WHATLEY CONTRACT CARRIERS, LLC 2835 Pyramid Avenue Montgomery, AL 36105-5405,	§ §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. U. 03-372
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Whatley Contract Carriers, LLC ("Taxpayer") for State use tax for September 1998 through June 2002. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on September 23, 2003. David Johnston and Paul Turner represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

ISSUES

The Taxpayer operates a long-haul trucking business based in Alabama. It purchased trucks in Alabama tax-free pursuant to the sales tax drive-out exemption at Code of Ala. 1975, §40-23-2(4). It subsequently used the trucks to haul goods in Alabama and various other states during the period in issue. The ultimate issue is whether the Taxpayer is liable for Alabama use tax on its use of the trucks in Alabama. Five sub-issues are involved:

(1) Does Alabama use tax apply only to tangible personal property purchased at retail outside of Alabama that is subsequently used, stored, or consumed in Alabama, or does it also apply to such property purchased in Alabama;

(2) Was the Taxpayer's use of the trucks in Alabama exempt from Alabama use tax because the trucks were exempt from Alabama sales tax when purchased pursuant to

the sales tax drive-out exemption at §40-23-2(4). That is, if property is exempt from sales tax when purchased in Alabama, is it also automatically exempt from Alabama use tax when it is subsequently used, stored, or consumed in Alabama;

(3) Even if the trucks were not subject to or were exempt from the use tax levied on motor vehicles at Code of Ala. 1975, §40-23-61(c), is the Taxpayer still liable for use tax on the trucks pursuant to the alternative use tax levied at Code of Ala. 1975, §40-23-61(e). That section levies a use tax on new or used property used in the performance of a contract in Alabama;

(4) Is the Department prohibited from taxing the trucks by the Due Process Clause of the U.S. Constitution, Amend. 14, §1, because the Taxpayer did not have notice and fair warning that it may be liable for use tax on the trucks; and,

(5) Were the trucks exempt from use tax pursuant to Code of Ala. 1975, §40-23-62(2). That statute generally exempts any property or transaction that the State is prohibited from taxing under the U.S. Constitution.

FACTS

The Taxpayer's trucking business is headquartered in Montgomery, Alabama. It also operates truck terminals in Atmore and Headland, Alabama. It purchased approximately 60 trucks at retail from Alabama truck dealers during the subject period. The trucks were purchased sales tax-free pursuant to the sales tax drive-out exemption at §40-23-2(4). That exemption applies if the purchaser certifies to the Alabama motor vehicle dealer at the time of purchase that the vehicle will be registered or titled outside of Alabama and will be removed for first use outside of Alabama within 72 hours.

The Taxpayer initially brought the trucks to one of its facilities in Alabama, where it applied the appropriate decals and tags and otherwise prepared the trucks for use. It also registered the trucks for International Registration Plan ("IRP") purposes in Oklahoma.[1] It thereafter assigned the trucks to drivers, who used the trucks during the period in issue to haul goods for the Taxpayer in Alabama and approximately 40 other states. Each truck was driven an average of 130,000 miles a year. Approximately 18 to 20 percent of those miles were driven in Alabama.

The Department audited the Taxpayer and assessed it for Alabama use tax on the trucks because the Taxpayer had used the trucks in Alabama, but had not paid sales or use tax on the trucks to any state. The Department made other minor adjustments that are not disputed. The Department's Taxpayer Advocate has also determined that the penalties included in the final assessment should be waived for reasonable cause.

OVERVIEW

The Department assessed the Taxpayer for use tax on the trucks in issue as part of an ongoing effort to require Alabama-based commercial truck owners to pay tax in Alabama. A brief history will help the reader understand the case.

In the mid-1990's, certain officials in the State of Oklahoma Tax Commission began allowing commercial truck owners based outside of Oklahoma to hire "titling agents" in

[1] The IRP is a reciprocal motor vehicle registration agreement among the various states and the Canadian Provinces. It requires that a commercial vehicle must be registered in a single base state for purposes of apportioning license fees among the various jurisdictions in which the vehicle is operated. For IRP purposes, a base jurisdiction is where the vehicle owner has a physical place of business and employees, and where the owner maintains its records.

Oklahoma, and thereby treat Oklahoma as their base jurisdiction for IRP registration purposes. The Taxpayer and numerous other Alabama-based truck owners thus registered their trucks through those agents in Oklahoma during the years in issue. By registering the trucks in Oklahoma instead of Alabama, the truck owners avoided paying Alabama property tax on the trucks. It also allowed the truck owners to purchase the trucks sales tax-free in Alabama pursuant to the §40-23-2(4) drive-out exemption because the trucks were being registered outside of Alabama, and the owners attested at the time of purchase that the trucks would be removed from and first used outside of Alabama within 72 hours.

