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
ON APPLICATION FOR REHEARING

A Final Order was entered in this case on June 15, 1995 granting the refund in issue. The Department applied for a rehearing on June 30, 1995. The application is denied and the Final Order is affirmed for the reasons stated below.

The Department contends that the Taxpayer purchased the forklifts in issue tax-free for the purpose of reselling them, and that the subsequent withdrawal of the forklifts for rental purposes outside of Alabama was a taxable withdrawal in accordance with State v. Kershaw Manufacturing Co., 130 So.2d 740 (1962). I disagree.

First, Kershaw can be distinguished because, unlike the materials in Kershaw, the forklifts in issue were not purchased tax-free for resale. Rather, they were purchased tax-free pursuant to Code of Ala. 1975, §§40-12-224 and 40-23-1(a)(9)j. because the Taxpayer intended to rent the forklifts in Alabama. If Kershaw was applicable, then the withdrawal and rental of the forklifts both in Alabama and outside of Alabama would be taxable under the withdrawal provision. Clearly, that is not the case.

The forklifts were properly purchased tax-free by the Taxpayer. The fact that a forklift was on occasion rented outside of Alabama did not retroactively void the exemption, nor did it constitute a conversion of the forklift to a taxable private use or consumption so as to trigger imposition of the withdrawal provision.

The purpose of the withdrawal provision is to tax property purchased at wholesale that is subsequently used and consumed by the wholesale purchaser and thus not resold. State v. Helburn Co., 111 So.2d 912 (1959). Just as the airplanes in Montgomery Aviation Corp. v. State, 154 So.2d 24 (1963) were not consumed when they were rented prior to sale, the forklifts in issue were not consumed when they were rented outside of Alabama. "We do not have before us a situation of complete consumption of personal property, as in the Kershaw case." Montgomery Aviation, at page 27.

The above quote from Montgomery Aviation further distinguishes Kershaw from this case. The Supreme Court considered the railroad equipment in Kershaw to have been completely consumed pursuant to the leases. On the other hand, like the airplanes in Montgomery Aviation, the forklifts in this case were clearly not consumed when they were leased outside of Alabama.

Pursuant to §40-12-224, the subsequent sale of tangible personal property previously purchased tax-free for rental purposes constitutes a taxable retail sale. The taxable measure is the gross receipts derived from that sale. The used forklifts were

sold at below cost, but the sales price was the fair market value of the forklifts at the time of sale. The Taxpayer properly paid sales tax on that amount.

As discussed in the Final Order, if the Department's taxing scheme is adopted, the Taxpayer would owe sales tax twice on the forklifts, once when the forklifts were withdrawn from inventory and rented outside of Alabama, and again when the forklifts were subsequently sold at retail in Alabama. As stated in Montgomery Aviation, at page 27, that double taxation scheme was clearly not intended by the Legislature and should be rejected.

The above considered, the Department's application for rehearing is denied. The Final Order previously entered is affirmed.

This Final Order on Application for Rehearing may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered August 10, 1995.

BILL THOMPSON
Chief Administrative Law Judge