

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

**VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE**

SUPREME COURT DOCKET NO. 2008-364

MAY 29 2009

MAY TERM, 2009

Ida J. Robertson d/b/a	}	APPEALED FROM:
Locust Creek Country Store	}	
	}	
	}	
v.	}	Washington Superior Court
	}	
	}	
State of Vermont	}	DOCKET NO. 729-11-07 Wncv

Trial Judge: Dennis R. Pearson

In the above-entitled cause, the Clerk will enter:

Ida J. Robertson, owner and operator of the Locust Creek Country Store, appeals pro se from a superior court order upholding an assessment by the Agency of Transportation for unpaid diesel and gasoline distribution taxes. Robertson contends the court erred in holding her liable for the unpaid taxes as the distributor of the fuel in question. We reverse.

Together with her son, Robertson operates the Locust Creek Country Store (Locust Creek), a service station and convenience store located on Route 107 in the Town of Bethel. In an apparent effort to save money by eliminating the "middle man," the store became a licensed diesel and gasoline distributor in January 2006. Shortly thereafter, in mid-February and early March 2006, Locust Creek purchased two shipments of fuel from Gary's Fuels of Haverhill, New Hampshire. The fuel, consisting of 15,000 gallons of regular 87-octane unleaded gasoline and 1,900 gallons of low-sulfur diesel, was supplied to Gary's by Irving Oil of Massachusetts, and was picked up and delivered to Locust Creek's three underground fuel storage tanks by an independent trucker hired by Gary's.

Robertson claims that the purchase price paid to Gary's included the cost of the gasoline, delivery costs, and the Vermont state tax imposed on all gasoline and diesel fuel sold by distributors in the state, although the invoices from Gary's Fuels show only the total purchase price. A subsequent audit of Locust Creek in January 2007 by the Department of Motor Vehicles was unable to verify that the distributor tax on the shipments had been paid. The audit also revealed that Gary's license as a fuel distributor had been cancelled in December 2005. Accordingly, as the trial court here observed, the Department claimed that Locust Creek owed the tax "[a]s the only authorized Vermont distributor in the chain of [these] particular sales," and assessed Locust Creek for diesel taxes in the sum of \$1,222.28 and gasoline taxes totaling \$3,865.81. Robertson filed an administrative appeal. Following a hearing, the hearing officer upheld the assessments. Robertson then appealed to the superior court.

The court heard oral argument and issued a written decision in March 2008, affirming all but \$616.84 of the diesel fuel tax.¹ The court found that, on the record, it could not be determined whether the purchase price by Locust Creek contained a distribution tax component; that Locust Creek remained responsible for payment of the tax as “the only authorized Vermont distributor” in the transaction; and that Locust Creek therefore owed distribution fuel taxes totaling \$4,471.25 plus interest. This appeal followed.²

Locust Creek maintains that, while it may have been a licensed distributor, it was not the distributor of the fuel in question and was not responsible for remittance of the distribution taxes to the State. We agree. Although the trial court was correct that, by virtue of its distributor’s license, Locust Creek was authorized to “in effect wear[] two hats at the same time,” the license did not make Locust Creek the distributor of the fuel purchased from Gary’s or render it liable for the distributor’s tax.

Under the applicable statutory scheme, distributors of diesel fuel are defined as “any person who sells or delivers fuel into bulk storage tanks of a dealer or user.” 23 V.S.A. § 3002(3). Distributors of gasoline are defined, in part, as “a person, firm or corporation who imports or causes to be imported gasoline or other motor fuel for use, distribution or sale within the state.” *Id.* § 3101(a). Although their language differs, both statutes make it clear that a distributor is a person or entity that brings fuel into the State, generally for further distribution or sale. Distributors are to be distinguished from “dealers” of diesel or gasoline, who are defined as “any person who sells or delivers fuel into the fuel supply tanks of motor vehicles owned or operated by others.” *Id.* §§ 3002(2), 3101(c).

