

FLOURNOY DEVELOPMENT CO., INC. 900 Brookstone Center Parkway Columbus, Georgia 31904-2987,	§	STATE OF ALABAMA	
	§	DEPARTMENT OF REVENUE	
		ADMINISTRATIVE LAW DIVISION	
FLOURNOY CONSTRUCTION COMPANY 900 Brookstone Center Parkway Columbus, Georgia 31904-2987,	§	DOCKET NOS.	F. 95-481
	§		F. 95-482
Taxpayers,	§		
v.	§		
STATE OF ALABAMA	§		
DEPARTMENT OF REVENUE.			

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed franchise tax against Flournoy Development Company, Inc. and Flournoy Construction Company (together "Taxpayers") for 1991 through 1994. Both Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. The appeals were consolidated, and a hearing was conducted on March 20, 1996. Frank DeLuca represented the Taxpayers. Assistant Counsel Dan Schmaeling represented the Department.

The Taxpayers presented additional information to the Department after the March 20 hearing. The Department reviewed the information and reduced the liability of Flournoy Construction Company ("Flournoy Construction") to \$2,195.36. Flournoy Construction agrees with that adjusted amount due, except concerning the \$359.05 penalty.

The Department also reduced the liability of Flournoy Development Company ("Flournoy Development") to \$120,705.28. Flournoy Development agrees with some of the Department's

adjustments, but disagrees that certain long-term debt should be included in its tax base. The debt was incurred by various limited partnerships operating in Alabama in which Flournoy Development is a general partner. The debt is nonrecourse against Flournoy Development and the other general partners.

The issues in this case are:

(1) Should the partnerships' long-term debt be included in Flournoy Development's Alabama capital base;

(2) If the debt is included in Flournoy Development's capital, should the entire debt be included, or should it be pro-rated based on Flournoy Development's ownership interest in the partnerships; and

(3) Should the penalties assessed against both Taxpayers be waived for reasonable cause pursuant to Code of Ala. 1975, §40-2A-11(h).

Flournoy Development is a general partner in various limited partnerships involved in real estate development and management in Alabama. The partnerships obtained long-term financing for their Alabama projects. The debt is nonrecourse against the general partners, and is secured solely by certain partnership properties.

Flournoy Development failed to include the partnership debt as capital on its Alabama franchise tax returns for the subject years.

The Department reviewed the returns and included the debt as capital pursuant to Code of Ala. 1975, §40-14-41(b)(3). The tax in

dispute is based on that adjustment.

A foreign corporation that is a general partner in a partnership operating in Alabama is "doing business" in Alabama through the partnership, and thus is subject to Alabama franchise tax. See, American Television & Communications Corporation v. State, F. 95-258 (Admin. Law Div. 8/29/95). Consequently, Flournoy Development, as a general partner in various limited partnerships operating in Alabama, is subject to Alabama franchise tax. As stated, the primary issue is whether the nonrecourse partnership debt should be included in Flournoy Development's capital base.

Alabama franchise tax is based on "capital employed" in Alabama. Code of Ala. 1975, §40-14-41(a).

"Capital" is defined at §40-14-41(b)(3) to include "long-term" indebtedness maturing in more than one year. If a foreign corporation is operating in Alabama as a general partner in a partnership, and the partnership has long-term debt, i.e., capital employed in Alabama, that capital employed is generally attributable to the foreign corporation/general partner. See, American Television.

Flournoy Development argues, however, that the partnership debt should not be included in its capital base because it is not liable for the nonrecourse debt. I disagree.

Capital employed in Alabama is the taxable event. The capital represented by the partnership long-term debt is being employed in

Alabama. That capital employed (or a portion thereof) is attributable to Flournoy Development through its interest in the partnership. The fact that Flournoy Development cannot be held liable for the debt is irrelevant.

The harder question is what portion of the debt should be included in Flournoy Development's Alabama capital base. In American Television, a foreign corporation owned a 29 percent interest in a partnership doing business in Alabama. The partnership had long-term debt (although not nonrecourse). The Department included in the corporation's Alabama capital base that portion of the long-term debt equal to the corporation's percentage ownership interest in the partnership. Otherwise, "if the entire long-term debt was allocated to each general partner 100 percent, the same capital would be subjected to multiple taxation in Alabama The Department properly treated the Taxpayer's percentage share of the partnership's long-term debt as Taxpayer capital." American Television, F. 95-258 at 2.

The long-term debt in this case should be pro-rated to Flournoy Development's Alabama capital base the same as the debt in American Television. Flournoy Development should notify the Department concerning its ownership interest in the various limited partnerships during the subject years. The Department should then recompute Flournoy Development's franchise liability by including the pro-rate share of the long-term debt in its Alabama capital base.

The Department should also explain why the penalties were assessed. A Final Order will be entered upon receipt of the adjusted amounts due. The Final Order will also address the waiver of penalties issue.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered January 21, 1997.

BILL THOMPSON
Chief Administrative Law Judge