

STATE OF ALABAMA  
DEPARTMENT OF REVENUE,

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DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

v.

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DOCKET NO. MISC. 89-219

BOBBY NELSON EARTHMOVERS &  
EXCAVATORS, INC.  
909 Musgrove Drive  
Florence, AL 35603,

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Taxpayer.

FINAL ORDER

The Revenue Department assessed motor fuel tax against Bobby Nelson Earthmovers & Excavators, Inc. (Taxpayer) for the period December, 1986 through February, 1989. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on January 30, 1991. Bobby Nelson appeared for the Taxpayer. Assistant counsel Dan Schmaeling represented the Department. This Final Order is based on the evidence presented by both parties.

FINDINGS OF FACT

The Taxpayer is in the earthmoving business and purchased fuel tax free during the period in issue for use in both on-road and off-road vehicles. The fuel was stored by the Taxpayer in a large, unmetered tank and pumped into each of the vehicles as needed.

The Taxpayer failed to file the required fuel tax returns with the Department during the subject period and also failed to keep records showing how much fuel was used in the off-road vehicles.

The Taxpayer did keep records for billing purposes showing the number of hours that the vehicles were operated each day.

The Department audited the Taxpayer and assessed the fuel tax

in question on all of the fuel purchased and used by the Taxpayer.

The Department acknowledges that the fuel used in the Taxpayer's off-road vehicles should be exempt, but argues that no exemption can be allowed because the Taxpayer failed to keep accurate records showing how much fuel was used in the off-road vehicles.

#### CONCLUSIONS OF LAW

The motor fuel tax levied at Code of Ala. 1975, §40-17-1 et seq. applies only to fuel used in on-road vehicles. However, a taxpayer subject to the tax must keep accurate records separately showing the exact amount of fuel used for exempt off-road purposes.

See, Code of Ala. 1975 §40-17-7 and Department Reg. 810-8-1-.17. The above regulation requires records showing the make, model and serial number of the off-road vehicle, the area or project on which the vehicle was used, and a daily log showing the distance traveled and the gallons of fuel used by the off-road vehicle. The exemption must be denied if a taxpayer fails to comply with the above regulation. Ex Parte White, 477 So.2d 422.

The Taxpayer in this case failed to file fuel tax returns with the Department and admittedly failed to keep records separately showing the number of gallons used in the off-road vehicles. The billing records submitted by the Taxpayer are not sufficient because the Department cannot determine from those records exactly how much fuel was used in the off-road vehicles. The Taxpayer's failure to comply with the law was caused more by ignorance of the

law than by a willful attempt to evade tax. Nevertheless, the Taxpayer must pay tax on all fuel that it cannot prove was used for off-road purposes.

The Taxpayer applied for a license after the audit in 1989 so that it could properly purchase fuel tax free and later report and pay tax on only the fuel used in its on-road vehicles. The Department denied the license pursuant to Code of Ala. 1975, §40-12-192 because the Taxpayer owed additional excise tax to the Department.

However, §40-12-192 relates to the motor fuel distributors license. The Taxpayer is not a motor fuel distributor, but rather should have been issued a license under Code of Ala. 1975, §40-17-14. That license is distinct from the motor fuel distributors license and allows a user to purchase fuel tax free and then pay tax to the Department on only the fuel used for taxable on-road purposes. The section requires a bond to protect the State's interest. See also the last clause of Code of Ala. 1975, §40-17-11.

Unfortunately, since 1989 the Taxpayer has paid tax on all its fuel and has failed to keep separate records showing the amount of fuel used for off-road purposes. Without such records no refund can be allowed.

The above considered, the assessment in issue must be upheld

and should be made final by the Department, with appropriate interest. However, the Taxpayer should be issued a license under §40-17-14 upon application for a license along with an appropriate bond.

Entered on April 16, 1991.

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BILL THOMPSON  
Chief Administrative Law Judge