MOTIVA ENTERPRISES, LLC P.O. BOX 2463 HOUSTON, TX 77252-2463,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. MISC. 08-410
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

Motiva Enterprises, LLC ("Taxpayer") petitioned the Department for a refund of wholesale oil license tax for the fiscal year ending September 30, 2002. The Department partially denied the petition. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(c)(5)a. A hearing was conducted on September 9, 2008. Bruce Ely and Matt Houser represented the Taxpayer. Assistant Counsel John Breckenridge represented the Department. Dean Mooty also filed an amicus brief in support of the Taxpayer on behalf of the Petroleum and Convenience Marketers of Alabama (f/k/a the Alabama Oilmen's Association).

This case involves the interplay between the wholesale oil license tax levied at Code of Ala. 1975, §40-17-174 and the motor fuels excise taxes levied at Code of Ala. 1975, §§40-17-2 and 40-17-220. The §174 wholesale tax is an annual tax levied against a wholesale distributor on the first wholesale sale of diesel and other motor fuels in Alabama. The motor fuels tax is a monthly tax levied against distributors or suppliers upon the receipt and sale of diesel and other motor fuels in Alabama. Diesel is not, however, subject to the motor fuels tax if it is sold at wholesale to another licensed distributor, or is sold to an exempt entity or for an exempt purpose. See generally, Code of Ala. 1975, §§40-17-2(2) and (3) and 40-17-220(d) and (f).

Section 40-17-2(1) also specifies that if motor fuels tax is ever paid on diesel, the diesel shall not be subject to any other State excise tax, including the §174 wholesale oil tax. See, *W. C. Rice Oil Co. v. State of Alabama*, Misc. 97-254 (Admin. Law Div. 10/15/1998). Consequently, if a wholesale distributor pays the §174 wholesale oil tax on diesel, and the motor fuels tax is later paid by another licensed distributor on that same diesel, the diesel is retroactively exempted from the §174 tax, and the wholesaler that paid that tax is due a refund.

The Department concedes the holding in *W. C. Rice* that a wholesaler is entitled to a §174 refund if motor fuels tax is later paid on the same diesel. At issue in this case is the method by which the wholesaler can establish the amount of the refund due.

The Department contends that for a wholesaler to obtain a §174 refund, it must prove that a downstream distributor actually paid the motor fuels tax on the diesel purchased from the wholesaler. The Department argues that to do so, the wholesaler must provide the Department with the downstream distributor's sales records showing that the distributor resold the wholesaler's diesel in a transaction subject to the motor fuels tax. The problem is that the wholesaler that pays the §174 wholesale tax and the downstream distributor that pays the motor fuels tax on the same product both sell to the same end users, and are thus competitors. Consequently, as discussed below, downstream distributors will generally refuse to provide their confidential sales records to a wholesaler, and the wholesaler cannot otherwise force them to do so. The Taxpayer thus argues that it should be allowed to prove the amount of §174 refund due using the purchase and sales information on the monthly motor fuels tax returns filed by its distributor customers.

The relevant facts are undisputed.

The Taxpayer sells diesel fuel to other licensed distributors at wholesale and also to both exempt and nonexempt end-users. It reported and paid over $466,000 in §174 wholesale tax on diesel sold to other distributors at wholesale or to exempt end-users during the year in issue. It also reported and paid motor fuels tax on its diesel sold to nonexempt end-users during the year.

A licensed distributor that purchased diesel from the Taxpayer at wholesale generally picked up the diesel from the Taxpayer's facility in a tanker truck. It then sold the diesel to either a single customer or to several customers. Some of the sales were subject to motor fuels tax, while others were wholesale sales to other licensed distributors or otherwise exempt from motor fuels tax. Any diesel remaining in the tanker at the end of the day was deposited into the distributor's storage tank, and thus commingled with diesel previously purchased from the Taxpayer and/or other wholesalers. The distributor subsequently withdrew and sold that commingled diesel to various taxable and nontaxable customers.