The IRP's administrative body and numerous states, including Alabama, objected to Oklahoma's practice of allowing trucks based outside of Oklahoma to be registered in Oklahoma. The IRP found Oklahoma to be out of compliance with its rules, and sanctioned the State. In the late 1990's, the Alabama Revenue Department also began ticketing trucks operating in Alabama that the Department determined had been improperly registered in Oklahoma.[2]

The Department also determined that the Alabama truck dealers that had sold the trucks sales tax-free to the Alabama-based truck owners had improperly done so because,

[2] Several Oklahoma Tax Commission officials were indicted on bribery and other charges in 2002 concerning their dealings with the Oklahoma titling agents. As a result, Oklahoma has banned out-of-state trucking companies from using titling agents to register their trucks in Oklahoma. Consequently, most if not all Alabama-based truck owners, including the Taxpayer, are now properly registering and paying property tax on their trucks in Alabama. Presumably, Alabama sales tax is also now being paid on trucks purchased in Alabama by Alabama-based owners because the drive-out exemption at §40-23-2(4) does not apply to vehicles registered in Alabama.

according to the Department, the drive-out exemption applies only to nonresidents of Alabama. It consequently audited and assessed numerous Alabama truck dealers for sales tax on the trucks they had sold tax-free to the Alabama-based truck owners.

One such truck dealer, Truck Central of Dothan, Inc., appealed to the Administrative Law Division. The Administrative Law Division rejected the Department's position in that case, holding that the sales tax drive-out exemption also applies to Alabama residents if they comply with the requirements of the statute, i.e. they register the vehicles outside of Alabama and remove the vehicles for first use outside of Alabama within 72 hours. *Truck Central of Dothan, Inc. v. State of Alabama*, S. 02-166 (Admin. Law Div. O.P.O. 8/21/02).[3] That case is currently on appeal in Houston County Circuit Court.

The Administrative Law Division also held in *Truck Central* that while the Department could not assess the truck dealers for sales tax on the trucks, it could assess the Alabama truck owners for use tax if they subsequently used the trucks in their business in Alabama. "The export exemption at §40-23-2(4) applies only to sales tax, and not to use tax. Consequently, the Department may also assess the truck owners for use tax, if applicable, on their use of the trucks in Alabama. See, *Glenn McLendon Trucking Co. v. State of Alabama*, S. 01-206 (Admin. Law Div. 11/29/01)." *Truck Central*, 9 at n. 4. That

[3] As explained in the *Truck Central* opinion, at 4, Alabama residents will usually not qualify for the drive-out exemption because Alabama residents are generally required to register or title their vehicles in Alabama. However, an Alabama truck owner may in some instances be allowed to register the truck outside of Alabama. For example, in Rev. Rul. 99-003, an Alabama-based trucking company purchased trucks in Alabama and then legitimately registered them in Tennessee because that State qualified as a base jurisdiction of the company for IRP registration purposes. The Department thus found that the Alabama-based company could purchase the trucks tax-free in Alabama pursuant to the drive-out exemption.

statement prompted the Department to assess the Taxpayer and various other Alabama-based commercial truck owners for use tax on trucks they had previously purchased tax-free in Alabama pursuant to the sales tax drive-out exemption.

In addition to the Taxpayer, several other Alabama-based truck owners have also appealed use tax assessments to the Administrative Law Division. Those cases are being held in abeyance pending a final decision in this case. Coincidentally, the same able attorneys that represented Truck Central also represent the Taxpayer in this case.

ANALYSIS

Code of Ala. 1975, §40-23-61(a) levies a general four percent use tax on property used, stored, or consumed in Alabama. Section 40-23-61(c) levies a reduced two percent use tax on motor vehicles used, stored, or consumed in Alabama. Section 40-23-61(e) also levies an alternative use tax, at the applicable rate specified in §§40-23-61(a), (b), or (c), on new or used property that is used, stored, or consumed in the performance of a contract in Alabama. The paragraph (e) levy does not apply, however, if the use tax imposed in paragraphs (a), (b), or (c) applies. Sections 40-23-61(c) and (e) are discussed below.

Issue (1) – Does Alabama use tax apply to property purchased at retail in Alabama that is subsequently used, stored, or consumed in Alabama?

The Taxpayer argues that the trucks in issue were not subject to Alabama use tax because the use tax applies only to property purchased at retail outside of Alabama, but not also to property purchased at retail in Alabama. I disagree.

