

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

VALCON DISTRIBUTING, LTD., INC.)	DOCKET NO.: MT-1999-1
)	
Appellant,)	
)	
-vs-)	FACTUAL BACKGROUND,
)	CONCLUSIONS OF LAW,
THE DEPARTMENT OF TRANSPORTATION)	ORDER and OPPORTUNITY
OF THE STATE OF MONTANA,)	<u>FOR JUDICIAL REVIEW</u>
)	
Respondent.)	

The above-entitled appeal was heard on February 9, 2000, in the City of Helena, Montana, in accordance with an order of the State Tax Appeal Board of the State of Montana (the Board). The notice of the hearing was duly given as required by law.

The taxpayer, represented by Controller Cliff Kunnary, Transportation Manager Debra Szalay, and Attorney James M. Ramlow, presented testimony in support of the appeal. The Department of Transportation (MDT), represented by Bureau Chief Robert Turner and Attorney Nick A. Roterling, presented testimony in opposition to the appeal. Testimony was presented, exhibits were received, and a schedule for post-hearing submissions was established. The Board then took the appeal under advisement; and the Board, having fully

considered the testimony, exhibits, post-hearing submissions, and all things and matters presented to it by all parties, finds and concludes as follows:

FACTUAL BACKGROUND

1. Due, proper and sufficient notice was given of this matter, the hearing hereon, and of the time and place of the hearing. All parties were afforded opportunity to present evidence, oral and documentary.

2. Valcon Distributing, Ltd., Inc. (Valcon) is a motor fuel distributor licensed by the Montana Department of Transportation.

3. As a licensed motor fuel distributor, Valcon is obligated to file with the MDT a monthly tax statement, accompanied by payment of tax owing, for all motor fuel sold during the previous month. Pursuant to §15-70-205 (1), MCA, the statement and payment are to be rendered by the 25th day of the month following the month that any tax is due.

4. During the month of March 1998, Valcon sold motor fuels as a distributor, therefore becoming liable for the reporting and payment of any fuel tax due the MDT.

5. Valcon's tax return and payment were supposed to be postmarked April 25, 1998, but because April 25 was a Saturday, under §15-70-103(3), MCA, Valcon could file its return and payment on Monday, April 27, 1998.

6. Valcon's March 1998 return and a motor fuel tax payment of \$309,307.61 were mailed to the MDT in an envelope bearing Valcon's postage meter stamp dated April 27, 1998. (Taxpayer's Exhibit 3)

7. The envelope also bears a hand-cancellation by the United States Postal Service in Kalispell, Montana, dated April 28, 1998.

8. The return and payment were received by the MDT on April 29, 1998.

9. As a consequence of the April 28, 1998 postal cancellation, the MDT determined that Valcon's March, 1998 motor fuel excise tax report and payment were filed one day late and assessed a delinquency penalty of \$30,930.76 (10% of the tax due), and interest of \$3,093.08 (1% of the tax due), for a total of \$34,023.84, pursuant to §15-70-210 (1), MCA. (Taxpayer's Exhibit 4)

10. By letter dated May 14, 1998, Valcon requested that the MDT abate the assessed penalty and interest. (Taxpayer's Exhibit 5)

11. Judy L. Bauer, Administrative Officer of the Fuel Tax Management & Analysis Bureau, Administration Division, MDT, responded by letter dated June 5, 1998, stating that the penalty assessment would be decreased to 3% of the tax owed, or \$9,279.23, and the balance of the penalty

assessment would be suspended for a three-year period. The suspended amount of \$21,651.53 would be reinstated if Valcon filed any late reports prior to April 2001. (Taxpayer's Exhibit 6)

12. By letter to William G. Salisbury, Administrator, Administration Division, MDT, dated June 22, 1998, Valcon requested a formal administrative hearing. (Taxpayer's Exhibit 7)

13. A telephonic hearing was held on February 1, 1999, with Hearings Examiner Katherine J. Orr presiding. The resulting order, dated May 7, 1999, stated that "Valcon is subject to the late penalty...and, therefore, owes the Department the amount of \$9,279.23 plus one percent in interest, \$92.79 or \$9,372.02."

