BOYD BROTHERS TRANSP., INC. 3275 Highway 30 Clayton, AL 36016-3003,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 04-203
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Boyd Brothers Transportation, Inc. ("Taxpayer") for State and combined local (City of Clayton) use tax for October 1997 through March 2003. 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 June 15, 2004. Jim Sizemore represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

ISSUE

The issue in this case is whether the Taxpayer owes State and City of Clayton use tax on commercial truck tractors and trailers used by the Taxpayer in Alabama during the assessment period.

FACTS

The Taxpayer operates an interstate motor freight carrier business throughout the United States. It is headquartered in Clayton, Alabama, and has service centers in Clayton; Birmingham, Alabama; Connolly, Georgia; Greenville, Mississippi; and Springfield, Ohio.

The Taxpayer purchased approximately 740 truck tractors and less than 500 truck trailers tax-free outside of Alabama during the period in issue. The Taxpayer assigned the

tractors to company drivers, who used the tractors to pull loads for the Taxpayer throughout the United States. The tractors were first used outside of Alabama, and were also registered outside of Alabama for International Registration Plan ("IRP") purposes.[1] The Taxpayer concedes that all of the tractors were used in Alabama during the period in issue, although when they first entered Alabama or to what extent they were used in Alabama is not in evidence.

The Taxpayer also used the trailers to haul goods throughout the United States. The trailers were also first used and registered for IRP purposes outside of Alabama. They were not, however, assigned to a particular truck or driver. Rather, they were used as available, depending on where they had been last used to haul goods. The Taxpayer also concedes that the trailers were used in Alabama during the audit period, although like the tractors, there is no evidence when the trailers first entered Alabama or to what extent they were used in Alabama. There is also no evidence the trailers were ever used in the City of Clayton.

The Department audited and subsequently assessed the Taxpayer for State use tax on its use of the tractors and trailers in Alabama.[2] The Department examiner computed the tax as follows:

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[1] The IRP is a reciprocal motor vehicle registration agreement among the states and the Canadian Provinces. It requires that a commercial vehicle must be registered in a single base state for purposes of apportioning annual license fees among the various jurisdictions in which the vehicle is operated.

[2] The Department also audited the Taxpayer for sales tax and lease tax. The Department has entered preliminary assessments of sales tax and lease tax against the Taxpayer, which are presently pending in the Department's Sales and Use Tax Division. Those preliminary assessments are not in issue in this case.

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The examiner determined that the Taxpayer was liable for State use tax on the truck tractors that were either (1) assigned to an Alabama-based driver during the audit period, or (2) used to haul intrastate loads in Alabama during that period. Applying the above criteria, the examiner determined that 519 tractors, or approximately 70 percent of the tractors owned by the Taxpayer during the audit period, were subject to Alabama use tax. He also determined that the taxable measure was the depreciated fair market value of the tractors when they first met one of the two criteria stated above, which was on average 400 days after the tractors were purchased by the Taxpayer.[3]

The Taxpayer did not maintain records showing where the trailers were used. Consequently, the examiner assumed that 70 percent of the Taxpayer's trailers had also been used in Alabama during the audit period. He thus included 70 percent of the trailers in the State assessment. The trailers were also taxed on their depreciated fair market value. The examiner assumed that like the tractors, the trailers became taxable on average 400 days after they were purchased by the Taxpayer.

Concerning the City of Clayton use tax, the Department assessed the Taxpayer on only those trailers that were invoiced to the Taxpayer's facility in Clayton. Presumably, the

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[3] The Department submitted the examiner's initial and revised audit reports into evidence at the June 15 hearing. Unfortunately, the reports do not fully set out the facts or explain the examiner's rationale behind the audit. The examiner also did not testify at the June 15 hearing. The documents submitted by the Department with its post-hearing brief also cannot be considered because they were not submitted into evidence at the hearing. Consequently, most of the facts stated herein are based on the testimony of the Taxpayer's witnesses.

taxable measure was the same depreciated fair market value of the trailers that the Department used for State purposes.

