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LAND COURT
STATE OF HAWAII
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IN THE TAX APPEAL COURT OF THE STATE OF HAWAII

In the Matter of the Tax)
Appeal) CASE NO. 1880
)
) FINDINGS OF FACT AND
 of) CONCLUSIONS OF LAW
)
)
 E-Z SERVE, INC.)
_____)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for hearing on an agreed statement of facts and this Court having duly considered the briefs of counsel, arguments thereon and otherwise being fully advised in the premises, makes and files the following findings of fact and conclusions of law:

FINDINGS OF FACT

The facts in this case are set forth in the Stipulation of Facts and Supplemental Stipulation of Facts on file with the record of this appeal and they are incorporated herein and by reference made the findings of this Court.

Briefly, the Taxpayer is a corporation duly organized and existing under the laws of the State of Delaware. It maintains no office and has no employees within this State. Except for the Taxpayer's transactions and dealings with the petroleum products herein involved, the Taxpayer has no contacts with the State of Hawaii. The Taxpayer has neither

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applied for, nor has been issued the general excise license required by HRS Section 237-9. It has not registered with the Department of Regulatory Agencies as a foreign corporation.

The Taxpayer is engaged in the business of distributing gasoline, diesel fuel and other petroleum products. It has entered into an exchange agreement entitled "Gasoline Contract" dated April 1, 1977, with Hawaiian Independent Refinery, Inc., a Delaware corporation licensed to do business in the State of Hawaii (hereinafter referred to as "HIRI"). The Agreement recites that E-Z needs supplies of gasoline in Hawaii and that HIRI needs supplies of gasoline in California. By way of the agreement, the parties have agreed to exchange like volumes of gasoline and other petroleum products. Under the exchange, should HIRI desire gasoline to be delivered to its customers on the mainland, the Taxpayer is required to supply the gasoline for HIRI's customers. Conversely, when the Taxpayer desires gasoline to meet its supply requirements in this State, HIRI is required to furnish the gasoline to satisfy the Taxpayer's requirements. The parties have further agreed that title to products to be delivered by HIRI to the Taxpayer in Hawaii shall occur within Foreign Trade Sub-Zone 9-A, located at Barbers Point, Oahu, Hawaii. The Agreement expressly provides that deliveries shall be made in Hawaii to Taxpayer E-Z or to E-Z's nominee on account of E-Z. However, for purposes of accounting and determination as to the volumes of gasoline involved in the exchange, the agreement provides that the gasoline is to be delivered to terminating facilities located at Iwilei, Honolulu, Hawaii, outside of the Foreign Trade Zone. All fuel transmitted to the terminal is by pipeline located

outside the Foreign Trade Zone, unbonded, and the fuel is commingled with other fuel not involved in the exchange. The volume of fuel to be delivered by HIRI is based upon a volume forecast made by the Taxpayer from month to month.

Whenever fuel involved in the exchange is delivered by HIRI to the terminal, a tank loading ticket is executed confirming the type and volume of the product delivered. The ticket also confirms the product has been "consigned to E-Z Serve Corporation". The volume of such product stored at the terminal is entered in the records of Aloha Petroleum as inventory for Taxpayer E-Z.

Physical delivery of the fuel at the terminaling facilities is accepted by Aloha Petroleum, Ltd., a Hawaii corporation licensed to do business in the State. Aloha receives the gasoline and petroleum products either as a nominee of the Taxpayer or in its independent capacity other than as such nominee and sells the products to retail dealers of gasoline and petroleum products. Portions of the gasoline and petroleum products are also shipped to storage facilities in Hilo, Hawaii, for distribution to retail dealers. The volume of gasoline and diesel fuel stored at the Hilo facilities is recorded by Aloha in its books as inventory for Taxpayer E-Z in Hilo. Gasoline from the terminal is also delivered to Atlantic Richfield Company (ARCO) to meet the Taxpayer's obligations to ARCO.

The Taxpayer and Aloha Petroleum both keep records of their transactions with each other as well as with other petroleum dealers. The books and records of Aloha show that, upon request of the Taxpayer, Aloha is required to remit cash payments to the Taxpayer by way of a "debit

advice" and, upon acknowledgment by the Taxpayer's bank that payment has been received, the bank issues a "credit advice" to the Taxpayer. Cash payments are made to HIRI for any differentials that may result from the transfer. These differentials may result due to differences in the grade of fuel delivered. The records of Aloha also show that it maintains an inventory in the State for the Taxpayer. The accounting records further show that all transactions involving this inventory are recorded and accounted for, including sales and liabilities enuring to the Taxpayer. The Taxpayer also reconciles the accounting transactions with the actual deliveries and sales in its own books and records. Reconciliation statements are periodically furnished to Aloha by the Taxpayer.

3. The Taxpayer has appealed the assessments and alleges it is not doing business in the State of Hawaii and that its activities are exempt from taxation because the transfer of title to the petroleum products has occurred in the Foreign Trade Sub-Zone 9-A. The Taxpayer has also asked this Court to be relieved of the penalties and interest assessed by the Director for its failure to timely file and pay the required general excise taxes.

4. The Director contends the transactions giving rise to the assessments have all occurred outside the Foreign Trade Zone, and accordingly, the Taxpayer has been properly assessed for its business activities in this State. Moreover, the Director contends the Taxpayer has not shown the presence of factors, other than its honest belief that it was not subject to the tax, for this Court to abate the penalties and interest herein assessed.

CONCLUSIONS OF LAW

1. HRS Section 237-13 imposes a general excise tax upon all persons on account of their business and other activities in the State. For purposes of the tax, HRS Section 237-2 defines business or engaging in business to include all activities engaged in or caused to be engaged in with the object of gain or economic benefit. The applicable rate for wholesalers is one-half of one percent (HRS Section 237-13(2)(A)).

