is due to negligence or disregard of rules and regulations, there shall be added to the tax an amount equal to five percent of that part of the tax attributable to negligence or disregard of rules or regulations.

For purposes of this subsection, the term “negligence” includes any failure to make a reasonable attempt to comply with Title 40, and the term “disregard” includes any careless, reckless, or intentional disregard.

Negligence, as defined in §40-2A-11(c), must be decided on a case-by-case basis.

In this case, the Department examiner found numerous bookkeeping or accounting entry

errors that resulted in additional tax due. It does not appear that the errors or omissions were due to reckless or intentional disregard. It is unclear, however, whether the mistakes were due to careless disregard or a failure to make a reasonable attempt to comply with Title 40.<sup>1</sup>

Exxon is a direct pay permit holder that is allowed to buy tangible property tax-free. It must then report and pay sales or use tax when and if the property is used for a taxable purpose. See, Dept. Reg. 810-6-4-.14. Exxon's accounting department records thousands of transactions each month, and the accounting personnel must decide in each case whether the transaction is or is not taxable. Exxon argued at the December 13 hearing that it has continuous turnover in its accounting department, and that despite training its new employees, mistakes are inevitable.

Simple accounting entry errors or omissions generally would not constitute negligence, as defined at §40-2A-11(c), unless they could have been avoided or greatly reduced by reasonable diligence. But regardless of whether Exxon was negligent, the penalties in issue must still be waived because the Department failed to comply with the Taxpayers' Bill of Rights, and specifically, Code of Ala. 1975, §40-2A-4(a)(3)a. That section requires that the Department must, at or before the issuance of a preliminary assessment, provide a taxpayer in simply, non-technical terms "[a] written description of the basis for . . . any penalty . . ." assessed by the Department.

The Department examiner conducted a thorough and detailed audit. He indicated in

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<sup>1</sup> Exxon's erroneous accounting entries and omissions did not comply with Code of Ala. 1975, §40-2A-7(a)(1), which requires taxpayers to keep an accurate and complete set of records. But again, it is unclear whether Exxon's failure to comply was unreasonable or due to careless disregard.

his audit report that the “assessment procedure and penalties were explained to the taxpayer.” Exxon Ex. 3, at p. 5. However, testimony at the December 13 hearing indicated that the examiner did not discuss or even mention a negligence penalty with any of Exxon’s employees during the audit until he provided Exxon with his final workpapers, and then the penalties were still not explained.

In any case, it is irrelevant whether the examiner verbally discussed or explained the penalties to Exxon personnel. Section 40-2A-4(a)(3)a. clearly requires that a written explanation of the basis for the penalty must be provided. The examiner stated in his audit report, that “I believe that (the) penalty (should) be assessed as it is legal, proper and is appropriate.” That conclusory statement does not, however, explain the basis for why the negligence penalty should apply.

The examiner also stated in his audit report that Exxon had provided all requested records and was cooperative throughout the audit. Importantly, the examiner had no recommendations for improvement. If Exxon was negligent in making its accounting entries, an obvious recommendation would be to improve the accuracy of those entries. The examiner’s supervisor conceded at the December 13 hearing that “the examiner should have gone in more detail,” and that perhaps the examiner should have made a notation concerning the negligence penalty. (T. 24.) I agree.

Code of Ala. 1975, §40-2A-4(c) provides that if the Department fails to substantively comply with any provision in the section, any penalties arising from the audit or assessment shall be abated. The Department’s failure to provide Exxon with a written explanation or basis for why the negligence penalty was assessed was a substantive failure to comply with §40-2A-4(a)(3)a. Consequently, the penalties must be waived.

The final assessments are voided. Judgment is entered accordingly.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered January 20, 2006.

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BILL THOMPSON  
Chief Administrative Law Judge