ANALYSIS

The issue in this case is whether the Taxpayer's tractors and trailers were subject to the use tax levied on motor vehicles at Code of Ala. 1975, §40-23-61(c); and if not, whether they were subject to the "alternative" use tax levied at Code of Ala. 1975, §40-23-61(e).[4] Section 40-23-61(c) levies a two percent use tax on motor vehicles purchased at retail that are subsequently used, stored, or consumed in Alabama. Section 40-23-61(e) levies a use tax, at the applicable rates 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 applies, however, only if the levies at paragraphs (a), (b), or (c) do not apply.

In *Ex parte Fleming Foods, Inc.*, 648 So.2d 577 (Ala. 1994), the Alabama Supreme Court held that Fleming Foods, an Alabama-based food distributor, was liable for the use tax levied at §40-23-61(c) on trucks it purchased outside of Alabama and subsequently used in Alabama and other states in its food distribution business. The Court explained that the Alabama use tax is a nonrecurring transactional tax on a discrete intrastate event, i.e. the use of tangible personal property in Alabama. Consequently, the use tax "is not imposed upon revenues derived from carrying on interstate business or interstate commerce . . . This is not taxation of interstate commerce." *Fleming Foods*, 648 So.2d at 579, 580. The Court also held that Fleming Foods' use of the trucks in Alabama

[4] The City of Clayton has by ordinance levied a municipal use tax which by reference (continued)

established a substantial nexus with the State of Alabama, and that the Alabama use tax otherwise satisfied the four-pronged Commerce Clause test established by the U. S. Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 97 S. Ct. 1076 (1977)[5]

The Administrative Law Division has also held that Alabama-based trucking companies were liable for Alabama use tax on commercial trucks used in Alabama on which sales or use tax was not previously paid to Alabama or any other state.

In *Glenn McClendon Trucking Co., Inc. v. State of Alabama*, S. 01-206 (Admin. Law Div. 11/29/01), the issue was whether 25 trucks used by McClendon in its long-haul trucking business were subject to Alabama use tax. McClendon is based in Alabama. However, it purchased the trucks in issue tax-free outside of Alabama, and also registered and placed the trucks into service outside of Alabama. McClendon conceded that all of the trucks occasionally hauled goods in or through Alabama.

McClendon argued that the trucks were not subject to Alabama use tax because they were purchased for use outside of Alabama and were substantially used outside of Alabama before entering the State, citing Dept. Reg. 810-6-5-.25(1). That regulation provides in part that "[w]here the owner of tangible personal property has purchased such property for use outside of Alabama and has, in fact, used it outside of Alabama, no use

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adopts all applicable provisions of the State use tax law. See, Taxpayer Ex.1.

[5] The Supreme Court held in *Complete Auto* that a state may tax an activity in interstate commerce 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) it is reasonably related to services and protections provided by the taxing state." *Complete Auto*, 97 S.Ct. at 1079; See generally, *Ex parte Dixie Tool & Die Co.*, 537 So.2d 923, 924 (Ala. 1988).

tax will be due by the owner because of (the) later storage, use or consumption of it in Alabama."

The Administrative Law Division rejected the above argument, holding that the Alabama use tax applied because McClendon had purchased the trucks intending to use them in Alabama. The fact that McClendon also intended to use the trucks in other states did not remove or exempt the use of the trucks in Alabama from the Alabama use tax.

> However, Alabama use tax applies to property purchased for use in Alabama, even if the purchaser also intended to use the property in other states. That is, Reg. 810-6-5-.25(1) applies only if property is purchased for use solely outside of Alabama. The Taxpayer clearly purchased the trucks in issue intending to use them in all the states in which it operated, including Alabama. The Taxpayer thus purchased the trucks for use in Alabama within the purview of §40-23-61(c).

McClendon at 4.