2. The Taxpayer has been assessed general excise taxes for the period April 1, 1977 through December 31, 1977, in the amount of \$52,714.28, together with penalty and interest. For the period January 1, 1978 through December 31, 1978, the Taxpayer has been assessed general excise taxes in the amount of \$98,258.32, together with penalty and interest. The total amount of assessments made to the Taxpayer is \$150,972.60.

3. The Court finds and determines that the Taxpayer is engaged in business in the State of Hawaii and that its business activities in the State have occurred outside the Foreign Trade Zone.

The Foreign Trade Zone is established and operated under the authority of the Foreign Trade Zone Act (19 U.S.C.A. Sec. 18a et seq.). In the State of Hawaii, the zone has been established by HRS Chapter 212. The Zone consists of a specifically defined, enclosed area with distinct geographic boundaries into which goods may be brought without being subject to the customs laws of the United States. Merchandise in a zone is not subject to customs duties or to state taxation and regulation until it actually enters the customs territory of the United States. 19 U.S.C.A. Sec. 81c;

During v. Valente, 46 N.Y.S.2d 385 (1944); Hawaiian Independent Refinery v. United States, 460 F.Supp. 1249 (1978).

The Taxpayer contends that title to the petroleum products has been transferred from HIRI to it in the Foreign Trade Zone, and accordingly, the transaction is exempt from State taxation. It relies upon HRS Section 490:2-401, the Uniform Commercial Code, that title shall pass when the parties so intend. The Taxpayer further urges that title has been transferred from the Taxpayer to Aloha Petroleum by the fact that Aloha receives delivery of the petroleum products as a nominee of the Taxpayer. As a nominee, the Taxpayer contends Aloha should properly be deemed a grantee of the petroleum products.

The passage of title from HIRI to the Taxpayer in the Zone is of no consequence because such a transfer will not give rise to any taxable activity assessable to the Taxpayer. As a vendee or grantee of the transfer, no gross proceeds will inure to the Taxpayer upon which the tax may be imposed.

The Court cannot agree with the Taxpayer's argument that, as nominee, Aloha is a grantee of the delivery from HIRI. The Gasoline Contract expressly and explicitly provides that the gasoline is to be delivered to Taxpayer E-Z or "to E-Z's nominee for account of E-Z". As a nominee taking delivery for account of the Taxpayer, it cannot be said that Aloha has taken delivery of the petroleum products in its own right as a grantee. "A nominee is synonymous with an agent to receive property in futuro and one who represents and acts for his principal, and the principal is bound by what he does in discharge of the agency." See B. F. Avery & Sons Co. v. Glenn, 16 F.Supp. 544, 547 (1936).

Accordingly, the Court finds Aloha is not a grantee to whom title has been transferred in the Foreign Trade Zone. Any delivery of gasoline to Aloha pursuant to the exchange agreement, therefore, must be deemed to have been made to Aloha on Taxpayer E-Z's account.

The Taxpayer's business activities in the State are evidenced by the fact the gasoline has been transmitted by pipeline from within the geographic boundaries of Foreign Trade Sub-Zone 9-A to terminating facilities located outside the Zone at Iwilei. Clearly, the gasoline has, in fact, been sent out of the Foreign Trade Zone and into the customs territory of the United States. Upon delivery of the gasoline to the storage tank, the gasoline is designated to be consigned to Taxpayer E-Z Serve. Both the Taxpayer's and Aloha's books and records duly record the products as inventory kept in this State and the subsequent disposition of the products is likewise duly recorded as sales occurring in this State. These accounts include an inventory account credited to the Taxpayer, a liability account evidencing an immediate liability to the Taxpayer, and various other inventory and sales accounts. All of the accounts and transactions detailing the inventory kept in the State and the subsequent disposition of the products are consistent with the express recital in the exchange agreement that the Taxpayer needs supplies of gasoline in the State of Hawaii. Accordingly, the Court determines the Taxpayer is doing business in the State.¹

¹In its Reply Brief, the Taxpayer has appended thereto a Decision from a collateral proceeding involving Aloha Petroleum and E-Z Serve in the United States District Court, Civil No. 79-0326, together with certain invoices detailing shipment of petroleum products to Hilo for sale to Miller Petroleum Co. The Decision is dated April 29, 1980, and considers Aloha Petroleum Ltd. and E-Z Serve to be a single entity, as sellers of petroleum products in the State of Hawaii. The invoices further evidence the scope of the Taxpayer's involvement in business activities in the State of Hawaii.

4. The Taxpayer has failed to file the general excise tax returns required by HRS Sections 237-30, -33 and remit the taxes required therein. As a result, the Director assessed the penalties and interest provided in HRS Section 231-39(b)(1). In order for the Taxpayer to be relieved of these additional assessments, it must show the failure was due to reasonable cause. In the appeal of In Re Grayco Land Escrow, Ltd., 57 Haw. 436 (1977), it was determined the Taxpayer has the burden of showing the presence of other factors, other than its honest belief that it was not liable for the tax to justify its failure to file the required return. The Court finds the record does not show the presence of any supporting factor or circumstance, other than the Taxpayer's belief it did not owe the taxes. The Court, therefore, further determines the Taxpayer has not met its burden of proving that its failure to file the required general excise tax return was due to reasonable cause.

5. The Court concludes the general excise taxes herein assessed are proper and valid assessments. Accordingly, judgment will be entered for the Director of Taxation. The sum of \$150,972.60 is hereby made a lawful government realization.

Date: Honolulu, Hawaii JAN - 5 1981.

Yasutaka Fukushima (SEAL)

Judge of the above-entitled Court

APPROVED AS TO FORM:

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