The Taxpayer petitioned the Department in October 2005 for a refund of the §174 wholesale tax for the fiscal year ending September 30, 2002 in the amount of $200,081.11, plus interest. It computed the refund amount using the monthly motor fuel returns of 14 of the largest licensed distributors to which it had sold diesel at wholesale during the year.[1] Those returns showed the total gallons of diesel purchased by each

[1] The Taxpayer sold diesel at wholesale to 70 licensed distributors in the subject year. It had requested the returns of approximately 20 of its largest customers. Only 14 volunteered their returns. The rest refused to cooperate.

distributor during the month, and also the total gallons sold subject to the motor fuels tax.

The Taxpayer computed the refund amount by first determining the percentage of diesel reported on each return on which the distributor had paid the motor fuels tax. It then multiplied that percentage by the amount of §174 wholesale tax it had paid on the diesel it sold to the distributor in the month to determine the amount of §174 tax to be refunded. For example, assume the Taxpayer sold 100,000 gallons of diesel at wholesale for $1.00 a gallon to another licensed distributor in a given month. The Taxpayer reported and paid $500 in §174 wholesale tax on the diesel ($100,000 x 1/2% = $500). The distributor had purchased a total of 1 million gallons of diesel during the month from various wholesalers, including the Taxpayer, and sold 200,000 gallons in transactions subject to motor fuels tax. Its monthly motor fuels return would show that it had purchased 1 million gallons, and had sold 200,000 gallons, or 20% of the total gallons, in transactions subject to motor fuels tax. The Taxpayer would compute the §174 refund due in the above example by applying the 20% "exemption" percentage to the $500 in §174 wholesale tax it had paid on the diesel sold to the distributor in the month. The refund due would thus be $100 ($500 x 20% = $100).

The Department responded by requesting that the Taxpayer obtain and provide the motor fuel tax returns and sales records of the distributors that the Taxpayer had sold diesel to during the year. The Department's February 6, 2006 letter to the Taxpayer reads in part:

> 1. If you are the sole supplier of the clear diesel fuel that is sold tax-free to a licensed distributor who remits the excise tax to the Department of Revenue, you must submit copies of the customer's monthly excise tax returns along with the petition for refund. Also, you

must provide documentation as to the sales price for each load of fuel sold to the customer.

2. If you are not the sole supplier of the clear diesel fuel sold tax-free to the licensed distributor who remits the excise tax to the Department of Revenue, the initial wholesaler is required to obtain and furnish the following documentation to the Department of Revenue:

a. Copies of the licensed distributor's monthly State of Alabama motor fuel excise tax returns.

b. Copies of each bill of lading and invoice that shows the sales price of the fuel and point of delivery.

c. Copies of each of the license distributor's bills of lading and invoices showing the excise tax billed to licensed distributor's customer(s). The invoices must balance back to the initial wholesaler's invoice for the total gallons billed.

d. If this product is commingled with fuel purchased from other suppliers in the licensed distributor's bulk storage facility, no exclusion will be allowed.

Taxpayer Ex. 2.

The Taxpayer responded that it could not obtain the requested sales records from any of its distributor customers, and that doing so would likely violate antitrust laws. It also stated that the Department already had access to the requested motor fuel returns filed by its customers.

The Department subsequently granted the Taxpayer a partial refund of $32,286.17, plus interest. The refund was based solely on the Taxpayer's wholesale sales to licensed distributors that had no exempt sales in a given month, i.e., distributors that had paid motor fuels tax on all of the diesel it had purchased in the month. It denied the balance of the claimed refund.

The Department argues that the burden is on the Taxpayer to prove it is entitled to a refund. It contends that the Taxpayer can do so only if it provides the bills of lading and invoices issued by its distributor customers showing the amounts and taxable or nontaxable nature of the distributors' sales to their customers.