McClendon next argued that the Department was prohibited from taxing the trucks by the Commerce Clause, Article 1, §8, cl. 3, of the U.S. Constitution, because the trucks did not have a substantial nexus with Alabama. The Administrative Law Division also rejected that argument, citing *Fleming* Foods. McClendon's substantial physical presence in Alabama and its use of the trucks in Alabama "clearly satisfied the Commerce Clause physical presence nexus test established in *Quill Corporation v. North Dakota*, 112 S.Ct. 1912 (1992)." *McClendon* at 9. Alabama also was not otherwise prohibited from taxing the trucks in accordance with *Complete Auto Transit*. *McClendon* at 10, 12.

Finally, the Administrative Law Division determined that even if the §40-23-61(c) levy did not apply because the trucks had not been initially purchased for use in Alabama (which was not the case), the use tax levied at §40-23-61(e) would apply. *McClendon* at 8. *McClendon* is currently on appeal in Randolph County Circuit Court.

The Administrative Law Division again addressed the issue in *Whatley Contract Carriers, LLC v. State of Alabama*, U. 03-372 (Admin. Law Div. 3/23/04). The facts in *Whatley* differed from the facts in *McClendon* in that Whatley purchased the subject trucks tax-free in Alabama pursuant to the Alabama sales tax drive-out exemption at Code of Ala. 1975, §40-23-2(4). As did McClendon, Whatley titled and registered the trucks outside of Alabama, which is a prerequisite for the drive-out exemption to apply. Whatley also used the trucks to haul goods in Alabama and other states.

The Administrative Law Division first held that the purchase of the trucks in Alabama did not exclude the trucks from the scope of the use tax. Rather, Alabama's use tax applies to property purchased at retail both inside and outside of Alabama if the property is subsequently used, stored, or consumed in Alabama.[6] The Administrative Law Division also found that the sales tax drive-out exemption at §40-23-2(4) did not apply to use tax. Consequently, a vehicle purchased tax-free in Alabama pursuant to the sales tax drive-out exemption is subject to Alabama use tax if at the time of purchase it was intended to be used in Alabama and was, in fact, subsequently used in Alabama. *Whatley* at 11-15.

And as in *McClendon*, the Administrative Law Division held in *Whatley* that if the general motor vehicle use tax at §40-23-61(c) did not apply, the alternative use tax at §40-23-61(e) would apply. *Whatley* at 15, 16. *Whatley* is currently on appeal in Henry County Circuit Court.

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[6] Property purchased at retail in Alabama is exempted from use tax if Alabama sales tax is paid at the time of purchase. Code of Ala. 1975, §40-23-62(1). Consequently, as a practical matter, the Alabama use tax generally applies only to property purchased at retail outside of Alabama or property purchased at retail in Alabama on which Alabama sales tax was not paid. For an in-depth discussion of the issue, see *Whatley* at 6 - 10.

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The Taxpayer argues that this case can be distinguished from *Fleming Foods, McClendon,* and *Whatley* because the vehicles in those cases were domiciled in Alabama, whereas its trucks and trailers were domiciled outside of Alabama. The Taxpayer contends that "[a]n Alabama domicile for the property is necessary for the consumers' use tax of ALA. CODE §40-23-61(c) to attach." Taxpayer's Brief at 2. The Taxpayer relies on the statement in *Fleming Foods* that the Alabama use tax at §40-23-61(c) "is an excise tax imposed upon the privilege of storing, using, or otherwise consuming tangible personal property purchased at retail outside the state and domiciled in the state." *Fleming Foods*, 648 So.2d at 579.

First, I disagree that the trucks in *McClendon* and *Whatley* were domiciled in Alabama, but that the Taxpayer's tractors and trailers were domiciled outside of Alabama. All three companies are based in Alabama, and the vehicles in all three cases were placed into service outside of Alabama, registered for IRP purposes outside of Alabama, and thereafter used in Alabama and other states. The vehicles were thus similarly situated.[7]

In any case, the §40-23-61(c) use tax is levied on all property used, stored, or consumed in Alabama. There is no requirement, statutory or otherwise, that the property