14. On June 8, 1999, Marvin Dye, Director, MDT, issued a Final Agency Decision, adopting and accepting the hearings examiner's proposed Order, stating that Valcon owes the MDT the amount of \$9,279.23 as the late filing penalty and 1 percent interest of \$92.79, for a total amount due and owing the Department of \$9,372.02.

15. Valcon appealed this decision to the State Tax Appeal Board by letter dated July 9, 1999, requesting that the Final Agency Determination dated February 1, 1999 be

reversed and that such other relief be granted as the Board deems appropriate.

16. The MDT answered Valcon's complaint on August 9, 1999, requesting that the Board uphold and affirm both the respondent's final decision and that of the hearings officer in this matter.

TAXPAYER'S CONTENTIONS

Attorney James Ramlow stated that the issue in this case is whether the MDT properly assessed a late filing penalty against Valcon for its fuel tax report and payment for March of 1998. He introduced testimony of Valcon employees Cliff Kunnary, Controller, and Debra Szalay, Transportation Manager, and presented several exhibits that had previously been introduced at the administrative hearing before the MDT hearings officer. A memorandum from William Salisbury, Administrator of the Administration Division, MDT, explaining the MDT's policy on waiver of penalty on late filing of tax returns, had been introduced as Taxpayer's Exhibit 1 at the previous administrative hearing, but was not introduced as a taxpayer's exhibit in this hearing.

Taxpayer's Exhibit 2 is a copy of the MDT fuel tax report for the month of March 1998, prepared and signed by Valcon's accountant, Cynthia L. Westbrook. Mr. Kunnary

testified that this report showed the total amount due to be \$309,307.61, and that lines 11 and 12, showing a penalty of \$30,930.76 and interest of \$3,093.08, were filled in by the MDT after they received the report. He testified that the MDT would have placed the date stamp in the upper right-hand corner of the report, which stated, "Received, April 29, at 8 something A.M., 1998."

Taxpayer's Exhibit 2A is a photocopy of the front and back of Valcon's cancelled check for \$309,307.61, dated April 27, 1998, that was sent with the March fuel tax report to the MDT.

Taxpayer's Exhibit 3 is a photocopy of the outside of the envelope in which Valcon's report and check were mailed, showing the postage meter stamp with the date of April 27, 1998 and the Kalispell post office's cancellation stamp dated April 28, 1998. Mr. Kunnary testified that the words "Due Date April 27, 1998," which are handwritten on the postage meter stamp, were not written by a Valcon employee but were written "someplace else after it had been mailed."

Taxpayer's Exhibit 4 is a two-page exhibit consisting of the MDT's first assessment notice to Valcon and a statement of taxpayers' appeal rights. The assessment notice states that Valcon is being assessed a penalty of \$30,930.76

and interest in the amount of \$3,093.08, for a total of \$34,023.84.

Taxpayer's Exhibit 5 is a two-page exhibit consisting of a letter from Valcon to the MDT requesting abatement of the assessed penalty and interest and a letter from Dan Kolesar of the Kalispell post office. This exhibit is summarized in pertinent part as follows:

Exhibit 5, page 1 is a letter addressed to the Montana Department of Transportation from Valcon Distributing, Ltd. Inc., signed by Cliff Kunnary, Controller, dated May 14, 1998:

Request is hereby made for an abatement of the above referenced assessment based upon the following:

Valcon Distributing is a responsible corporate citizen and makes every effort to file their excise tax reports timely and accurately and have done so for years.

The March fuel reports were processed and were mailed on the due date of April 27, 1998. I went to the post office to discuss this situation with them and per the enclosed letter from the post office there were any number of things that could have happened that created the delay.

We feel that this particular piece of mail had gone out in our normal daily routine which is that one of our office staff drops off the mail on her way home. Our records do not indicate that she had worked late that evening and she is certain that the mail had gone out that particular day.

To make certain that this situation does not happen again, we will start mailing early.