Distributors of diesel and gasoline must file monthly reports with the Department of Motor Vehicles setting forth the number of gallons of fuel sold or delivered, the identity of the person to whom the fuel was sold, and the amount of the tax collected. 23 V.S.A. §§ 3014(a) (diesel), 3108 (gasoline). Each report must also be accompanied by the distributor’s tax due on the fuel sold. *Id.* § 3015(a) (diesel), 3106 (gasoline). In this regard, the statutes make it clear that remittance of the tax is the responsibility of the distributor of the fuel sold. As provided in § 3106(a), “each [gasoline] distributor shall pay to the commissioner a tax of \$0.19 per gallon upon each gallon of motor fuel sold by the distributor.” (Emphasis added); see also § 3015(1) (“The [diesel] distributor’s tax shall be determined by multiplying the number of gallons of fuel sold or delivered into bulk tanks of dealers or users by the rate per gallon stated in section 3003 of this title.”).

As these provisions demonstrate, therefore, it was Gary’s that served as the distributor of the diesel and gasoline in this case, importing the fuel from Irving Oil and arranging for its delivery into Locust Creek’s storage tanks, and it was Gary’s that was responsible for remittance of the distributor’s tax based upon each gallon “sold by the distributor.” Although Gary’s license

¹ The court determined that Locust Creek should not be assessed for a portion of the diesel fuel sold from above-ground tanks for kerosene and other non-taxable uses, and reduced the assessment by \$616.84, a ruling which neither party has challenged.

² While the appeal was pending, the State filed a motion with the Court, observing that it appeared the trial court had applied a deferential rather than de novo or independent standard of review, as required by 23 V.S.A. §§ 3023, 3115, and stating that it would not object if Robertson requested a remand for new hearing. Robertson filed a response opposing any remand or rehearing. In light of our decision to reverse the assessment, we need not address the motion, which is denied as moot.

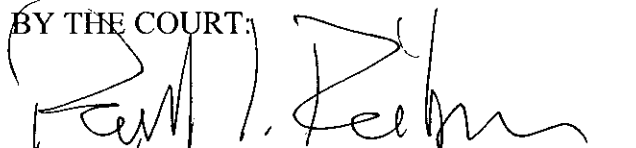
may have been cancelled, nothing in the statutory scheme suggests that, by virtue of the cancellation, it ceased to be the distributor of the fuel in question or was absolved of responsibility for remitting the distributor's tax to the State. Nor, similarly, does anything in the statutory scheme suggest that, by virtue of the cancellation, Locust Creek somehow stepped into the role of distributor of the fuel sold and became responsible for payment of the distributor's tax.

In arguing to the contrary, the State relies on Robertson's acknowledgement that it filed a "motor fuel distribution report" for the fuel in question. Whether this suggests an unnecessary abundance of caution or, as the State suggests, an acknowledgment by Locust Creek that it was the distributor does not alter the facts of the transaction showing that Gary's was the distributor who imported and sold the fuel to the local dealer. The State also contends that Locust Creek meets the definition of distributor because it "caused" the gasoline to be imported. *Id.* § 3101(a). As Robertson points out, however, the argument would effectively make every dealer a distributor simply by virtue of the act of ordering fuel, and thus eliminate any meaning to the distinct statutory categories, an interpretation we decline to adopt. See *In re Miller*, 2009 VT 36, ¶ 14 (we presume that statutory terms are inserted for a purpose and will not allow a significant part to be rendered surplusage).

While the State is entitled to a distributor's tax for the fuel in question, its remedy lies with the distributor—whether licensed or not—that failed to remit the tax, not with the dealer to whom it was delivered.

Reversed.

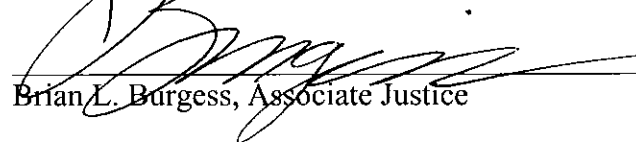
BY THE COURT:



Paul L. Reiber, Chief Justice



Denise R. Johnson, Associate Justice



Brian L. Burgess, Associate Justice