Alabama's use tax levy does not and has never limited the use tax to only property purchased at retail outside of Alabama. Rather, it is broadly imposed on all "tangible

personal property . . . purchased at retail . . . for storage, use, or other consumption in this state. . .” Section 40-23-61(a). However, until 1997, the use tax applied as a practical matter to only property purchased outside of Alabama because the use tax law included an exemption at §40-23-62(1) for “property, the gross proceeds of sales of which are required to be included in the measure of the (Alabama sales tax).”[4] That is, property sold at retail in Alabama and thus subject to Alabama sales tax was exempt from Alabama use tax. Because the §40-23-62(1) exemption limited the use tax as a practical matter to only property purchased at retail outside of Alabama, Alabama’s appellate courts often stated the general rule that the “sales tax statutes apply to retail sales or purchases taking place within the state; the use tax statutes apply to goods purchased at retail outside of the state and brought into the state for use by the purchaser.” *State of Alabama v. Marmon Industries, Inc.*, 456 So.2d 798, 801 (Ala. Civ. App. 1984), citing *State of Alabama v. Thiokol Chemical Corp.*, 246 So.2d 447, 448 (Ala. Civ. App. 1970); see also, *State v. Toolen*, 167 So.2d 546 (Ala. 1964); *Paramount-Richards Theatre, Inc. v. State*, 55 So.2d 812 (Ala. 1951). It must be emphasized, however, that the use tax applied as a practical matter only to property purchased at retail outside of Alabama only because property purchased at retail in Alabama, and thus subject to Alabama sales tax, was exempted from the tax.

The purpose for the §40-23-62(1) exemption was to avoid double taxation. Without the exemption, property sold at retail in Alabama and subsequently used in Alabama would

[4] That use tax exemption for property that was subject to Alabama sales tax was included in Alabama’s first use tax statute in 1939, see Act 67, Acts of Alabama 1939, at Section III.(a).

have been subject to both Alabama sales tax and Alabama use tax. The Alabama Supreme Court recognized in *Paramount-Richards*, *supra*, that the Alabama use tax levy also applied to property sold at retail in Alabama, and that the use tax exemption for property subject to Alabama sales tax was necessary to avoid double taxation:

> The technical means of confining the use tax to interstate sales or sales (purchases) made outside of the state for use in the state, is accomplished by exempting from the provisions of the use tax any property sold under such circumstances as would make the sale taxable under the provisions of the Sales Tax Act. In other words, the Use Tax Act is drafted in such manner as to impose a use tax upon the use of tangible personal property within the state, at the same rate as the sales tax. In order to limit the use tax to interstate transactions, the Act is so worded as to exempt from the measure of the tax all retail sales of tangible personal property made within the state. Sec. 789, Title 51, Code 1940. But for this provision, the Use Tax Act would have the effect of imposing an additional tax in the same amount as imposed by the Sales Tax Act. In this way, retail sales made within the state would be subjected to a double tax.

Paramount-Richards, 55 So.2d at 821.

The use tax exemption at §40-23-62(1) was amended in 1997 in response to the Administrative Law Division's decision in *Bluegrass Bit Co. v. State of Alabama*, U. 96-294 (Admin. Law. Div. 1/16/97). Bluegrass Bit purchased property at retail from out-of-state vendors that it subsequently used in Alabama. Delivery occurred and the sales were closed in Alabama. The Department nonetheless assessed Bluegrass Bit for use tax on the property based on its long-held position that regardless of where the retail sale occurred, Alabama use tax applied if the seller was physically located outside of Alabama. The Administrative Law Division held that because the sales were closed in Alabama,

Alabama sales tax applied, citing *State v.* Dees, 333 So.2d 818 (Ala. Civ. App. 1976).[5] The use tax assessment was thus voided because the property, being subject to Alabama sales tax, was exempt from Alabama use tax pursuant to the §40-23-62(1) exemption discussed above.

In *Bluegrass Bit*, the Administrative Law Division also discussed a loophole in Alabama's sales and use tax structure. The loophole occurred if an out-of-state retailer with no nexus with Alabama made retail sales closed in Alabama. The sales would be subject to Alabama sales tax, but the out-of-state retailer could not be assessed because of lack of nexus with Alabama.[6] The in-state purchaser also could not be assessed for sales tax because a purchaser cannot be directly assessed for sales tax under Alabama law. Alabama use tax also could not be assessed because the sales were subject to Alabama sales tax, and thus exempt from use tax pursuant to the §40-23-62(1) exemption. Consequently, neither Alabama sales tax nor Alabama use tax could be collected on the transactions.

---

[5] In *Dees*, a company based in Mississippi sold an airplane to a purchaser in Montgomery, Alabama. The sale was closed in Alabama. The Department assessed the Alabama purchaser for use tax on the airplane, again based on its long-held (but erroneous) position that regardless of where the sale occurred, use tax always applied if the seller was located outside of Alabama. The Court of Civil Appeals held that because the sale was closed in Alabama, and thus subject to Alabama sales tax, the purchaser's subsequent use of the airplane in Alabama was exempt from Alabama use tax pursuant to §40-23-62(1) (then Title 51, §789, Code 1940).

[6] The U.S. Supreme Court has held that for sales and use tax purposes, an out-of-state seller must have a "substantial nexus," i.e. some physical presence in a state, before the state can require the seller to collect and remit tax to the state. *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992).