Exhibit 5, page 2 is a letter addressed to Valcon Distributing from Dan Kolesar, Supervisor, Customer Service, United States Postal Service, 350 North Meridian, Kalispell, Montana, dated May 13, 1998:

Your particular piece of mail had a postage meter date of 4-27-98. It also shows a cancelation (sic) of 4-28-98. A few things might have caused this piece to not be processed until 4-28-98. 1. It could have been deposited after our pick-up time in our collection cans. 2. It could fallen (sic) behind the plastic tubs in the collection can. 3. It could have been deposited in the Kalispell city cans and not sorted until after the outgoing mail was worked. 4. One of our clerks could have missed this piece or missorted to Kalispell by misreading the mailing label. Regardless of what has happened I want to let you know that we are sorry for this situation.

Mr. Kunnary testified that after he had received the assessment notice, he "went down to the post office to

inquire about their procedures, and in talking with a clerk at the counter, he had said that it could have been any number of things that could have happened that would have created the post office to cancel or hand cancel that particular piece of mail. So I asked Dan if they could give me something in writing." Mr. Roterling objected to this letter as being hearsay evidence. The exhibit was admitted with the objection noted. Mr. Kunnary testified that Valcon has changed its procedures for mailing fuel tax reports. The reports are now taken into the post office, and the post office issues a certificate of mailing, documenting the exact date and time of mailing.

Taxpayer's Exhibit 6 is a letter from Judy L. Bauer, Administrative Officer, Fuel Tax Management & Analysis Bureau, Administration Division, MDT, to Valcon Distributing, dated June 5, 1998, summarized in pertinent part as follows:

I've received your request to abate the penalty and interest assessed for the late filing of your March 1998 Gasoline/Special Fuel Distributors Report. MDT assessed a penalty at ten percent (10%) of the tax owed, plus one percent (1%) interest on the unpaid tax. The total penalty was \$30,930.76 and the total interest was \$3,093.08.

The letter from the Postal Service indicates what could have happened to this particular piece of mail, however, does not take responsibility for the late postmarked envelope. The department has accepted actual postal error as timely filed which in turn abates the penalty and interest assessed. This occurs when it is out of the control of the taxpayer.

Montana law prohibits MDT from waiving interest for any reason. However, MDT does have authority and adopted a flexible policy recognizing inadvertent errors, late filings, and other related mishaps. MDT's Penalty Waiver Policy requires MDT to evaluate the taxpayer's account history. If the taxpayer has no late filing or payment occurrences on

the account history during the three-year period preceding the month of the offense, MDT will waive a portion of the penalty, based on the policy criteria.

Valcon Distributing did not have a late filing during the three years prior to the March 1998 return. Therefore, MDT determines the following:

- 1. MDT will decrease the penalty assessment from ten percent (10%) of the tax owed to three percent (3%) for a first-time late filing resulting in a penalty assessment of \$9,279.23.*
- 2. MDT suspends the balance of the penalty assessment for a three-year period. The suspended amount of \$21,651.53 will be reinstated if Valcon Distributing files any late Gasoline/Special Fuel Distributor reports prior to April 2001. You have a right to appeal this decision in an administrative hearing...*

Taxpayer's Exhibit 7 is a letter dated June 22, 1998, to William G. Salisbury, Administrator, Administration Division, MDT, from Mr. Kunnary, requesting a formal administrative hearing. This hearing was held telephonically on February 1, 1999 and resulted in an order that upheld the assessed penalty and interest. The hearings examiner's order was upheld by Marvin Dye, Director of the MDT, in a final agency decision dated June 8, 1999.

Following the conclusion of Mr. Kunnary's testimony, Mr. Ramlow called Debra Szalay as a witness. Ms. Szalay testified that she has been employed by Valcon since June of 1978 and is currently Valcon's Transportation Manager. In April of 1998 her job responsibilities were "more administrative and customer service," and they included taking mail to the post office. Taxpayer's Exhibit 8 is a map that is highlighted to show Ms. Szalay's residence, Valcon's office, and the Meridian Road post office. Ms. Szalay testified that she lives "exactly 1 mile from Valcon.

