WRIGHT TRANSPORTATION, INC. 2333 DAUPHIN ISLAND PKWY. MOBILE, AL 36605-3449,	§	STATE OF ALABAMA ALABAMA TAX TRIBUNAL
Taxpayer,	§	DOCKET NO. S. 14-806
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Wright Transportation, Inc. ("Taxpayer") for use tax for January 2009 through December 2011. The Taxpayer appealed to the Revenue Department's Administrative Law Division, now the Tax Tribunal, pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. The Tribunal conducted a hearing on March 18, 2015. Jim Sizemore represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

FACTS

The Taxpayer is in the long-haul trucking business, and is based in Mobile, Alabama. It operates primarily in the Southeastern United States. All of its trucks are dispatched from its headquarters in Mobile.

The Taxpayer purchased 81 trucks and 22 trailers from an Alabama dealer during the period in issue. The Alabama dealer delivered the trucks and trailers to the Taxpayer at an office maintained by the Taxpayer in Pascagoula, Mississippi. The Taxpayer's drivers picked-up the trucks and trailers in Mississippi, and thereafter used the trucks and trailers to haul goods in interstate commerce.

Thirty-five of the trucks first picked up and hauled goods from an Alabama location. The Taxpayer concedes that it owes Alabama use tax on those trucks, and also on a

corresponding percentage of the 22 trailers purchased from the Alabama dealer. The remaining 46 trucks first picked up goods in either Mississippi, Florida, or Indiana. The Taxpayer contends that those trucks, and a corresponding number of the trailers, were not subject to Alabama use tax. There is no evidence showing where the trucks and trailers were subsequently used after they were first placed in service outside of Alabama, although the Taxpayer's representative indicated that the trucks and trailers traveled from 18 to 24 percent of their total miles in Alabama during the years in issue.

The Taxpayer also purchased 12 trailers at auction in Mobile during the subject period.

The Department audited the Taxpayer for use tax for the subject period and determined that the Taxpayer had purchased the trucks and trailers in Alabama. It reached that conclusion because (1) the Taxpayer's Mobile location was physically close to the Alabama truck dealer's location in Mobile, (2) the Taxpayer's office in Mississippi did not qualify as a terminal for International Registration Plan ("IRP") purposes, and (3) the Taxpayer dispatched the trucks from Mobile. It consequently assessed the Taxpayer for use tax on the trucks and trailers because the Taxpayer had not paid sales tax when it purchased the trucks and trailers from the Alabama dealer. The Department did, however, allow the Taxpayer a credit for a prorated Mississippi use tax the Taxpayer had paid on the vehicles. The Department also assessed the Taxpayer for use tax on the 12 trailers it purchased at auction in Mobile during the subject period.

Additional relevant facts are set out in the below analysis.

ANALYSIS

Concerning the 81 trucks and the 22 trailers that the Taxpayer purchased from the Alabama dealer, the evidence is undisputed that the dealer delivered the trucks and trailers to the Taxpayer in Mississippi. The sales were thus closed in Mississippi, not in Alabama, as argued by the Department.[1] See generally, *State, Dept. of Revenue v. AAA Cooper*, 160 So.3d 286 (Ala. Civ. App. 2014). ("For Alabama sales tax purposes, a sale is closed when and where title is transferred by the seller to the purchaser. Code of Ala. 1975, §40-23-1(a)(5) . . . title is transferred under Alabama law when the seller . . . completes the physical delivery of the goods to the purchaser. . . ." *AAA Cooper*, 160 So.3d at 290, 291, quoting *State v. Delta Air Lines*, 356 So.2d 1205 (Ala. Civ. App. 1978)). But where the sales occurred is irrelevant for purposes of determining if the Taxpayer owes Alabama use tax on the trucks and trailers.[2]

Code of Ala. 1975, §40-23-61(c) levies a two percent use tax on cars, trucks, truck trailers, etc. Alabama's appellate courts have held that for the tax to apply, the trucks and trailers must be purchased at retail, the purchaser must intend at the time of purchase to

[1] For purposes of determining where the sales occurred, the fact that the Taxpayer's location and the dealer's location in Mobile were in close proximity, or that the Taxpayer's Mississippi office was not a terminal for IRP purposes, or that the Taxpayer dispatched the trucks from Mobile, is irrelevant.

