WISE FORKLIFT, INC. 561 Murray Road Dothan, Alabama 36303,	§ §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 94-420
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed State, Houston County, and City of Dothan sales tax against Wise Forklift, Inc. ("Taxpayer") for the period July 1991 through June 1994. The Taxpayer paid the tax and applied for a refund. The Department denied the refund and the Taxpayer appealed to the Administrative Law Division. A hearing was conducted on March 13, 1995. Cameron A. Metcalf represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The issue in this case is whether forklifts withdrawn from the Taxpayer's inventory in Alabama and subsequently rented to customers outside of Alabama are subject to Alabama sales tax at the time of withdrawal under the sales tax "withdrawal for use" provision included in Code of Ala. 1975, §40-23-1(a)(10).

The Taxpayer is located in Dothan, Alabama and rents and sells forklifts in Alabama, Georgia and Florida. The Taxpayer maintains a separate rental fleet of forklifts that it purchases tax-free. Forklifts generally remain in the rental fleet for three to five years, although they are available for sale at any time. The forklifts are generally rented to customers for various periods from one-half day up to several months. All of the rental fleet forklifts are eventually sold by the Taxpayer at retail. The average wholesale cost of

a new forklift is $17,000. The average retail sales price charged by the Taxpayer for a used forklift is $14,000.

The Taxpayer also maintains a separate inventory of new forklifts for sale only. The Taxpayer does not own those forklifts. Rather, they are on a floor plan with the forklift manufacturer.

The Taxpayer paid Alabama rental or sales tax on all forklifts rented or sold in Alabama during the subject period. The Taxpayer also incorrectly paid Alabama rental tax on forklifts rented in Florida or Georgia prior to September 1993. After September 1993, the Taxpayer properly remitted rental tax to either Georgia or Florida, depending on where the rental occurred. The Taxpayer also properly paid sales tax to either Georgia or Florida if a forklift was sold at retail in either of those states.

The Department audited the Taxpayer and assessed Alabama sales tax on the wholesale cost of those forklifts withdrawn from inventory in Alabama and subsequently rented outside of Alabama. The Department claims that the withdrawal of the forklifts from inventory for rental purposes outside of Alabama was a taxable "withdrawal, use, or consumption" pursuant to the sales tax withdrawal provision, Code of Ala. 1975, §40-23-1(a)(10).

To be fair, the Department taxed only those forklifts rented outside of Alabama for more than 30 days. However, if the forklift was subsequently returned to and sold in Alabama, the Department claims that the subsequent sale was also subject to Alabama sales tax, even if the prior withdrawal for rental purposes outside of Alabama had been taxed.

This case involves several technical legal issues.

The Taxpayer claims that the forklifts were purchased tax-free for resale. However, the forklifts stayed in the Taxpayer's rental fleet from three to five years. Consequently, in my opinion the forklifts were purchased primarily for rental purposes, not for resale. Nevertheless, the Taxpayer still correctly purchased the forklifts at wholesale. Code of Ala. 1975, §40-23-1(a)(9)j. defines "wholesale sale" to include a sale of property to any person engaged in the business of leasing or renting such property "if such tangible personal property is purchased for the purpose of leasing or renting it to others under a transaction subject to" the Alabama lease tax.[1] If a purchaser is engaged in the business of renting such property in Alabama, the purchase is at wholesale under §40-23-1(a)(9)j.

The Taxpayer in this case is engaged in the business of renting forklifts in Alabama. The forklifts in issue were thus properly purchased by the Taxpayer tax-free, notwithstanding that on occasion the forklifts were also rented outside of Alabama. Theoretically, any property purchased for rental purposes in Alabama could at some point also be rented outside of Alabama. Nonetheless, if the property is purchased for rental in Alabama, it can be purchased tax-free, as in this case.

The next and primary question is whether the withdrawal of the forklifts for rental outside of Alabama constituted a taxable withdrawal under §40-23-1(a)(10). That section defines "sale at retail" to include the "withdrawal, use, or consumption of any tangible

[1]See also, Code of Ala. 1975, §40-12-224, which reiterates that the sale of tangible personal property to someone engaged in the business of leasing such property in Alabama constitutes a tax-free wholesale sale.

personal property by anyone who purchases same at wholesale, . . ."

The Department concedes that the withdrawal and rental of a forklift in Alabama is not taxable under the withdrawal provision. In my opinion, a forklift withdrawn and rented outside of Alabama also is not subject to Alabama sales tax.

As stated, the forklifts were correctly purchased at wholesale. Sales tax is not due because the forklifts were subsequently rented out-of-state.[2] The initial sales tax exemption allowed because the forklifts were purchased for rental in Alabama is not automatically lost because the forklifts were at some point rented outside of Alabama in a transaction not subject to Alabama rental tax.