The post office is pretty close to halfway between. I have to go past the post office to go home." She stated that on a typical afternoon in Kalispell the traffic "is not really heavy. There are only two stop lights between there, and the very most it would take me would probably be ten minutes on the outside. I don't recall any extra heavy traffic. I'm sure I was there within five minutes of leaving the office."

Taxpayer's Exhibit 9 is a copy of Ms. Szalay's time card for the month of April, 1998, showing that on April 27 she worked from 8 a.m. to 5 p.m. Days on which she had worked overtime were so indicated on the time sheet. Ms. Szalay testified that she deposited the envelope containing Valcon's March 1998 fuel tax report and payment in the outside receptacle at the Meridian Road post office "right after 5:00" on April 27, 1998. She explained that the receptacle cans are clearly marked that "any deposits after 6:00 p.m. will be postmarked the next day," and she added that "I am fully aware of the consequences with the taxes and have prepared them for years; and it was something I was always very cognizant of around the 25th of the month, making sure that it got there prior to 6:00." Ms. Szalay stated that in her more than twenty years of working for Valcon, she was sure that Valcon had never been late in filing the motor fuel tax report.

MDT'S CONTENTIONS

Nick Rotering, staff attorney for the MDT, explained that until 1991, the Montana Department of Revenue (DOR) was responsible for the collection of motor fuel taxes. In 1991, when the legislature created the Montana Department of Transportation, the responsibility of collecting motor fuel taxes was transferred to that department. Many of the former DOR employees who had been responsible for the collection of motor fuel taxes also transferred to the MDT. Some of the related administrative rules were transferred to the MDT, but others were not. "So, initially the MDT wrote some policies having to do with penalty for late payment and interest on motor fuel taxes, that have later been put into the Administrative Rules of Montana (ARM)."

Robert Turner, Bureau Chief of the Fuel Tax and Management Analysis Bureau for the Administration Division of the MDT, testified that he had served in that capacity since August of 1998, and prior to that time had served as Bureau Chief of the Income Tax Division of the Montana Department of Revenue for over twenty years. Mr. Turner referred to Taxpayer's Exhibit 2, Valcon's March 1998 fuel tax return, and explained that lines 11 and 12, the penalty and interest entries, were completed by the MDT following

the late arrival of the return. He stated that the "received" stamp, showing April 29, 1998, in the upper right-hand corner of the tax return, was put on by the MDT upon receipt of the return. The numbers in the upper right-hand corner of the form are cashier's numbers, which are added to both the return and the check at the time of processing by the MDT.

Mr. Turner explained that Montana law allows motor fuel distributors to retain 1% of the tax they have collected as a fee for collecting and remitting the tax to the MDT, so the distributors actually remit only 99% of the amount they have collected.

Mr. Turner referred to Taxpayer's Exhibit 6, the June 5, 1998 letter to Valcon from Judy L. Bauer of the MDT, in which the MDT responded to Valcon's request for abatement of the penalty and interest by offering to reduce the penalty from 10% to 3%. He testified that Valcon did not accept that offer. The offer was based on the MDT's internal policy as set forth in MDT's Exhibit A, a five-page exhibit which includes a memorandum dated July 15, 1994, from William G. Salisbury, Administrator of the Administration Division, MDT, entitled The Department of Transportation's Policy on Waiver of Penalty on Late Filing of Tax Returns, and a one-page memorandum dated May 1, 1992 entitled Gasoline

Distributor's Penalty Waiver Policy. This exhibit is summarized in pertinent part as follows:

The Department of Transportation's Policy on Waiver of Penalty on Late Filing of Tax Returns

Purpose:

To provide guidelines for the uniform, fair, and equitable way to treat all similarly situated taxpayers in a similar manner when waiving penalty. In evaluating each request for waiver of penalty, the taxpayer's request will be considered on a case by case basis. Waiver of a penalty will be considered the exception rather than a rule.

The purpose of a penalty on tax liability is to secure the proper and timely filing of a tax return or assessment and the prompt payment of the tax by penalizing the delinquent taxpayer. The purpose of interest on tax liability is to compensate the state of Montana for the cost of money which is incurred while the tax is delinquent. 15-70-210 and 15-70-352 MCA does not give the department of transportation authority to waive interest.