The Taxpayer counters that a wholesaler and its distributor customers are competitors because they sell to the same end-users. Consequently, a distributor's pricing schemes and the identity of its customers, as shown on its sales records, are confidential, and a distributor generally will not provide those records to another distributor; nor can one distributor require or otherwise force another distributor to provide those records.[2] It argues that obtaining that information may also violate various antitrust and other State and federal laws. It claims that under the circumstances, it should be allowed to use the information on its customers' monthly motor fuel returns as a reasonable method to compute the refund due. I agree.

The Taxpayer was required to keep adequate records of its business activities during the period in issue. Specifically, §40-17-174 required the Taxpayer to maintain records relating to the wholesale oil tax showing the date, character, and amount of its wholesale sales. Section 40-17-7 also required the Taxpayer to maintain records relating to the motor fuels tax showing the amount of its sales, distributions, etc. of motor fuels in Alabama. It is undisputed that the Taxpayer properly maintained those records.

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[2] The Taxpayer requested sales records from at least two of its distributor customers, and was rebuffed both times. The Taxpayer's Southeast Regional Manager testified that he called his largest reseller in the country and "asked them if they would be willing to provide invoices, pricing detail, and customer lists. And he told me no. And then he came back and said not just no but hell no." (T. 57, 58)

Code of Ala. 1975, §40-2A-7(a)(1) also generally required the Taxpayer to maintain records sufficient to allow the Department to determine the correct tax owed by the Taxpayer. That recordkeeping requirement dovetails with the Taxpayer's burden of establishing its right to a refund. But Alabama's courts have construed such general recordkeeping statutes as not requiring that a taxpayer maintain a particular type or form of records. *State v. Ludlum*, 384 So.2d 1089 (Ala. Civ. App. 1980); *State v. Mims*, 30 So.2d 673 (1947).

In *Ludlum*, the taxpayer failed to keep specific records showing his sales and/or services that were exempt from sales tax. The Department consequently assessed the taxpayer on all of his receipts. The taxpayer's accountant presented evidence on appeal by which he estimated from a test period that 80% of the taxpayer's income was from exempt transactions. The circuit court found such evidence sufficient to verify the taxpayer's exempt transactions during the period in issue.

The Court of Civil Appeals agreed. Citing *Mims*, the Court held that "the supreme court explicitly refused to lay down any particular method of bookkeeping as required by the statute for fear that such a course might unduly burden the small businessman taxpayer. Noting the taxpayer in Mims did have records of his sales and invoices covering purchases, the court upheld the trial court's decision that the taxpayer had preserved a record within the requirements of the statute sufficient to allow a checkup of his business." *Ludlum*, 384 So.2d at 1092.

In *State of Alabama v. Durbin*, S. 92-339 (Admin. Law Div. 9/28/1993), the issue was whether a produce market had maintained records sufficient to establish the amount of its homegrown produce sales, which are exempt from sales tax pursuant to

Code of Ala. 1975, §40-23-4(44). The market had paid sales tax on all produce sold in the subject years. It later learned that homegrown produce was exempt, and applied for a refund. It estimated the amount of the refund based on the percentage of homegrown produce it had purchased from its suppliers. It then applied that percentage to its total sales to determine the percentage of exempt sales. The Administrative Law Division, citing *Ludlum*, accepted the taxpayer's calculations as sufficient, stating that "the rule to be applied is whether the Department can determine with reasonable certainty from a taxpayer's records what part of the taxpayer's sales are exempt and what part are taxable. Records declaring a specific sale or sales to be exempt, while preferable, are not necessary." *Durbin* at 4.[3] The Department did not appeal *Durbin* to circuit court.