The Alabama Legislature closed the *Bluegrass Bit* loophole by enacting Act 97-301. That Act amended §40-23-62(1) to provide that the use tax exemption applies only to "property on which the sales tax imposed (by Alabama law) is paid by the consumer to a person licensed under (the Alabama sales tax law)." Section 2 of Act 97-301 provided – "The intent of this Act is to clarify that current law exempts from use tax only that property sold at retail in Alabama on which sales tax was paid."[7] As amended, §40-23-62(1) now exempts from Alabama use tax only that property sold at retail in Alabama on which Alabama sales tax was paid. Property sold at retail in Alabama on which Alabama sales tax is not paid is not exempt.

In summary, the Alabama use tax is levied on all tangible personal property purchased anywhere at retail that is intended to be used, stored, or consumed in Alabama. Since 1997, which includes the period in issue, §40-23-62(1) has exempted from the use tax only property purchased in Alabama on which Alabama sales tax was paid. The Taxpayer did not pay Alabama sales tax when it purchased the trucks in issue. The §40-23-62(1) exemption thus does not apply. Consequently, the Taxpayer's use of the trucks in Alabama constituted a non-exempt, taxable activity under the Alabama use tax levy.[8]

---

[7] To bar any refunds, the provision was also made retroactively effective for all open tax years, see, §3 of Act 97-301. The retroactive application of Act 97-301 was affirmed by the Alabama Court of Civil Appeals in *Monroe v. Valhalla Cemetery Co., Inc.*, 749 So.2d 470 (Ala. Civ. App. 1999), cert. denied March 20, 2000.

[8] In a similar case, the Administrative Law Division held in *Glenn McClendon Trucking*, *supra*, that an Alabama trucking company was liable for use tax on trucks used in its trucking business in Alabama and various other states. The trucks involved in *McClendon* were purchased tax-free outside of Alabama. However, that factual distinction is irrelevant because, as discussed, the use tax levy applies to all property used, stored, or consumed in Alabama, regardless of where it is purchased. *McClendon* is currently on appeal in

(continued)

Issue (2) – Was the Taxpayer's use of the trucks in Alabama automatically exempt from Alabama use tax because the trucks were exempt from sales tax when purchased pursuant to the §40-23-2(4) drive-out exemption?

The Taxpayer argues that because the trucks in issue were exempt from Alabama sales tax when purchased pursuant to the sales tax drive-out exemption, its subsequent use of the trucks in Alabama must also be exempt from Alabama use tax. I disagree.

A statutory exemption from sales tax does not also constitute an exemption from use tax, or vice versa. The sales tax and use tax laws are found in separate Articles in Chapter 23, Code of Ala. 1975, and apply to different transactions, i.e. the sales tax applies to the retail sale of property in Alabama and the use tax applies to the use, storage, or consumption of property in Alabama. An exemption or other provision in one law does not automatically apply to the other unless the same exemption or provision is found in both laws.

The separate nature of Alabama's sales and use tax laws is illustrated by the fact that both laws contain separate exemption statutes. Code of Ala. 1975, §40-23-4 currently includes 46 sales tax exemptions. Code of Ala. 1975, §40-23-62 currently includes 35 use tax exemptions. Many of the same exemptions are found in both statutes. For example, the sales tax pollution control exemption is found at §40-23-4(a)(16), and an identical use tax pollution control exemption is found at §40-23-62(18). If a sales tax exemption applied automatically to use tax, as argued by the Taxpayer, there would have been no need for

---

Chambers County Circuit Court.

the Legislature to include the same exemption in both laws.[9] It is presumed that the Legislature does not enact meaningless or unnecessary statutes. *Druid City Hospital Bd. v. Epperson, et al*, 378 So.2d 696 (Ala. 1979).

I agree that Alabama's sales tax and use tax statutes are complimentary and should be construed in *pari materia*, i.e. "with reference to each other." Black's Law Dictionary, Fifth Ed. at 1004. Consequently, "an examination of the terms and definitions of one (law) might be of assistance in examining comparable terms and definitions of the other for the purpose of determining legislative intent." *East Brewton Materials, Inc. v. State, Dept. of Revenue*, 233 So.2d 751, 755 (1970). However, Alabama's appellate courts have never held that a specific sales tax exemption also automatically provides an exemption from use tax, or vice versa.