Background:

July 1, 1991 the Motor Fuels Division of the Department of Revenue function transferred to the Department of Transportation. However, the Waiver of Penalty and Interest Administrative Rules (42.3.100) did not transfer with the motor fuels function. Since then MDT has adopted penalty waiving policies addressing special fuel users, IFTA, and gasoline distributors inadvertent errors and first time late filers with a clean filing history for a three year period.

Finding:

...Examples of "reasonable cause" for failure to file a tax return or report or pay a tax on the date required by statute by a taxpayer include:

a) where it can be substantiated that the return was mailed in time to reach the department of transportation within the legal period; ...

The taxpayer who requests waiver of penalty on a tax has the burden of proving to the department that reasonable cause exists for the failure to timely file the tax statement and report and/or timely pay the tax ...

Gasoline Distributor's Penalty Waiver Policy

5/01/92

Montana Statute does not allow the Department of Transportation to waive interest ...

The Department of Transportation may waive penalty on Gasoline Distributor's inadvertent errors such as:

Late filing of gasoline distributor report; or late payment of gasoline distributor report.

The Department may waive or suspend penalty assessments for taxpayers meeting the following criteria:

First time late filing offense or late payment offense; and a clean filing history for a three year period.

The Department's basis for such waivers prior to implementation of this policy is 3%, 6%, 9% error rates:

A first time offense within a three year period will result in approximately 3% penalty assessment. (1 in 36 months)

A second time offense within a three year period will result in approximately 6% penalty assessment. (2 in 36 months)

A third time offense within a three year period will result in approximately 9% penalty assessment. (3 in 36 months)

Mr. Turner testified that the MDT had implemented administrative rules **18.9.701**, waiver of motor fuel penalties; **18.9.701**, suspension of penalties; and **18.9.703**, proration of interest, in March of 1999, following a hearing in the fall of 1998. He stated that these rules went even farther than the previous MDT policy regarding waivers, because the penalty could be reduced from 10% to 1%, rather than the previous 3%, if the distributor has a good filing history. Mr. Turner testified that the MDT had made an offer to Valcon to impose only the 1% penalty and to pro-rate the interest, but this offer was not accepted. He stated that "there is no legal waiver of interest in our policy. That is correct by statute." He reiterated that the amount before this Board is the 3% penalty of **\$9,279.23** and the 1% interest of **\$3,093.08**, for a total of **\$12,372.31**.

BOARD'S DISCUSSION

The facts in this case are fairly straightforward, as summarized in the MDT's post-hearing brief. Valcon Distributing, as a licensed fuel tax distributor, is required to file a monthly tax statement with the MDT, accompanied by a payment of the tax due. This statement and payment are due on the 25th day of the month following the

month for which the tax is due. In this instance, the March 1998 tax report and remittance were due on April 25, 1998. However, since April 25th was a Saturday, by statute the tax return had to be mailed no later than Monday, April 27. A Valcon employee completed the report, the check was written, and the envelope containing both was mailed by Valcon employee Debra Szalay on April 27, 1998, between 5 and 5:30 p.m., according to her testimony. The post office did not cancel the document until the following day, April 28, and it was not received by the MDT until April 29.

Ms. Szalay, a twenty-year employee of Valcon, testified under oath, substantiated by her time sheet, that she left the office at 5:00 p.m. on April 27. The distance to her home from Valcon is only a mile, with the Meridian Street post office half-way between Valcon's office and her home. The final mail pick-up each day is posted on the collection boxes as 6:00 p.m. From the evidence and testimony presented, the Board believes that the envelope was deposited in the collection box by Ms. Szalay prior to the posted 6:00 p.m. final collection time. Because the mail was dropped in a collection box rather than sent by certified or registered mail, there is no way to track precisely what happened to it after it was mailed. We know from the testimony that it was not cancelled by the post office until