What the Department has failed to consider is that the same forklift rented outside of Alabama, and which the Department is attempting to tax in this case under the withdrawal provision, may also be subsequently rented in Alabama and rental tax paid thereon. For example, the Taxpayer may rent a forklift to a customer in Alabama for a

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[2]The 30 day grace period allowed by the Department is a commendable attempt by the Department to be fair. But it is not supported by law. If the withdrawal provision applied (and it does not), then theoretically the withdrawal would be taxable even if the rental outside of Alabama was for one-half a day.

year. Alabama rental tax would be due on the gross proceeds derived from the rental. The forklift may then be rented outside of Alabama for a two month period. The Taxpayer would collect and remit rental tax to the state in which the forklift was rented, either Georgia or Florida. The Department would also charge the Taxpayer a sales tax on the wholesale cost of the forklift. If the forklift is returned to Alabama and rented again, the Taxpayer would again be liable for Alabama rental tax on the rental gross proceeds, even though sales tax has already been paid. Finally, when the Taxpayer eventually sells the used forklift at retail, which it has done in all cases, the Taxpayer would owe another sales tax on the retail sales price charged for the forklift. I do not believe the Legislature intended to impose sales tax on a taxpayer twice on the same property. Rather, Alabama rental tax is due on the rental of the forklift in Alabama, and Alabama sales tax is due on the final sale of the forklift in Alabama. Code of Ala. 1975, §40-12-224 specifies that the subsequent sale of tangible personal property previously purchased at wholesale for rental purposes in Alabama shall be a taxable retail sale.

In Montgomery Aviation Corp. v. State, 154 So.2d 24 (1963), the taxpayer purchased airplanes tax-free, rented the airplanes for a period, and later sold the airplanes in Alabama. The Department attempted to impose a sales tax when the airplanes were withdrawn from inventory for rental purposes, and a second sales tax on the later retail sale of the airplanes. The Alabama Supreme Court held that because the airplanes were subsequently sold at retail in an arm's-length transaction, the earlier rental of the airplanes did not constitute a taxable withdrawal. The Court's primary concern was that to tax the withdrawal for rental would result in double taxation.

The Court held as follows, at pages 26, 27:

> "It is not contended, nor do we find any evidence to show, that any planes were 'consumed' by rental service. In fact, as we have said, appellee's theory is that any 'withdrawal' gives rise to the sales tax, and further that after withdrawal, however short the time, if sold the taxpayer is obligated to collect another sales tax. Appellant says this is double taxation and that while permissible, is to be avoided wherever possible. Paramount-Richards Theatres v. State, 256 Ala. 515, 55 So.2d 812. Appellee says it is not double taxation, since the taxpayer would pay only the withdrawal tax and the purchaser would pay the sales tax. This is contrary to what we said in both the Helburn and Kershaw cases, which, as we have said above, is in effect that the purpose of both §752(1)(j) and §786(2)(f)(h) was to reach transactions which could not be taxed otherwise. As we have shown, there was not such withdrawal as to prevent levy of the sales tax. Moreover, according to appellee's postulate there would be double taxation if appellant paid a 'withdrawal' tax, and then upon selling the plane collected and paid another.
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> We do not have before us a situation of complete consumption of personal property, as in the Kershaw case. We do not have a case where the property cannot be taxed because there was no sale to another, to obviate which we have observed was the purpose of the act. To repeat, the State's real position is that the statute comprehends a real imposition of two taxes on the same property. With this we are unable to agree.

In Drennen Motor Co. v. State, 185 So.2d 405 (Ala. 1966), a Buick dealer withdrew automobiles from inventory for use as demonstrators. The demonstrators were available for sale at any time. They were all eventually sold for an average of 4.5% less than a new car.

The dealer remitted sales tax on the sales price received for the demonstrators. As in this case, the Department attempted to impose a second sales tax under the withdrawal provision when the vehicles were withdrawn for use as demonstrators.[3]

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[3]In Drennen Motor, the Department examiner considered the use of a vehicle as a

demonstrator for less than two weeks not to be a taxable withdrawal. Drennen Motor, at p. 410. That arbitrary two week grace period is similar to the 30 day rental grace period allowed by the Department examiner in this case.

The Alabama Supreme Court rejected the Department's argument and held that the withdrawal provision was not applicable. The Court held that sales tax was due only once on the reduced but fair market sales price received for the used demonstrators. The same logic applies in this case. The Court affirmed the Montgomery Aviation rationale that to tax the same property twice would constitute impermissible double taxation. Drennen Motor, at p. 411.

The above considered, the tax in issue should be refunded to the Taxpayer, plus applicable interest. This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered June 15, 1995.

BILL THOMPSON
Chief Administrative Law Judge