[2] The Alabama use tax at Code of Ala. 1975, §40-23-61(c) applies to tangible personal property purchased at retail both inside and outside of Alabama that is intended for use in Alabama and is first used in Alabama. See generally, *Paramount-Richards Theatre, Inc. v. State*, 55 So.2d 812 (Ala. 1951); *Whatley Contract Carriers, Inc. v. State of Alabama*, Docket U. 03-322 (Admin. Law Div. 3/23/2004). If the tangible personal property is purchased in Alabama and Alabama sales tax is paid on the purchase, the purchaser's subsequent use of the property in Alabama would be exempt from the use tax, see Code of Ala. 1975, §40-23-62(1). Double taxation would thus be avoided.

use, store, or consume the trucks and trailers in Alabama, and the trucks and trailers must actually be first used, stored, or consumed in Alabama. See, *Boyd Brothers Transportation, Inc. v. State Dept. of Revenue*, 976 So.2d 471 (Ala. Civ. App. 2007). Citing Department Reg. 810-6-5-.25(1), the Court in *Boyd Brothers* found that property purchased for use outside of Alabama is not subject to Alabama use tax if there was a real and substantial use of the property outside of Alabama before it was brought into and used in Alabama. The Court thus found that the trucks and trailers in issue in *Boyd Brothers* were not subject to Alabama use tax because they had been first used to haul goods outside of Alabama before being brought into and used in Alabama.

It is undisputed that 46 of the trucks in issue were initially put into service outside of Alabama because those trucks first picked up a load outside of Alabama. In *Boyd Brothers*, the Court held that Alabama use tax did not apply because "the first usage of the property" was not in Alabama. *Boyd Brothers*, 976 So.2d at 478, quoting *Culverhouse, Inc. v. Alabama Dep't of Revenue*, 358 B.R. 806 (M. D. Ala. 1006). Applying the *Boyd Brothers* and *Culverhouse* rationale, the Alabama use tax can apply only if the property is first or initially used for its intended purpose in Alabama. Because the 46 trucks in issue were first placed in service outside of Alabama, their subsequent use in Alabama was not subject to Alabama use tax.

The Taxpayer in this case admittedly had the Alabama dealers deliver the trucks and trailers to the Taxpayer's office in Mississippi so as to avoid Alabama sales tax.[3] I

[3] The Taxpayer apparently paid a pro-rated Mississippi use tax on the trucks and trailers that was less than the amount of Alabama sales tax that would have been due if the Taxpayer had purchased the trucks and trailers in Alabama.

agree with the Taxpayer, however, that Alabama law did not prohibit or prevent the Taxpayer from doing so. See, *West Point Pepperell, Inc. v. State, Dep't of Revenue*, 624 So.2d 579 (Ala. Civ. App. 1992), and the other cases cited in the Taxpayer's Brief at 5.

The Taxpayer's owner testified at the March 18 hearing that there was usually a significant delay between when he ordered a truck and when the dealer delivered the truck. Consequently, when the Taxpayer ordered a truck, it did not know where that truck would first be used. Rather, when the Taxpayer received a new truck from a dealer, it first used the truck in Alabama or elsewhere, depending on where a customer needed goods hauled from at the time. Under those facts, I believe that the Taxpayer purchased the trucks for use in Alabama within the purview of the use tax levy at §40-23-61(c). But as discussed, the *Culverhouse* and *Boyd Brothers* rationale also requires that for the use tax to apply, the property must also be initially used in Alabama. The 46 trucks first placed in service outside of Alabama were not.