the next day, April 28, and we have only the letter from Dan Kolesar, Supervisor of Customer Service at Kalispell's Meridian Street post office speculating as to what might have happened to it. Mr. Kolesar stated that: **1. It could have been deposited after our pick-up time in our collection cans.** However, Ms. Szalay testified, under oath, that she left the office shortly after 5 p.m., was not delayed in traffic, did not run any errands prior to going to the post office, and that the envelope was mailed well in advance of the 6:00 p.m. deadline. **2. It could fallen (sic) behind the plastic tubs in the collection can.** **3. It could have been deposited in the Kalispell city cans and not sorted until after the outgoing mail was worked.** Ms. Szalay had testified that "she was sure she put it in the right one." She further stated, "I know there's been cases where I put mail in and it would go part way down in, and I'd have to force it down, unless it could have got stuck up inside the can and they didn't see it when they hauled it out. I don't know. But, in answer to your question, I know I put it in the right can." **4. One of our clerks could have missed this piece or missorted to Kalispell by mis-reading the mailing label.** Mr. Kolesar has presented several possibilities for the one-day delay of the post office cancellation stamp. There are opportunities for error on the part of the postal service.

Should a taxpayer with no previous record of late filing be penalized for an error that admittedly could have been due to the action of the postal service employees? The taxpayer has no control over what happens to a return once it has been entrusted to the post office, and the Board is troubled by the fact that a taxpayer can be penalized through an action of another entity. Mr. Kolesar's letter is adequate proof that something beyond Valcon's control could indeed have happened to that return as a result of post office action or inaction.

The Board considered the statutory authority for a possible waiver of penalty and interest in this case. As a licensed motor fuel distributor, Valcon is regulated by Title 15, Chapter 70, Part 2 of the Montana Codes Annotated, relating to gasoline distributors, and Title 15, Chapter 70, Part 3, which relates to special fuels distributors. ("Special fuel" means those combustible gases and liquids commonly referred to as diesel fuel or any other volatile liquid of less than 46 degrees A.P.I. {American petroleum institute} gravity test...) **Section 15-70-21, MCA**, states: "Upon a showing of good cause by the distributor, the department of transportation may waive penalty." **Section 15-70-352, MCA**, states: "Upon a showing of good cause by the

distributor, the department of transportation may waive penalty."

The relevant section of the Administrative Rules of Montana, states: 18.9.701 WAIVER OF MOTOR FUEL PENALTIES, (1) The department may waive the motor fuel late file and late pay penalties for gasoline, aviation fuel and special fuel if there is "good or reasonable cause." The causes listed in the subsequent sections do not include "postal service error," but it is the finding of the Board, as stated previously in this decision, that if the filing is late due to the action or inaction of another agency or entity, the taxpayer should not be penalized. It is the determination of the Board, therefore, that the assessed penalty shall be abated.

The Board is also concerned about the assessment of interest in this case, and studied the MDT's post-hearing brief and Valcon's reply brief for an anticipated discussion of the statutory authority for the MDT's inability to waive assessed interest. During the hearing, the Board had requested such a citation. Ms. Nelson had asked Mr. Rotering and Mr. Turner the following question: *"Can you point me to the statutory authority that talks about a 1% interest that cannot be abated? That's in statute, and could you point me to that statute, please. I think I heard testimony that*

there was no negotiation on that one, that that was in the statute." Mr. Turner replied that "15-70-210, MCA is the tax penalty for delinquency. That's actually where it's assessed." Ms. Nelson asked again "and would that statute be where I would look to see some discussion of the 1% interest." Mr. Turner responded, "The 1%, I'm sorry, I'm not understanding." Ms. Nelson stated, "There are two components in the penalty assessment; there's the penalty and then there's the 1% interest." Mr. Turner then responded, "That's where you see the 1% interest, in 15-70-210, subsection 3." Since this statute does not address whether or not the interest can be waived, Mr. Thornquist rephrased the question as follows: "Maybe I didn't hear the answer correctly to Ms. Nelson's question. You stated that you could not waive the 1% interest. Where can I look to see that, where it says interest cannot be waived?" Mr. Turner responded, "I'll have to get that for you, the exact cite for that." Mr. Rotering then stated "I would suggest, because it was going to be a part of my argument on the interest, that if opposing counsel agrees, we may submit a brief memorandum. Because this Board has heard some of these before, and there is a case that I recall that the Board accepted the fact that interest isn't waivable, only the penalty." Mr. Thornquist requested that in addition to the

statutory citation, Mr. Roterling might also provide any previous STAB decisions or court cases relating to the inability of the MDT to waive interest.