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[7] It is also questionable that the Taxpayer's tractors and trailers even had a "domicile," which I assume means a fixed home or base. The term is generally used in reference to individuals, not tangible property. And while Ohio may have been the base state for IRP registration purposes, once the tractors were placed into service, they were thereafter dispatched and used as needed throughout the United States. The trailers were likewise hauled from place-to-place throughout the States. They never returned to Ohio or anywhere on a regular or planned basis. Consequently, unlike the trucks in *Fleming Foods*, which were based out of and regularly returned to Fleming Foods' facility in Alabama, the Taxpayer's tractors and trailers had no fixed home or domicile.

must be domiciled or based in Alabama. The trucks in *Fleming Foods* happened to be based in Alabama, but that was not required for Alabama use tax to apply. Rather, the Court found that the activity being taxed, i.e. Fleming Foods' use of the trucks in Alabama, "had a substantial nexus with the State of Alabama." *Fleming Foods*, 648 So.2d at 579. It was irrelevant that the trucks were also based in Alabama.

The U.S. Bankruptcy Court for the Middle District of Alabama recently addressed the same issue in *In re Culverhouse, Inc.*, Case No. 03-12288-WRS, 2004 Bankr. Lexis 1687 (Oct. 29, 2004).[8] Culverhouse is a trucking company based in Alabama. It purchased 21 trucks sales tax-free in Alabama pursuant to the sales tax drive-out exemption at §40-23-2(4). It also purchased 21 trailers tax-free outside of Alabama. As in this case, the trucks and trailers were all registered outside of Alabama, and were subsequently used in Alabama and other states.

The Department assessed Culverhouse for use tax on its use of the trucks in Alabama. Culverhouse disputed the tax, arguing, as the Taxpayer does in this case, that the §40-23-61(c) use tax applies only to motor vehicles domiciled in Alabama. The Bankruptcy Court rejected that argument:

> The Debtor (Culverhouse) contends that "the consumers use tax of Ala. Code §40-23-61(c) does not attach unless the property is domiciled in Alabama." The Debtor cites the case of Ex parte Fleming Foods, Inc., 648 So.2d 577 (Ala. 1994), for this proposition. . .
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> The Debtor argues that the Alabama Supreme Court's use of the phrase "domiciled in the state" constitutes a narrowing of the statute. It should be noted that the word "domicile" does not appear anywhere in the text of §40-

[8] The same able attorney that represented Culverhouse in the Bankruptcy Court also represents the Taxpayer in this case.

> 23-61(c). Nothing in the text of the decision in Fleming Foods would suggest that the Alabama Supreme Court intended such a limitation on the plain language of the statute. The more reasonable reading of this passage would indicate that the reference to domicile was descriptive rather than limiting. That is, the Court in Fleming Foods found that the subject property, in that case, was domiciled in the State and that this finding supported its conclusion that the property had been used in the State of Alabama. That the property in Fleming Foods was domiciled in that case does not support the Debtor's claim that (domicile) must be found in every case for the use tax to be lawfully imposed.
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> To Debtor's contention, that use tax may not be imposed unless the property is domiciled within the State is incorrect for two reasons. First, it would add an additional condition not contained in the plain language of the statute. Second, it would impose a condition which the Alabama Supreme Court did not define and did not intend to engraft upon the existing statute. . . The more logical reading of this passage is that the Alabama Supreme Court determined that, in the Fleming Foods case, the property was domiciled in the State of Alabama, thereby satisfying the statutory requirement that property be used within the State. This finding is not a valid basis upon which one would then impose the requirement that for every future case, the tax may not be imposed unless the property is "domiciled" within the State. For this reason, the Debtor's reading of Fleming Foods is rejected.

Culverhouse at 7.

The Taxpayer also argues that the §40-23-61(c) use tax does not apply because the tractors and trailers were not purchased for use in Alabama, citing Reg. 810-6-5-.25(1). Section 40-23-61(c) does require that the subject property must be purchased for use in Alabama. But as in *McClendon*, the tractors and trailers in issue were purchased for use in Alabama. The fact that the Taxpayer also intended to use the tractors and trailers in other states does not remove or exclude the use of the vehicles in Alabama from the scope of the §40-23-61(c) use tax.