Taxpayers are also allowed to reasonably estimate the amount of income tax deductions to which they are entitled using the rule established in *Cohan v. Commissioner*, 39 F.2d 540 (2nd Cir. 1930), i.e., the *Cohan* rule. The *Cohan* rule provides that where a taxpayer has established the right to a deduction, but has failed to maintain records showing the amount that should be allowed, the taxpayer may use other information from which a reasonable estimate can be determined. The IRS regularly applies the *Cohan* rule, and the Administrative Law Division has also applied the rule if a taxpayer presented verifiable evidence from which the amount of the deduction or deductions could be reasonably estimated. *Wideman v. State of Alabama*, Inc. 08-503 (Admin. Law Div. 12/19/2008); *Boles v. State of Alabama*, Inc. 06-272

[3] As discussed below, if a Department regulation requires a particular type or method of recordkeeping, and the type or method is reasonable, the regulation must be followed. *Ex parte White (Re Shellcast Corporation v. White)*, 477 So.2d 422 (Ala. 1985).

(Admin. Law Div. 7/11/2007); *Whitfield v. State of Alabama*, Inc. 03-290 (Admin. Law Div. 7/24/2003).[4]

Taxpayers subject to Alabama sales tax and income tax are also required to keep adequate records, see generally §40-2A-7(1)(a), just as are motor fuel wholesalers subject to the §174 wholesale oil tax. The above authority clearly allows taxpayers to estimate the amount of exempt sales for sales tax purposes or allowable deductions for income tax purposes using verifiable and reliable evidence in lieu of direct records. The same reasonable rule should apply concerning the §174 wholesale oil tax, especially under the circumstances in this case.

The sale and distribution of diesel and other motor fuels is a very competitive, low margin business. Distributors routinely sell at wholesale to other licensed distributors for resale, and also directly to end-users. Distributors thus compete with each other for business. A distributor's customer list and pricing information, as reflected on its sales records, are highly sensitive proprietary trade secrets.[5]

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[4] The Administrative Law Division has also declined to use the rule if a taxpayer failed to present sufficient evidence from which the deduction or deductions could be reasonably estimated. *Glenn v. State of Alabama*, Inc. 08-307 (Admin. Law Div. 8/21/2008); *Johnson v. State of Alabama*, Inc. 06-383 (Admin. Law Div. 2/15/2007); *Broadfoot v. State of Alabama*, Inc. 04-709 (Admin. Law Div. 3/14/2005).

[5] The President of the Petroleum and Convenience Marketers of Alabama emphasized the importance of keeping a distributor's sales records confidential in an affidavit submitted with the association's amicus brief, as follows:

> Of tantamount concern to P&CMA is the Department of Revenue's attempt to require a supplier like Motiva to obtain from its jobber customers the customer records of THOSE jobbers in order for the terminal supplier to properly process a refund, here regarding the wholesale oil license fee. From the industry's perspective, it is absolutely imperative that the licensed distributor not be required to provide to its

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Consequently, as established by the undisputed evidence in this case, a distributor will likely not voluntarily provide its sales records to other distributors/competitors, nor can a distributor force another distributor to provide those confidential records.

The Department argues that "[t]here is no dispute about the fact that all of the taxpayers involved in Motiva's Petition for Refund have specific, strict and complete recordkeeping requirements. What is the use of such requirements if a taxpayer can simply ignore them and submit 'calculations' to support its claims?" Dept. Brief at 5. The Department is thus arguing that because the Taxpayer's wholesale customers, i.e., other licensed distributors, are required to keep records of their downstream sales of the diesel, the Taxpayer is somehow required to also maintain or at least have ready access to those third-party records. That is not the case. The Taxpayer obviously has no knowledge of, and thus cannot maintain records showing the amount and taxable or nontaxable nature of sales made by downstream distributors, nor, as discussed, does it have access to the distributors' records. I know of no other situation in which the Department can or should require a taxpayer to obtain and provide confidential records