The MDT's post-hearing brief contains the following statements regarding the waiver of interest:

The Department believes that interest is not something that can be waived when a payment is late. Part of this is the decision of the State Tax Appeal Board, Mont 1996-1, Montana Petroleum, Inc. In its decision dated November 26, 1996, it ordered that the 1 percent interest assessed cannot be waived. Further, the statutes involved, Mont. Code Ann. §§15-70-210(1) and 15-70-352(1) indicated upon a showing of cause by the distributor, the Department may waive any penalty. There is no specific indication on waiving interest. When you examine the existing rules of the Department of Revenue, they do not indicate whether you can waive interest, but it is stated that it is rarely done by the Department of Revenue. Since interest is to make up to the State the lost use of the tax money, waiver of it should not be favored.

The Board found no statutory citation regarding the waiver of interest in the post-hearing brief, as had been expected. Instead, the brief states that the Department "believes" that interest cannot be waived and that "there is no specific indication on waiving interest." Because the law states that penalty can be waived, and it does not specifically mention interest, the Department has interpreted the statute to say that interest cannot be waived. Page 5 of MDT's Exhibit A, Gasoline Distributor's Penalty Waiver Policy, dated 5/01/92, stated "Montana Statute does not allow the Department of Transportation to waive interest." However, this policy does not cite any statutory authority. Page 1 of Exhibit A, the administrative memo on the MDT penalty waiver policy, states, "15-70-210

and 15-70-352 MCA does not give the department of transportation authority to waive interest." This memo also states, "July 1, 1991 the Motor Fuels Division of the Department of Revenue function transferred to the Department of Transportation. However the Waiver of Penalty and Interest Administrative Rules (42.3.100) did not transfer with the motor fuels function. Since then MDT has adopted penalty waiving policies..."

ARM 42.3.101 (1), referring to the Department of Revenue, states that "The taxes which the department enforces variously provide for the **abatement or waiver of interest** and/or penalties at the sound discretion of the department..." (emphasis added). **42.3.101 (2)** states, in pertinent part, "The purpose of interest on a tax is, in part, to compensate the state of Montana for the cost of money which is incurred while the tax is delinquent. Therefore, interest on the tax will rarely, if ever, be abated or waived by the department for a taxpayer who: (2) files a tax return or statement or makes a tax payment over five days late; (b) has previously filed a late tax return or statement or made a late payment; or (c) has previously not complied with the tax law or regulations." Valcon's payment was not over five days late, they had never previously filed a late tax return or statement or made a

late payment, and they had previously complied with the tax law. If the Department of Revenue rather than the MDT were still administering the motor fuel tax, Valcon would be subject to possible abatement or waiver of both the penalty and interest in this instance. Mr. Rotering had explained that when the Department of Transportation was created by the legislature in 1991, "most of the statutes and administrative rules stayed intact; however not all of the administrative rules transferred over." It is a concern of this Board that a taxpayer may be treated differently regarding interest waivers, depending upon which department administers a particular tax, but it is beyond the scope of the Board to address this issue. This would be a matter for the legislature to decide, or for the DOR and the MDT to address through administrative rules.

The Board addressed the discrepancies in the amount of the interest that was assessed. Mr. Turner testified that the amount of interest before the Board is **\$3,093.08**, 1% of the \$309,307.61 tax. Following the telephonic administrative hearing on February 1, 1999, the findings of the hearings examiner stated that the amount of interest due was **\$92.79** (1% of the revised penalty amount of \$9,279.23). The June 8, 1999 Final Agency Decision, which adopted the proposed Order of the hearings examiner, stated that the interest due was