It is also irrelevant that the tractors and trailers may have been used in other States before entering Alabama. Section 40-23-61(c) only requires that the subject property must

be (1) purchased at retail for use in Alabama, and (2) subsequently used, stored, or consumed in Alabama. It is not required that the property must be first used in Alabama, or put into use in Alabama immediately or within a certain period. As the Bankruptcy Court stated in *Culverhouse* – ". . . the use tax under §40-23-61(c), does not limit its application to a 'first use' in the State of Alabama. Therefore, . . . where, as here no out-of-state sales tax is paid, the subsequent use of the motor vehicles in the State of Alabama properly triggers the imposition of the Alabama use tax." *Culverhouse* at 9.

The Taxpayer asserts that the §40-23-61(c) use tax cannot apply because the Department based the tax on the depreciated fair market value of the tractors and trailers, not the retail sales price, which is the correct taxable measure under §40-23-61(c). I agree that the use tax at §40-23-61(c) is levied on the sales price of the vehicle. Unfortunately, the Department examiner did not testify and explain his rationale for the audit at the June 15 hearing. The Department's audit reports also do not explain why the vehicles were taxed on their depreciated fair market value instead of their sales price.[9] But the fact that

[9] The Department also failed to explain why it taxed only those tractors that either hauled intrastate loads in Alabama or were assigned to an Alabama-based driver. Those events have nothing to do with when the Alabama use tax attaches. Rather, the use tax "attaches after the act of transportation ends and the property comes to rest in this state for use or consumption." *Paramount-Richards Theatres v. State*, 39 So.2d 380, 384 (Ala. 1949). *Paramount-Richards* was decided when states were constitutionally prohibited from taxing interstate commerce, and thus could only tax property after it came to rest in a state. Since the U.S. Supreme Court's decision in *Complete Auto Transit* in 1977, states are no longer prohibited from taxing interstate commerce. Consequently, there is no longer a taxable moment test that requires the subject property to come to rest in a state. "The four-part test of *Complete Auto Transit, Inc. v. Brady* (cite omitted), has replaced the taxable moment test for constitutional analysis." *Zantop Intern. Airlines, Inc. v. Dept. of Treasury*, 2001 WL 682372, Mich. App., 2001; see also *KKS Transp. Corp. v. Baldwin*, 9 N.J. Tax 273, 282 (1987), affd. 11 N.J. Tax 89 (1989). The Alabama use tax thus applies equally to property used at a fixed location in Alabama and also commercial vehicles used while

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the Department applied the wrong taxable measure does not mean that the §40-23-61(c) levy does not apply. It clearly does.

The Taxpayer argues that Alabama use tax cannot be assessed because if it had purchased the tractors and trailers in Alabama, they would have been exempt from Alabama sales tax pursuant to the §40-23-2(4) drive-out exemption. The Taxpayer's representative stated at the June 15 hearing that "[p]roperty that is not subject to the sales tax is also not subject to the use tax." T. at 66. The Taxpayer cites *State of Alabama v. Bay Towing and Dredging Co.*, 90 So.2d 743 (Ala. 1956) in support of its position.

I agree that property sold at wholesale in a "casual" transaction in Alabama is not subject to Alabama sales tax. Such property also is not subject to Alabama use tax when used in Alabama because, like the sales tax, the use tax is levied only on property sold at retail. The Alabama Supreme Court also held in *Bay Towing* that it would be unconstitutional to assess use tax on property purchased in a casual transaction outside of Alabama because Alabama sales tax does not apply to casual sales in Alabama. Consequently, the Taxpayer is correct that property purchased at wholesale or in a casual transaction is not subject to either Alabama sales tax or use tax, regardless of where the sale occurs.