The Alabama Court of Civil Appeals confirmed in *Stauffer Chemical v. State, Dept. of Revenue*, 628 So.2d 897 (Ala. Civ. App. 1993), that a sales tax statute does not also apply to use tax. Before 1981, the sales tax and use tax laws contained identical provisions, §§40-23-1(a)(9)b. and 40-23-60(4)b., respectively, that defined "wholesale sale" to include the sale of property that became an ingredient or component part of property manufactured for sale. The Legislature amended the sales tax provision in 1981, but not the use tax provision. The Court of Civil Appeals held that the amendment to the sales tax law did not also amend the separate use tax provision. "However, the 1981 amendment

[9]Sections 40-23-4 and 40-23-62 also both contain different exemptions not found in the other. For example, the sales tax exemption for certain plant seeds and seedlings found at §40-23-4(a)(36) is not included in the use tax law. Conversely, religious magazines and publications are exempt from use tax at §40-23-62(20), but are not exempt from sales tax.

changed the sales tax provision only as the use tax provision §40-23-60(4)(b) was not amended. Therefore, due to legislative intent, for use tax purposes, the (pre-1981 test for applying the ingredient or component part provision) still applies. . ." *Stauffer Chemical*, 628 So.2d at 899. The Court thus confirmed that the sales tax and use tax laws are separate, and that a statute in one law does not apply to the other. (The use tax ingredient and component part provision was subsequently amended to conform to the sales tax provision. See, Acts 1997, No. 97-648, §2.)

In support of its position, the Taxpayer cites the statement by the Court of Civil Appeals in *Marmon Industries*, *supra*, that "an exemption from sales tax would be equally an exemption from use tax." *Marmon Industries*, 456 So.2d at 801, citing *Thiokol Chemical*, 246 So.2d at 448. However, neither *Marmon Industries* nor *Thiokol* involved a statutory exemption from either sales tax or use tax. Rather, the issue in both cases was whether certain property had been purchased for resale. If so, the sales would have been at wholesale, and thus not subject to either sales tax and use tax because those taxes apply only to property purchased at retail. Unfortunately, in referring to the wholesale sale exclusion, which applies equally to both taxes, the Court characterized the exclusion as an "exemption."[10] When viewed in context, however, what the Court was referring to in both

[10] A transaction or property is excluded from sales or use tax if it is not included within the scope of the levy to begin with. Property sold at wholesale is thus excluded from both the sales tax and use tax levies. A transaction or property is exempt from sales or use tax if it initially comes within the scope of the levy, but is later exempted or removed by a specific statutory provision. While the result is the same, i.e. no tax is owed on the transaction or property, different presumptions and rules of statutory construction apply to levy statutes versus exemption statutes. Understanding the technical difference between an exclusion and an exemption is also important in understanding this issue.

Marmon Industries and *Thiokol* was that property sold at wholesale, and thus excluded from the scope of the sales tax levy, would equally be excluded from the scope of the use tax levy. The Court did not hold in either case that a statutory sales tax exemption also provided an exemption from use tax. To the contrary, as previously stated, Alabama's appellate courts have never held that a statutory exemption in either the sales tax or the use tax law automatically provides an exemption in the other.

Finally, the Taxpayer attempts to show the "fallacy of the Department's position" by analogizing the drive-out exemption with the sales tax prescription drug exemption at §40-23-4.1. See, Taxpayer's Brief at 8. There is not a corresponding prescription drug exemption in the use tax law. The Taxpayer argues that if the sales tax drug exemption at §40-23-4.1 is not also treated as an exemption from use tax, the Department could assess use tax against the patients that use the drugs in Alabama.

The Taxpayer is technically correct, although to my knowledge the Department has never assessed an individual for use tax on drugs purchased tax-free pursuant to §40-23-4.1. It would also be administratively difficult to do so.

It must be remembered, however, that most of the sales tax exemptions in §40-23-4 are also found in the use tax law at §40-23-62.[11] Many of the identical exemptions found in

[11] Section 40-23-62 contains all of the exemptions found in the use tax law. But the sales tax law contains other exemptions in addition to those found in §40-23-4. The drive-out exemption at §40-23-2(4) and the prescription drug exemption at §40-23-4.1 are two examples. Those exemptions apply by their language only to sales tax. However, Code of Ala. 1975, §40-23-4.2 exempts all purchases made with food stamps from both sales and use tax. Code of Ala. 1975, §40-23-5 also exempts various organizations from both sales and use tax. Those two provisions in the sales tax law that apply to both sales tax and use tax further illustrate that if the Legislature had intended for the drive-out exemption to apply to both sales tax and use tax, it could have specified that the exemption applied to both

(continued)

both laws were enacted in the same legislative Act, which illustrates that the Legislature knew that for an exemption to apply to both sales tax and use tax, separate exemptions relating to both taxes must be enacted.[12] Because the Legislature included the drive-out exemption in only the sales tax law, but not also in the use tax law, it clearly intended for the exemption to apply only to sales tax.[13]

Issue (3). The applicability of §40-23-61(e).

Even if the trucks were not taxable under the two percent use tax levied on motor vehicles at §40-23-61(c), they would still be subject to the alternative use tax levied at §40-23-61(e). That section levies a use tax on new or used property that is used in the performance of a contract in Alabama.[14] It applies, however, only if the use taxes levied in

---

taxes. It did not do so.

