

STATE OF ALABAMA  
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

v.

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DOCKET NO. F. 91-122

FUND ALABAMA, INC.  
2100 AmSouth/Harbert Plaza  
Birmingham, AL 35203,

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Taxpayer.

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ORDER

The Revenue Department assessed franchise tax against Fund Alabama, Inc. (Taxpayer) for 1990 and also denied a petition for refund of franchise tax concerning 1989. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on May 7, 1991. Mr. Wayne E. Dutt appeared for the Taxpayer. Assistant counsel Dan Schmaeling represented the Department. This Order is based on the evidence and, arguments presented by both parties.

FINDINGS OF FACT

The issue in dispute is whether the Taxpayer employed capital in Alabama during the years in issue so as to be liable for the Alabama foreign franchise tax levied at Code of Ala. 1975, 540-14-41. The relevant facts are undisputed.

The Taxpayer was incorporated in Delaware in 1988 and also qualified to do business in Alabama in that year. The Taxpayer has from 400 to 700 shareholders and its only business is to invest in stocks of Alabama corporations or corporations with significant activities in Alabama.

The Taxpayer contracted with Sterne, Agee and Leach Investment

Advisors (SALIA) to make the actual investment decisions and SALIA receives an annual fee based on the asset value of the portfolio.

The securities are held by First Alabama Bank which receives a small fee for its services. The Taxpayer has two officers and maintains an office in Birmingham but has no other physical assets in Alabama or elsewhere.

The Taxpayer petitioned for a refund of franchise tax paid for the year 1989. The Department audited the Taxpayer, denied the refund and also assessed tax due for 1990. The Department determined the Taxpayer's capital employed in Alabama from the Taxpayer's balance sheet after allowing a deduction for all stock held in domestic Alabama corporations. The Department's position is that the Taxpayer's stock in foreign corporations constitutes taxable capital employed in Alabama.

The Taxpayer argues that it is a "mere investor" and that the ownership of corporate stocks and securities does not constitute the employment of capital in Alabama so as to subject it to the Alabama foreign franchise tax.

#### CONCLUSIONS OF LAW

The question is whether the stock owned by the Taxpayer in foreign corporations constitutes capital employed in Alabama pursuant to 540-14-41. Alabama Textile Products Corp. v. State, 83 So.2d 42, is directly on point. As stated in that case, "the shares of stock of a foreign corporation owned by a foreign

corporation whose commercial domicile is in Alabama, as is the case with the instant corporation, and the situs of the shares of stock presumably being in Alabama, . . . , are includable in the measure of the franchise tax of the corporation so owning said shares of stock." See, p. 59. Consequently, the stock owned by the Taxpayer constitutes capital employed in Alabama subject to the Alabama foreign franchise tax.

The Taxpayer cites State v. City Stores Company, 171 So.2d 121; State v. National Cash Credit Ass'n, 141 So. 541, and other cases in support of its position. Those cases are not persuasive.

In the City Stores case, the taxpayer operated retail store outlets in various states, not including Alabama. The taxpayer acquired real estate in Alabama but "never owned or operated a store in Alabama. Its only activity in this state was the ownership of the Birmingham real estate for a short period of time". See, p. 122. The Alabama Supreme Court held that the passive ownership of property not used in the taxpayer's primary business activity was not sufficient to subject the taxpayer to the Alabama franchise tax. That is not the situation in the present case.

In this case the Taxpayer through its agent SALIA is actively engaged in buying and selling stocks in Alabama to make a profit.

The buying, selling and holding of stocks is the Taxpayer's Primary business activity and is not an incidental function, as was

the ownership of the Alabama real estate in City Stores.

In National Cash Credit, the taxpayer, a foreign corporation, owned stock in two subsidiary Alabama corporations. The Supreme Court ruled that the taxpayer should

not pay franchise tax on the stock of the Alabama corporations because those corporations had already paid domestic franchise tax.

The Court Determined that to tax the stock again would constitute impermissible double taxation.

However, in this case the Department properly deducted from the measure of the tax the Taxpayer's stock in Alabama corporations, as required by Code of Ala. 1975, §40-14-41(d).

Thus, there is no double taxation as was the concern in the National Cash Credit case.

In addition, the court pointed out in National Cash Credit that capital employed for purposes of the franchise tax includes "all of the properties and moneys set apart from other uses and invested or employed in the operation of the business with a view to income or profit therefrom". See, p. 554. As stated, in this case the Taxpayer bought and sold stocks for the primary purpose of realizing a profit. The stocks were assets used by the Taxpayer in its sole business activity and constitute capital employed in Alabama subject to the foreign franchise tax.

The above considered, the Department properly denied the refund for 1989 and assessed additional tax due for 1990. In

compliance with Department regulations, this Order constitutes a Recommended order relating to the 1989 refund and has been submitted to the Commissioner along with the administrative record for entry of a Final Order. The Final Order entered by the Commissioner may be appealed by the Taxpayer pursuant to Code of Ala. 1975, §41-22-20. This Order is a Final Order relating to the 1990 assessment and the Department is directed to make the assessment final, plus applicable interest. The final assessment may be appealed pursuant to Code of Ala. 1975, §40-2-22.

Entered on July 11, 1991.

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BILL THOMPSON  
Chief Administrative Law Judge