The same principle does not apply, however, to exemptions from sales and/or use tax. That is, property that is exempt from sales tax when purchased in Alabama is not automatically also exempt from Alabama use tax if subsequently used in Alabama. The

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traveling through or moving in interstate or intrastate commerce in Alabama.

sales tax and use tax laws are separate, and contain different exemptions.[10] And specifically, there is no use tax exemption similar to the sales tax drive-out exemption at §40-23-2(4). Consequently, even if the Taxpayer had purchased the tractors and trailers tax-free in Alabama pursuant to the sales tax drive-out exemption, Alabama use tax would still have been due on the Taxpayer's subsequent use of the tractors and trailers in Alabama. As stated by the Bankruptcy Court in *Culverhouse,* "where the 72 hour drive-out provision is invoked to avoid the payment of sales tax at the time of purchase, and where, as here, no out-of-state sales tax is paid, the subsequent use of the motor vehicles in the State of Alabama properly triggers the imposition of the Alabama use tax." *Culverhouse* at 9.

Finally, the Taxpayer contends that the Department's position is inconsistent with recently promulgated Dept. Reg. 810-6-5-.11.05(7). That regulation involves the "casual" use tax on motor vehicles brought into and used in Alabama. The Bankruptcy Judge in *Culverhouse* rejected that argument because the regulation was not promulgated until after the period in issue. He also rejected the argument on the merits:

> Even if the Court were to consider the Debtor's argument on its merits, the argument nevertheless fails. The regulation in question applies to "persons, firms, or corporations that purchase automotive vehicles which are taxable pursuant to Code of Ala. 1975, Section 40-23-102." Ala. Admin. Code §810-6-5-11.05(7). As the tax in issue here is a use tax, imposed pursuant to Ala. Code §40-23-61(c) and not pursuant to §40-23-102, the regulation quite simply does not apply here. The Debtor is attempting to take advantage to an exemption which, (1) was not in effect at the time of the transactions in question, and (2) which applies to a tax other than the tax in question.
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> The Debtor's argument ignores an additional requirement imposed by the regulation. "If the vehicle was used in another state and proper sales or use

[10] For a detailed analysis of the issue, see *Whatley* at 11, 15.

> tax was paid to the other state, no additional tax is due." Ala. Admin. Code §81-6-5.11.05(7). As no sales or use tax was paid to any other state, this regulation would provide the Debtor no relief even if it did apply. The additional argument advanced in the Debtor's Addendum to its brief is rejected.

Culverhouse at 18.

The Taxpayer argues in its Supplemental Brief that *Culverhouse* is still pending in Bankruptcy Court, and thus cannot be cited as legal authority. The Bankruptcy Judge's analysis can, however, be relied on as a correct interpretation and application of the Alabama use tax statutes.

The Taxpayer also contends in its Supplemental Brief that *Culverhouse* conflicts with Rev. Rul. 99-003. Rev. Rul. 99-003 involved the sales tax drive-out exemption at §40-23-2(4). The Ruling concluded that under the given facts, the drive-out exemption would apply, and that "the contemplated purchases will be exempt from the sales and/or use tax in accordance with Ala. Code 40-23-2(4);. . . "

First, Rev. Rul. 99-003 is not relevant to this case because the §40-23-2(4) drive-out exemption is not in issue. The subject tractors and trailers were purchased outside of Alabama. Second, the conclusion that the sales tax drive-out provision also provides an exemption from use tax is wrong. As discussed above, at page 7, in *Whatley* at 11-15, and in *Culverhouse* at 9, the sales tax drive-out exemption does not also apply to use tax. The Taxpayer's reliance of Rev. Rul. 99-003 is thus misplaced.

In summary, the Taxpayer's use of the tractors and trailers in its long-haul trucking business in Alabama constituted a taxable use of the property for Alabama use tax

purposes.[11] The Taxpayer has not paid sales or use tax on the vehicles to any other state. The Alabama use tax was intended to apply in such cases.