The trailers in issue were not assigned to a particular truck, but rather, were randomly used as needed. I agree with the Taxpayer that the same percentage of trucks first used outside of Alabama should also be applied to the trailers. The result is that only nine of the trailers were first used in Alabama, and were thus subject to Alabama use tax. As explained in the Taxpayer's Brief, at 12, 13:

> Forty six (46) of 81 trucks (56.79%) were used first outside Alabama. When the same percentage is applied to the trailers delivered in Mississippi, rounding to the nearest integer, 13 of the 22 were used first outside Alabama and are not taxable. The attached Appx. Ex. 3, lines 105-118, reveals a calculation of exempt/non-exempt trailers delivered to Mississippi. Of the 22 trailers acquired, therefore, 13 were used first to haul freight from Mississippi or Florida, rather than Alabama. For the same reason that the trucks first used outside Alabama are not taxable, likewise 13 of the 22 trailers acquired from Gulf City Trailer and Body Works, Inc., were not purchased for use in

Alabama and are not taxable.

> The Department uses a percentage applicable to trucks (56.79% in this case) to calculate the use of trailers to apportion property taxes on the value of trailers in implementation of the decision in *B-H Transfer Co., Inc. v. Magee*, CV 2012-900318 (Cir. Ct. Talladega Cnty, Feb. 25, 2014). "[T]he taxpayer has the burden of establishing the extent to which the trailer is not subject to taxation in this state. A reasonable means of satisfying this burden of proof is by showing the percentage of miles traveled by the Alabama truck fleet outside of this state. . . ." *Id*. P. 16, ¶8. The percentage of trucks purchased for use outside Alabama is a reasonable proxy for the use of the trailers similarly purchased since trailers never go anywhere without a truck.

The Taxpayer argues that it is not liable for use tax on the 12 trailers purchased at auction because the owner of the trailers, S&M Transportation, Inc., was not in the business of selling trailers at retail. The Taxpayer thus asserts that the sales by the auction company, Taylor & Martin, Inc., were nontaxable casual sales.[4]

I agree that the trailer owner was not in the business of selling trailers. I also agree that a casual sale is not a retail sale subject to Alabama sales tax; nor is the property sold in a casual sale later subject to Alabama use tax. See again, *Bay Towing & Dredging*, infra. But the trailer sales in issue were not casual sales because the auctioneer that made the sales was in the business of making retail sales.

Department Reg. 810-6-1-.05 is entitled "Auctioneer," and reads as follows:

> (1) An auctioneer is engaged in a business which is subject to sales tax where as a course of business he makes sales at retail of his own tangible personal property or makes sales at retail of tangible personal property owned by others which is consigned to him for sale.
>
> (2) For the purpose of administering the sales tax law, it is deemed that the auctioneer will have the property on consignment when he receives payment for the property sold, issues his bill of sale or invoice, and pays the owner for

[4] A "casual sale" for sales tax purposes is a sale by a seller that is not in the business of selling the tangible personal property being sold. See generally, *State of Alabama v. Bay Towing & Dredging Company, Inc.*, 90 So.2d 743 (Ala. 1956).

> the property sold with his check or other remittance. An auctioneer does not become liable for sales tax when selling tangible personal property not owned by him where the owner has commissioned the auctioneer to make such sales in the name of the owner and for him in the operation of a business licensed under the sales tax law.
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> (3) The sales tax will apply upon the gross receipts derived from sales of all tangible personal property sold by persons regularly engaged in conducting auction sales, regardless of how such tangible personal property may have been acquired or by whom it may be owned, except the sale of tangible personal property which normally would not be subject to tax such as a wholesale sale.

The auctioneer in this case, Taylor & Martin, sold the trailers in issue on consignment from the owner. Paragraph (1) of Reg. 810-6-1-.05 clearly applies. Taylor & Martin also sold the property on consignment as described in the first sentence of paragraph (2) of the above regulation because the Taxpayer paid Taylor & Martin for the trailers, Taylor & Martin issued an invoice for the trailers, and Taylor & Martin presumably paid the owner the sale proceeds, less a consignment or auctioneer fee.[5]

Although the invoices listed the owner, S&M Transportation, as the "seller," the seller/taxpayer for sales tax purposes was the auctioneer. And because an auctioneer is in the business of selling tangible personal property, sales by an auctioneer are not nontaxable casual sales.