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> terminal supplier the requested information. There is hardly any more sensitive information to the jobber industry than the identity of its customer base and its pricing practices with regard to that customer base. Pricing practices differ from customer to customer based on volume, credit risks, different freight charges and numerous other criteria. Moreover, and what makes the DOR's mandated production of this customer information by the jobber to its supplier even more frightening, is the very real fact that those same refiner/suppliers compete with the jobber for much of the same customer base. Under no circumstances would the jobber industry want the supplier industry to have its customer lists and pricing arrangements with those customers. The jobber is truly a "middle man." The terminal supplier's sales pitch to the ultimate customer/end user is they can "cut out the middle man" and reduce associated costs. If the supplier knew who the jobber's customers were AND how they priced the fuel to them, the supplier can ruin the jobber's business.

from a third-party competitor before the taxpayer can obtain a refund to which it is otherwise entitled.

The Department subsequently promulgated Reg. 810-8-1-.06, effective October 11, 2006, which in substance adopted the recordkeeping requirements set out in the Department's February 2, 2006 letter to the Taxpayer. The Department concedes that the regulation was enacted after the fact and does not apply to the period in issue. It nonetheless is in substance attempting to make those recordkeeping requirements retroactive to the subject year. But even if the regulation had been in effect in the subject year, the requirement that a wholesaler seeking a §174 refund must obtain and submit the sales records maintained by a third-party distributor would still be rejected.

In *Shellcast*, *supra*, the Alabama Supreme Court held that a taxpayer must follow the method prescribed by a Department regulation for recording taxable and nontaxable transactions unless the method is unreasonable. The recordkeeping requirements in Reg. 810-8-1-.06, at least those relating to the production of confidential third-party records, are clearly unreasonable. The Taxpayer has maintained all sales, distribution, and other records it was required by law to keep. It is unreasonable to require the Taxpayer, or any distributor, to provide the confidential and proprietary sales records of a third-party competitor before it can obtain a refund. As discussed, those competitors will generally refuse to provide the records. A wholesaler also has no method to require or compel its distributor customers to provide those records, nor has the Department suggested such a method.

Licensed motor fuel distributors are required to maintain thousands of invoices, bills of lading, and other documents relating to their sales/distributions of diesel.

Requiring all of a distributor's wholesale customers to copy and provide all of those documents would be so time-consuming and administratively burdensome so as to itself be unreasonable. Just as the Alabama Supreme Court was concerned in *Mims* that requiring a particular method of recordkeeping may "unduly burden businesses," *Ludlum*, 384 So.2d at 1092, citing *Mims*, 30 So.2d at 674, requiring distributors to copy and provide perhaps tens of thousands of their sales records any time a wholesale supplier petitions for a §174 refund would unduly burden the distributors. See Brief of Amicus Curiae at 4, 5. Finally, requiring the Taxpayer to obtain its customers' sales information may also cause antitrust violations, see Taxpayer's Brief at 14, 15, and/or violate the federal Robinson-Patman Act, 15 U.S.C. §13, and the Alabama Motor Fuel Marketing Act, Code of Ala. 1975, §8-22-1 et seq., see Taxpayer's Brief at 16 – 19.

The method used by the Taxpayer to compute the refund is also reasonable. The Taxpayer computed the refund using the information on the monthly Alabama motor fuel tax returns filed by 14 of its wholesale customers. The numbers on those returns are exact numbers, not estimates, that reflect the total gallons of diesel purchased by each distributor in the month and also the amount sold in the month subject to motor fuels tax. Multiplying the total gallons purchased by the gallons on which the motor fuels tax was paid, the Taxpayer determined an exact percentage of gallons sold by each distributor on which the motor fuels tax was paid, and on which a refund of the §174 tax is due. It then multiplied the exemption percentage by the §174 tax it had paid on the diesel sold to each distributor in each month to arrive at the exact refund due.