The four prongs of *Complete Auto Transit* are also satisfied. First, as discussed, the Taxpayer and the activity being taxed, i.e. the Taxpayer's use of the vehicles in Alabama, had a substantial nexus with Alabama. The second prong is satisfied because Alabama provides a credit for sales or use tax paid to any other state. Code of Ala. 1975, §40-23-65. See generally, *Fleming Foods*, 648 So.2d at 579. Third, the Alabama use tax does not discriminate against interstate commerce because property purchased at retail in Alabama is subject to an equal Alabama sales tax; or, if Alabama sales tax is not paid on such property, the subsequent use of the property in Alabama would be subject to Alabama use tax. Finally, the use tax is fairly related to the many services provided to the Taxpayer by Alabama.[12]

The above holding is supported by the same cases relied on by the Alabama Supreme Court in *Fleming Foods*, 648 So.2d at 580. See also, *Cole Bros. Circus v.*

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[11] This ruling is limited in scope because a vehicle or other tangible property not used in the performance of a contract that is brought into Alabama by a nonresident for temporary use is specifically exempted from Alabama use tax. Code of Ala. 1975, §40-23-62(3). Consequently, nonresidents visiting Alabama are not liable for Alabama use tax on the vehicles and other property they bring into and temporarily use in Alabama. Property temporarily stored in Alabama also is not subject to Alabama use tax. Dept. Reg. 810-6-5-.23. Likewise, property brought into Alabama and fabricated or otherwise prepared for its ultimate purpose that is later transported and used for that ultimate purpose outside of Alabama is not subject to Alabama use tax. *C&S Components, Inc. v. State of Alabama*, Docket S. 01-300 (Admin. Law Div. Op. and P.O. 2/15/02), citing *Exxon Corp. v. Wyoming State Bd. of Equal.*, 783 P.2d 685 (Wy.1989).

[12] Professor Walter Hellerstein, a leading scholar on state taxation, has also concluded that imposing a use tax on trucks used to haul goods in interstate commerce through a state is constitutional if the four prongs of *Complete Auto Transit* are satisfied. See generally, J.

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Huddleston, 1993 Tenn. App. LEXIS 386 (Tenn. Ct. June 4, 1993) in which the circus was held liable for Tennessee use tax on the full cost of property that it periodically brought into and used in Tennessee. In affirming the tax, the court held that "[t]here is no statutory exception (from the use tax) for a 'de minimus' presence in Tennessee." Cole Bros., LEXIS 386, at 9. The same is true in Alabama.

Because the Taxpayer's tractors and trailers were subject to the use tax levied at §40-23-61(c), a discussion of the applicability of the use tax levied at §40-23-61(e) is not necessary. The State assessment on the tractors and trailers is due to be affirmed.

The Department assessed the Taxpayer for City of Clayton use tax on only those trailers that were invoiced to the Taxpayer's facility in Clayton. The Taxpayer argues that the fact that the trailers were invoiced to a Clayton address is insufficient evidence on which to apply Clayton use tax. It also contends that the Clayton tax is not internally consistent, and thus unconstitutional as applied, because Clayton does not allow a credit for tax paid to other local jurisdictions.

An obvious prerequisite for the Clayton use tax to apply is that the subject property must be used, stored, or consumed in Clayton. No evidence to that effect was submitted in this case. Although some of the trailers were invoiced to the Taxpayer's Clayton location, the Taxpayer's vice president of finance testified that all of the trailers in issue were delivered to the Taxpayer outside of Alabama. T. at 30. She also testified that "someone might drop the trailer and another person come through Clayton to fuel and then head on somewhere else." T. at 31. That is not sufficient evidence to establish that Clayton use tax

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Hellerstein & W. Hellertstein, *State Taxation* (3d ed. 2001) at ¶18.04.

is due on the trailers invoiced to the Clayton address.

Because there is no evidence that the trailers were ever used in Clayton, the City of Clayton final assessment must be dismissed. The constitutional issue raised by the Taxpayer concerning the Clayton tax is pretermitted by the above holding.

The State use tax final assessment is affirmed. Judgment is entered against the Taxpayer for use tax and interest of $916,166.95. Additional interest is also due from the date of entry of the final assessment, February 13, 2004. The City of Clayton final assessment is dismissed.

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

Entered December 17, 2004.

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BILL THOMPSON
Chief Administrative Law Judge