[12] For example, and to cite only a few, the identical sales tax and use tax herbicide exemptions at Code of Ala. 1975, §§40-23-4(a)(25) and 40-23-62(25), respectively, were enacted together by Act 375 in 1965. The identical sales tax and use tax exemptions at Code of Ala. 1975, §§40-23-4(a)(30) and 40-23-62(30), respectively, for prescription drugs purchased by persons over 65 years old were enacted together by Act 176 in 1972.

[13] The Taxpayer argues in its brief at 2, n. 2, that because §40-23-2(4) includes the phrase "exempt from Alabama tax," the exemption arguably could be construed as applying to all Alabama taxes, including use tax. However, the complete prepositional phrase in the statute reads – "In order for the sale to be exempt from Alabama tax." The phrase "Alabama tax" thus clearly refers to Alabama sales tax because only sales tax applies to the sale of motor vehicles. The statute also includes the language "exempt sale." Consequently, the sales tax exemption at §40-23-2(4) cannot be construed as also applying to use tax.

[14] Section 40-23-61(e) does not require that the property must have been originally purchased for use, storage, or consumption in Alabama, as do the use taxes levied at §§40-23-61(a), (b), and (c). In any case, the Taxpayer in this case purchased the trucks in issue with the intent of using them in Alabama, although it also intended to use them in other states.

subparagraphs (a), (b), and (c) do not apply.

The trucks in issue, whether they were new or used when first used in Alabama, were used by the Taxpayer in Alabama to perform its long-haul trucking contracts with its customers. The Taxpayer's substantial use of those trucks in Alabama clearly comes within the scope of the §40-23-61(e) levy, which concerning motor vehicles is at the same two percent rate specified at §40-23-61(c). For a similar holding, see *Glenn McClendon Trucking*, *supra*, at 7, 8.

Issue (4). The Due Process Clause.

The Taxpayer argues that assessing it for use tax violates the Due Process Clause of the U.S. Constitution because it did not have "notice" and "fair warning" that it would be subject to Alabama use tax. "Thus, in this case, it is clear that the Taxpayer did not have either notice or fair warning that it could one day be assessed a use tax against the trucks (because) all of the Department's revenue rulings, regulations, and published information provided that the use tax" applied only to property purchased outside of Alabama. Taxpayer's Brief at 12. The specific revenue ruling, regulation, and information referred to by the Taxpayer are Rev. Rul. 99-003, Reg. 810-6-5-19.01(6)(c), and two statements on the Department's web site.

Rev. Rul. 99-003 involved the applicability of the §40-23-2(4) sales tax drive-out exemption. It concluded that "the contemplated purchases will be exempt from the sale and/or use tax. . . ." To begin, the ruling is wrong in holding that the subject vehicles would also be exempt from use tax because, as discussed in Issue (2) above, the §40-23-2(4) drive-out exemption applies only to sales tax, and not also to use tax. In any case, a revenue ruling is binding only with respect to the taxpayer that requested the ruling. Code

of Ala. 1975, §40-2A-5. Consequently, it cannot be cited or relied on as binding precedent by another taxpayer.

Reg. 810-6-5-19.01(6)(c) does imply that use tax applies only to property purchased outside of Alabama by stating that a use tax return should include "the total purchase price of tangible personal property purchased outside of Alabama. . . ." The Department's web site is also misleading in stating that the "consumers use tax is imposed on tangible personal property brought into Alabama for storage, use, or consumption. . .," and also that "items purchased for use in Alabama from out-of-state vendors . . . may be subject to consumers use tax."[15]

But while the web site comments may be misleading, they are technically correct. Consumers use tax is imposed on property brought into Alabama for use, storage, or consumption.[16] Unfortunately, the web site does not also inform the reader that use tax may also be imposed on property purchased at retail in Alabama if Alabama sales tax was not paid on the property.

It is also technically correct that "items purchased for use in Alabama from out-of-state vendors . . . may be subject to consumers use tax." But again, that statement is incomplete because items purchased from in-state vendors may also be subject to

---

[15] The Department's web site is at www.ador.state.al.us. The specific statements cited are located in the Practitioner's Corner under frequently asked questions and sales tax brochures and pamphlets.

[16] The Department can assess use tax against either the seller or the user of property. See, Code of Ala. 1975, §§40-23-61(d), 40-23-67, and 40-23-68. The Department thus designates use tax assessed against the seller as "seller's use tax," and against the user as "consumer's use tax."

Alabama use tax if sales tax was not paid on the property.