Paragraph (3) of Reg. 810-6-1-.05 specifies that sales tax is due on sales by an auctioneer regularly engaged in conducting auction sales "regardless of . . . by whom (the property) may be owned, . . ." Again, the auctioneer is making the retail sale, not the owner of the property. Consequently, the fact that the sales would have been a casual sales if the owner had made the sales is irrelevant.

[5] The auction invoice submitted by the Taxpayer as Ex. 1, Tab 18, reads in part – "The Buyer has made full payment to Taylor & Martin, Inc. Auctioneers. . . ."

The Taxpayer cites the last clause in paragraph (3) of the regulation, which excepts from taxation "the sale (by an auctioneer) of tangible personal property which normally would not be subject to tax such as a wholesale sale." I agree that if an auctioneer sells tangible personal property to a licensed retailer for resale, the wholesale sale would not be taxable. The same would apply if the auctioneer sold to an entity such as a municipality or county that is exempt from paying sales tax, see Code of Ala. 1975, §40-23-4(a)(15).

In the above examples, however, the sale by the auctioneer would be exempt because it was at wholesale or to an exempt entity. The auction sales of the trailers in issue were not exempt because the auctioneer was in the business of selling goods at retail, and the sales were not at wholesale or to an exempt entity. Again, the fact that the sales would have been nontaxable casual sales if the owner had made the sales is irrelevant. The auctioneer made the sales on consignment, not the owner.

Most all goods sold on consignment by auctioneers are owned by people or entities that are not in the business of selling the type of goods being sold. For example, auctioneers are routinely hired to conduct estate sales, and must collect Alabama sales tax on those sales, even though the deceased owner had not been in the business of selling the estate sale items. Applying the Taxpayer's rationale, those sales would be exempt casual sales. Clearly, they would not be.[6]

[6] The second sentence in paragraph (2) of Reg. 810-6-1-.05 specifies that if the owner of a licensed retail business commissions an auctioneer to make sales in the retail business's name, the retail business and not the auctioneer is liable for sales tax on the sales. In that case, the auctioneer is acting as an agent selling on the retailer's behalf. That situation can be distinguished from the more common situation where the auctioneer is the retail seller of goods on consignment, as in this case.

Alabama's sales tax on motor vehicle, trailers, etc. is based on the "gross proceeds of sales" of a retail business. Code of Ala. 1975, §40-23-2(4). The above phrase is defined at Code of Ala. 1975, §40-23-1(a)(6) to include "the proceeds from the sale of any property handled on consignment by the taxpayer. . . ." Consequently, the gross proceeds from the sale of property handled and sold on consignment by an auctioneer are subject to sales tax. The trailers in issue sold by the auctioneer to the Taxpayer were taxable retail sales.[7]

The auction invoices show that the Taxpayer was not charged Alabama sales tax on the trailers. The use tax exemption at §40-23-62(1) that exempts from the Alabama use tax property on which the Alabama sales tax has been paid thus does not apply. There is also no evidence that the trailers purchased at auction in Alabama were first used outside of Alabama. The Taxpayer is thus liable for Alabama use tax on its use of the 12 trailers in Alabama.

Finally, the Taxpayer argues that concerning those trucks and trailers that are subject to Alabama use tax, the tax must be apportioned based on the miles traveled in Alabama versus the total miles traveled everywhere. "Where two or more states have jurisdiction to impose a tax on property moving in interstate commerce, any such tax must be apportioned." Taxpayer's Brief at 19.

[7] For decisions issued by the Department's Administrative Law Division, now the Tax Tribunal, that are consistent with the above finding, see, *Presley v. State of Alabama*, Docket S. 03-782 (Admin. Law Div. 3/24/2004); *Ray v. State of Alabama*, Docket S. 03-271 (Admin. Law Div. 7/21/2003); and Webster *v. State of Alabama*, Docket S. 03-165 (Admin. Law Div. OPO 6/12/03).