\$92.79. Mr. Turner had testified that the MDT had made an offer to Valcon to reduce the 3% penalty to 1% and to **pro-rate the interest due**, as is now provided in the administrative rules. Although these rules were adopted in March of 1999, after the date of this appeal, the MDT was willing to negotiate with Valcon based on the new rules. The rule relating to interest is **ARM 18.9.703 PRORATION OF INTEREST** (1) Interest charged on delinquent gasoline and special fuel taxes is 12% a year or 1% a month. (2) **Interest will be calculated daily using the rate arrived at by dividing 12% interest per year by 365 days.** (emphasis added) The Board notes that the two sections of applicable statute relating to the amount of interest due are not consistent. **§15-70-210, MCA**, which relates to gasoline distributors, states in pertinent part: "*... the tax shall bear interest at the rate of 1% per month from the date of delinquency until paid.*" **§15-70-352, MCA**, relating to special fuels distributors, states in pertinent part: "*...the tax bears interest at the rate of 1% on the tax due for each calendar month or **fraction of a month.***" (emphasis added)

The MDT contends that Valcon's return and payment were one day late. Therefore, it is the determination of the Board that the actual interest due in this case is one day's interest, or **\$102.07**. This is calculated by dividing the 12%

annual rate of interest by 365 days and multiplying the resulting .00033 daily interest rate times the \$309,307.61 tax due. The Board could find no statutory authority to allow waiver or abatement of interest in this case.

CONCLUSIONS OF LAW

1. The State Tax Appeal Board has jurisdiction over this matter. **§15-2-302 MCA.**

2. **§15-70-111, MCA. Judicial review and appeals.** Any final written determination by the director of the department of transportation under this chapter may be appealed to the state tax appeal board which may, upon the record of a hearing, affirm, modify, or reverse the decision of the department.

3. **§15-70-205, MCA.** (1) Each distributor shall, not later than the 25th day of each calendar month, render a true signed statement to the department of transportation of all gasoline distributed and received by the distributor in this state during the preceding calendar month... The statement must be accompanied by a payment...

4. **§15-70-344, MCA.** (1) Each distributor shall, not later than the 25th day of each calendar month, render to the department of transportation a signed statement that specifies all special fuel distributed and received by the

distributor in this state during the preceding calendar month... The statement must be accompanied by a payment...

5. **§15-70-103, MCA. Time of mailing and filing.** (1) Any claim, statement, remittance, or other document which is transmitted to this state through the United States mail shall be deemed filed and received by this state on the date shown by the post-office cancellation mark stamped upon the envelope or other appropriate wrapper containing it.

5. **§15-70-103, MCA.** (3) If the date for filing any claim, statement, remittance, or other document falls upon a Saturday, Sunday, or legal holiday, the filing shall be considered timely if done on the next business day. Such reports shall be considered filed or received on the date or as provided in this chapter.

6. **§15-70-210. Tax penalty for delinquency.** (1) Any license tax not paid within the time provided shall be delinquent, and a penalty of 10% shall be added to the tax and the tax shall bear interest at the rate of 1% per month from the date of delinquency until paid. Upon a showing of good cause by the distributor, the department of transportation may waive penalty.

7. **§15-70-352, MCA. Penalties for delinquency.** (1) Any license tax not paid within the time provided in 15-70-344 is delinquent, a penalty of 10% is added to the tax, and the

ORDER

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that no penalty for late payment shall be assessed. In accordance with **ARM 18.9.703**, interest shall be assessed in the amount of \$102.07. The appeal of the taxpayer is therefore granted in part and denied in part and the decision of the Department of Transportation is modified.

Dated this 14th day of March, 2000.

BY ORDER OF THE
STATE TAX APPEAL BOARD

(S E A L)

GREGORY A. THORNQUIST, Chairman

JAN BROWN, Member

JEREANN NELSON, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of March, 2000, the foregoing Order of the Board was served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

James M. Ramlow
Kaufman, Vidal, & Hileman, P.C.
22 Second Avenue West
P.O. Box 728
Kalispell, MT 59903-0728

Nick A. Rotering
Legal Services
Montana Department of Transportation
P.O. Box 201001
Helena, MT 59620-1001

DONNA EUBANK
Paralegal