The above regulation and web site comments reflect the general rule that use tax usually applies to property purchased from out-of-state vendors. As discussed, that was true as a general rule before 1997 because property purchased from in-state vendors was subject to Alabama sales tax, and thus exempt from use tax. It is still true as a general rule since 1997 because Alabama sales tax is usually paid on in-state purchases, thereby exempting the property from use tax under current law. As discussed, however, the use tax levy itself has always applied to property purchased anywhere at retail that is later used, stored, or consumed in Alabama. And since §40-23-62(1) was amended in 1997, the law has been clear that property purchased at retail in Alabama (from either an out-of-state or in-state retailer) on which Alabama sales tax is not paid is not exempt from use tax. Unfortunately, the Department has failed to amend its regulation or update its web site to reflect the change in the law.[17]

---

[17] The Department's attorney stated at the September 23 hearing that the Department has not changed its regulations because Alabama's sales and use tax laws are in a state of flux due to the Administrative Law Division's decisions in *Bluegrass Bit* and *Truck Central*. T. at 94-99. However, *Truck Central* only involved the issue of whether the §40-23-2(4) sales tax drive-out exemption is available to Alabama residents. Consequently, while dicta in *Truck Central* may have prompted the Department to assess the Taxpayer and other Alabama-based truck owners for use tax, it has nothing to do with the substantive issues involved in this case.

And while the rationale applied in *Bluegrass Bit* was contrary to the Department's long-held position as to when sales tax and use tax applied, it was consistent with the Court of Civil Appeals' opinion in *Dees* and subsequent cases. Consequently, that decision did not "turn the sales and use tax law in this state upside down," as claimed by the Department attorney. T. at 96. To the contrary, that decision and the subsequent amendment to §40-23-62(1) clarified that Alabama use tax is levied on all property purchased anywhere at retail that is later used, stored, or consumed in Alabama, and that only property on which Alabama sales tax was actually paid is exempt from use tax pursuant to §40-23-62(1), as amended. Alabama law was clear after the 1997 amendment,

(continued)

In any case, the Taxpayer in this case has not been denied due process because the Department regulation and the web site statements discussed above may be misleading.

The U.S. Supreme Court has held that the Due Process Clause requires that a taxpayer must have "notice" and "fair warning" that he may be subject to tax in a state. See, *Quill Corp.*, *supra*; *Trinova Corp. v. Michigan, Dept. of Treasury*, 111 S.Ct. 818 (1991); *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174 (1985); *International Shoe v. Washington*, 66 S.Ct. 154 (1945). However, those cases involved the issue of whether a taxpayer had minimum contacts or nexus sufficient to subject the taxpayer to the state's taxing jurisdiction. That issue is not in dispute in this case because the Taxpayer owns property, has employees, and actively conducts its business from Alabama. The Taxpayer is clearly subject to Alabama's taxing jurisdiction.

The gist of the Taxpayer's argument is that the Department should be estopped from assessing it for use tax based on the misleading information discussed above. I disagree.

Alabama law is clear that the Revenue Department cannot be estopped from properly interpreting and administering the tax laws because of erroneous or misleading statements by the Department or its employees.[18] *Security Savings Life Insurance Co. v.*

---

and the Department could have conformed its regulations and web site at that time. It failed to do so for whatever reason.

[18] The Department's attorney also stated at the September 23 hearing that he personally agreed with some of the Taxpayer's arguments. T. at 94-99. But again, the Department is not bound by the personal opinion of a Department employee that is contrary to the law, nor is the Administrative Law Division. Unfortunately, the Department failed to file a brief and elaborate on its official position in the case.

Mike Weaver, 579 So.2d 1359 (Ala. Civ. App. 1991), citing *State v. Maddox Tractor & Equip. Co.*, 69 So.2d 426, 430 (1953). Also, there is no evidence that the Taxpayer was even aware of the Department regulation and web site statements discussed above. Consequently, the Taxpayer could not have relied on the information to its detriment.

Department Reg. 810-6-5-.25(2) also clearly specifies that the use tax levied at §40-23-61(e) applies to any new or used property used in the performance of a contract in Alabama. Consequently, if it is assumed that the Taxpayer was aware of and misled by Reg. 810-6-5-19.01(6)(c) and the web site comments, it must also be assumed that it was also aware of Reg. 810-6-5-.25(2), and thus on notice that it was subject to the use tax levied at §40-23-61(e).

Issue (5). The §40-23-62(2) exemption.

Section 40-23-62(2) exempts from Alabama use tax any property used, stored, or consumed in Alabama that the State is prohibited from taxing by the U.S. Constitution. The Taxpayer, citing *Ex parte Dixie Tool & Die Co., Inc.*, 537 So.2d 923 (Ala. 1988), argues that the Department cannot tax the trucks in issue because when the §40-23-62(2) exemption was enacted, Alabama and all other states were prohibited from taxing interstate commerce.[19] Consequently, according to the Taxpayer, the statute must be construed as exempting transactions in interstate commerce, and thus the trucks in issue

[19] The exemption now codified at §40-23-62(2) was first enacted in 1939. The U.S. Supreme Court first held that a state may tax interstate commerce under certain circumstances in *Complete Auto Transit, Inc. v. Brady*, 97 S.Ct. 1076 (1977).

are exempt because they were engaged in interstate commerce. I disagree.