The only assumption by the Taxpayer is that the downstream distributors paid the motor fuels tax on the same percentage of the diesel purchased from the Taxpayer that it did on diesel purchased from all wholesalers in the month. In the above example, *supra* at 4, the distributor paid motor fuels tax on 20% of the total diesel it purchased during the month. The Taxpayer's method assumes that the distributor also paid motor fuels tax on the same 20% of the diesel that the subject wholesaler sold to the distributor in the month. The assumption is reasonable.

Diesel is fungible, and a distributor routinely commingles diesel purchased from numerous wholesalers in a large storage tank at its terminal. The distributor then withdraws and sells that commingled diesel to various taxable and nontaxable customers. The Department's position, as reflected in its February 6, 2006 letter to the Taxpayer and Reg. 810-8-1-.06, is that if a distributor sells commingled diesel for both taxable and nontaxable purposes, a §174 refund can never be issued because the exact amount of diesel provided by each wholesale supplier cannot be identified as having been sold in a taxable transaction. That is, the molecules of diesel provided by each wholesaler cannot be traced to a sale subject to the motor fuels tax.[6] That

[6] The Department allowed the Taxpayer a partial §174 refund because some distributors had paid motor fuels tax on all diesel they sold in a month. For example, if a distributor had purchased 9,900 gallons of diesel at wholesale from the Taxpayer in a month and 100 gallons at wholesale from another wholesaler, and then commingled and sold all 10,000 gallons in transactions subject to the motor fuels tax, the Department would allow the Taxpayer a refund of all of the §174 wholesale tax paid on the 9,900 gallons it sold the distributor. If, however, the distributor had sold 9,900 of the commingled gallons in transactions subject to motor fuels tax and 100 gallons to an exempt customer, the Department would not allow the Taxpayer any §174 refund, even though motor fuels tax was paid on 9,900 of the 10,000 gallons, because an indeterminable part of the 9,900 gallons sold by the Taxpayer to the distributor may have been a part (or all) of the 100 gallons sold to the exempt customer. That example,

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absolute bar improperly prohibits §174 refunds that are otherwise due under Alabama law.

Under the circumstances, it is reasonable to assume that the overall percentage of a distributor's taxable sales in a month would apply pro rata to the diesel purchased from each wholesaler in the month, i.e., the 20% in the above example. If a distributor purchased one-half of a tanker of diesel from one wholesaler and the other one-half from another, and then sold one-half of the commingled fuel to a taxable customer and the other half to an exempt customer, logic dictates that one-half of each wholesalers' diesel was sold in a transaction subject to the motor fuels tax. That is the same reasonable assumption the Taxpayer has made in this case.

The Department argues that if the Taxpayer's refund method is accepted, the State might be required to issue §174 refunds based on more than 100% of the diesel on which motor fuels tax was subsequently paid. But that could never happen if the Department accepted (or required) the Taxpayer's method in all cases. If 20 wholesalers each sold 1,000 gallons of diesel to a distributor in a month, and the distributor resold 20% in transactions subject to the motor fuels tax, each wholesaler would be entitled to a refund of 20% of the §174 wholesale tax it paid on the 1,000 gallons it sold to the distributor. An over-refund of the §174 wholesale tax could never occur.

A problem could potentially arise if the Department allowed wholesalers to compute §174 refunds using both the Taxpayer's method and also the records of

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although admittedly extreme, further illustrates the unreasonableness of the Department's position.

downstream distributors. For example, the 20 wholesalers in the above example each sold 1,000 gallons to the distributor in a month. If the distributor for some reason provided its sales records to one of the wholesalers, and the records showed that the distributor had sold all of the gallons purchased from that wholesaler in transactions subject to the motor fuels tax, the Department would in theory be required to grant that wholesaler a refund of 100% of the §174 tax the wholesaler paid on the 1,000 gallons. If the other 19 wholesalers applied for a refund using the Taxpayer's method, they would receive refunds of 20% of the §174 tax they paid. The Department would thus pay a §174 refund on more gallons of diesel than were actually subject to motor fuels tax.[7]