The U.S. Supreme Court has indicated that a state may tax an activity or property used in interstate commerce only if (1) there is a substantial nexus between the activity and the taxing state; (2) the tax is fairly apportioned; (3) the tax is nondiscriminatory; and (4) the tax is reasonably related to services and protections provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 97 S. Ct. 1076 (1977).

The Taxpayer argues that unless the use tax on the tractors and trailers is apportioned, the second or "fairly apportioned" prong of *Complete Auto* would be violated. I disagree.

Quoting from the U.S. Supreme Court's decision in *Goldberg v. Sweet*, 109 S. Ct. 582, 260-62, the Alabama Court of Civil Appeals, in *Boyd Brothers*, supra, explained that for a tax to be fairly apportioned, it must be both internally and externally consistent.

> As part of the apportionment test, the United States Supreme Court has held that a tax must be internally and externally consistent. *See Goldberg v. Sweet*, 488 U.S. 252, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989). The court explained:
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> > [W]e are mindful that the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction. . . . [W]e determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent.
> >
> > To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passes an identical statute.
> >
> > The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. We thus examine the in-state business activity which triggers the taxable event and the practical or

economic effect of the tax on that interstate activity.

Boyd Brothers, 976 So.2d at 481.

The use tax levied at §40-23-61(c) is both internally and externally consistent. It is internally consistent because if every other state enacted a similar use tax, there could be no multiple taxation because the subject property could be first used in only one state.

The tax is also externally consistent because Alabama allows a credit for sales or use tax previously paid on the property to another state. See, Code of Ala. 1975, §40-23-65. The Department has in fact allowed the Taxpayer a credit for the use tax it paid to Mississippi on the trucks and trailers in issue. In *Ex parte Fleming Foods of Alabama, Inc.*, 648 So.2d 577 (Ala. 1994), the Alabama Supreme Court held that the §40-23-61(c) use tax was externally consistent, as follows:

> The use tax is described in 68 Am. Jur. 2d, *Sales and Use Tax* § 188 (1973), as neither a property tax nor an ad valorem tax: it is a nonrecurring tax. Also, a use tax is externally consistent because of the credit provided for payment of sales or other use tax:
>
> > The provision of a *credit* in a use tax statute for sales or use tax paid to another state makes a use tax externally consistent, as much as such a provision avoids actual multiple taxation.
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> (Emphasis added.)
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> The use tax imposed in the present case is not imposed upon revenues derived from carrying on an interstate business or interstate commerce, but is intended to prevent one from avoiding the sales tax law.

Fleming Foods, 648 So.2d at 579.

As further stated by the Court in *Fleming Foods*, the §40-23-61(c) use tax "is not a tax on revenues generated from carrying on interstate business, like the taxes in *Goldberg v. Sweet* (cite omitted) . . . (rather) it is a one-time tax levied at the same rate as the sales

tax and is complementary to the sales tax." *Fleming Foods*, 648 So.2d at 579.

Based on the above, the Commerce Clause at Art. 1, §8 of the U.S. Constitution does not require that Alabama's §40-23-61(c) use tax must be apportioned.

The Department is directed to recompute the tax due based on the 35 trucks and the 9 trailers that the Taxpayer concedes were subject to Alabama use tax, and also on the 12 trailers purchased by the Taxpayer at auction. The Department also assessed the Taxpayer for the minimum $50 failure to file penalty for 24 months for which the Taxpayer was not required to file a return. The Department agrees that those penalties should be waived. The penalties assessed by the Department should be adjusted accordingly. The Department should then notify the Tax Tribunal of the adjusted amount due. An appropriate Order will then be entered.

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, §40-2B-2(m).

Entered July 9, 2015.

Bill Thompson

BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr
cc: Duncan R. Crow, Esq.
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