Alabama's use tax is not a tax on interstate commerce. Rather, it is a non-recurring transactional tax on the act of using, storing, or consuming property within Alabama. See, *Ex parte Fleming Foods of Alabama*, 648 So.2d 577 (Ala. 1994); *Paramount-Richards*, *supra*. Consequently, the Alabama Supreme Court held even before the *Complete Auto* decision in 1977 that applying the use tax to property used, stored, or consumed in Alabama did not impinge on interstate commerce, and thus did not violate the Commerce Clause, even if the property was subsequently used in interstate commerce. *Paramount-Richards Theatre, Inc. v. State*, 39 So.2d 380 (Ala. 1949); *National Linen Service Corp. v. State Tax Commission*, 186 So. 478 (1939). The U.S. Supreme Court has also held that a tax imposed by a state on a discrete intrastate transaction does not violate the Commerce Clause. *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 115 S.Ct. 1331 (1995); *Henneford v. Silas Mason Co.*, 57 S.Ct. 524 (1937).

This case is similar in substance to *Ex parte Fleming Foods*, *supra*. Fleming Foods was headquartered in Alabama and purchased trucks it used to haul food products in Alabama and across state lines.[20] The Department assessed Fleming Foods for use tax on the trucks. Fleming Foods appealed, arguing that the trucks were used in interstate commerce and could not be taxed; or, at the least, the tax must be apportioned. The Alabama Supreme Court rejected Fleming Foods' arguments, holding that the use tax is a one-time transactional tax and "is not imposed upon revenues derived from carrying on an

[20] Fleming Foods purchased the trucks outside of Alabama. However, as discussed, where the trucks were purchased is irrelevant to whether the Alabama use tax applies, and certainly that fact is irrelevant to the interstate commerce issue.

interstate business or interstate commerce. . . This is not taxation of interstate commerce." *Fleming Foods*, 648 So.2d at 579, 580. Likewise, assessing the Taxpayer on its use of the trucks in Alabama also did not violate the Commerce Clause, even as interpreted before the *Complete Auto* decision in 1977. Consequently, the trucks are not exempt from use tax pursuant to §40-23-62(2). For a similar result, see *Glenn McClendon Trucking*, *supra*, at 8-14.

CONCLUSION

The Alabama use tax levy applies to all property purchased (anywhere) at retail that is subsequently used, stored, or consumed in Alabama. And since 1997, property purchased at retail in Alabama is exempted from use tax pursuant to §40-23-62(1) only if Alabama sales tax was actually paid on the property. If Alabama sales tax was not paid, and the property is not otherwise exempted by a specific use tax exemption, which the trucks in issue are not, then use tax is owed.

The Taxpayer purchased the trucks intending to use them in Alabama, which subjected their subsequent use in Alabama to the use tax levied at §40-23-61(c). The fact that the Taxpayer also intended to use the trucks outside of Alabama is irrelevant. Even if the trucks were not subject to or were exempt from the use tax levied at §40-23-61(c), they clearly would be taxable under §40-23-61(e). The Department also is not prohibited from assessing the Taxpayer by the Due Process Clause; nor by the Commerce Clause as construed either before or after the U.S. Supreme Court's 1977 decision in *Complete Auto.*

Alabama's sales and use tax laws currently provide a comprehensive and complementary system for taxing either the retail sale of property in Alabama or the use of property in Alabama on which Alabama sales tax was not paid. The Alabama Legislature

has exempted the purchase of certain vehicles in Alabama from sales tax by the §40-23-2(4) drive-out exemption, presumably to promote the purchase of vehicles from Alabama dealers.[21] The Legislature has not, however, exempted the subsequent use of those vehicles in Alabama from Alabama use tax. Consequently, the Taxpayer is liable for Alabama use tax on its use of the subject trucks in Alabama.

The tax and interest assessed by the Department is affirmed. I agree with the Department's Taxpayer Advocate, however, that under the circumstances, the penalties assessed by the Department should be waived for reasonable cause. Code of Ala. 1975, §40-2A-11(h).[22] Judgment is entered against the Taxpayer for use tax and interest of $164,949.18. Additional interest is also due from the date of entry of the final assessment, May 1, 2003.

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

Entered March 23, 2004.

---

[21] Because the drive-out exemption applies only if the vehicle will be titled or registered outside of Alabama, it is most often available to non-residents of Alabama. However, the statute does not limit the exemption to only non-residents, and as discussed in n. 3, *supra*, Alabama residents may qualify for the exemption under certain circumstances.

[22] The penalties included in the final assessment relate only to the Taxpayer's failure to report and pay use tax on the trucks. Reasonable cause clearly exists to waive those penalties given that until recently, the Department had never before assessed use tax on property purchased at retail in Alabama, and also considering the misleading Department regulation and web site comments discussed above. Waiver of the penalties should not, however, be viewed as approval of the Taxpayer's initial registration of the trucks in Oklahoma.