But while the threat of an excess refund is theoretically possible, there is no evidence that such a situation has occurred. The record reflects that the Department has received only two other §174 wholesale tax refund petitions from wholesale suppliers. One of the refunds was granted because the wholesaler obtained and provided the Department with the sales records of at least one of its distributor customers.[8] The other was disallowed. There is no evidence that the granted petition involved either the same year or any of the 14 distributors involved in this case, both of which would be necessary for an excess refund in this case to be possible. And the fact

[7] The distributor's records could also show that the distributor had sold less than 20% of the petitioning wholesaler's diesel in transactions subject to motor fuels tax. In that case, the Department would refund less overall than under the Taxpayer's method.

[8] It was suggested at the September 9 hearing that the distributor customer that provided its sales records to the wholesaler that got the §174 refund did so only because the wholesaler agreed to share some of the refund with the distributor. A distributor also approached the Taxpayer with that same offer, but was rejected.

that only one wholesaler has petitioned for a §174 refund and provided the Department with a downstream distributor's sales records in support of the petition further indicates the unreasonableness of the requirement.

As discussed, there would be no possibility of an excess refund if the Department required all wholesalers to compute §174 refunds using the Taxpayer's method. A regulation requiring the exclusive use of that method would clearly be reasonable, in which case all wholesalers would be required to use it when petitioning for a §174 refund. See, *Shellcast*. And the fact that the trade association that represents motor fuel distributors in Alabama filed an amicus brief in support of the Taxpayer in this case illustrates that distributors would readily accept and abide by such a regulation.

The Administrative Law Division recognized in *W. C. Rice* that retroactively exempting diesel from the §174 wholesale tax presented administrative problems:

> I concede that the above interpretation complicates the reporting and paying of the §174 tax. The §174 tax is reported and paid annually on a distributor's wholesale sales during the preceding year. As a practical matter, a wholesaler cannot in all cases follow the diesel it sells during the year to know if the §40-17-2 tax is ultimately paid on the diesel. The diesel may be sold several more times at wholesale, it may be commingled with other diesel, and the ultimate retail seller may sell some for taxable on-road use and some for nontaxable off-road use. Some of the diesel may also still be in storage at the end of the year, its ultimate use, taxable or nontaxable, yet to be determined. In short, a wholesaler may not know the intended use of the diesel at the time the §174 must be reported and paid. However, the exclusion provided at §40-17-2 cannot be ignored simply because it may be difficult to administer.

W. C. Rice at 6, 7.

But despite the fact that the retroactive exemption presents administrative problems, the exemption, and the resulting refunds, must be allowed under current Alabama law. "[A]ll questions of propriety, wisdom, necessity, utility and expediency in

the enactment of laws are exclusively for the legislature, and are matters with which the courts have no concern. (cite omitted) [I]t is our job to say what the law is, not to say what it should be." (cite omitted) *Alabama Department of Revenue v. Jim Beam Brands Company, Inc.*, 2008 Ala. Civ. App. LEXIS 771 (December 19, 2008).

A taxpayer's records must be "sufficient to allow a checkup of (the taxpayer's) business." *Ludlum*, 384 So.2d at 1092. The Taxpayer has offered a reasonable method of computing the refund due a wholesaler based on verifiable purchase and sales information. The Department can "checkup" on a §174 refund petition computed using the Taxpayer's method by reviewing the motor fuel tax returns of the distributors that purchased at wholesale from the wholesaler during the refund period. It can audit those returns if necessary, but a distributor certainly would not intentionally over-report the amount of taxable diesel on its motor fuel returns, and consequently pay additional motor fuels tax, only so its wholesale suppliers could get a larger §174 wholesale tax refund.

The Taxpayer's refund petition is granted. The Department is directed to refund to the Taxpayer the balance of its claimed refund ($167,794.94), plus applicable interest. 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 February 19, 2009.

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BILL THOMPSON
Chief Administrative Law Judge

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