CROWN HOUSING GROUP, INC. BEST HOME CENTER 70 SKYLAND BLVD. EAST TUSCALOOSA, AL 35405-4099,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 06-399
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Crown Housing Group, Inc. ("Taxpayer"), d/b/a Best Home Center, for State sales tax for January 2, 2003 through September 2005. 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 February 23, 2007. Jim Moore represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

The Taxpayer sells mobile homes and modular buildings in Alabama. It is headquartered in Tuscaloosa, Alabama, and had sales outlets in Tuscaloosa and three other locations in Alabama during the period in issue.

The Department audited the Taxpayer and assessed it for State sales tax, State use tax, and municipal and county ("local") sales tax. The Taxpayer only appealed concerning the State sales tax final assessment. Consequently, the State use tax and local sales tax final assessments are not in issue.

The Taxpayer's representative raised three issues at the February 23 hearing. One of the issues involved the local sales tax final assessment and another involved the use tax final assessment. Although those final assessments are not in issue, the local sales tax

and State use tax issues will be addressed to give the Taxpayer guidance for the future.[1]

The three issues are:

(1) Was the Taxpayer liable for local sales tax when it sold and delivered a mobile home into a municipality and/or county in Alabama in which it did not have a physical place of business?

(2) Was the Taxpayer liable for Alabama use tax on tangible personal property that it purchased tax-free in Alabama and then used in its business in Alabama?

(3) Was the Taxpayer liable for sales tax on modular buildings that it purchased from an Alabama manufacturer and resold to customers in Alabama?

Issue (1). The Local Tax Issue.

The Taxpayer hired independent contractors to deliver and set-up the mobile homes that it sold during the audit period. The Taxpayer collected local tax on only those mobile homes that were delivered into a local jurisdiction where the Taxpayer had a business outlet.[2]

The Department assessed the Taxpayer for local sales tax if the Department administered the local tax for the municipality and/or county where a mobile home was delivered, and the Taxpayer had not previously collected the tax. The Department contends that when the Taxpayer, through its agents, delivered a mobile home into a local

[1] The Alabama Manufactured Housing Association and the Alabama Retail Association filed an amici curiae brief with the Administrative Law Division supporting the Taxpayer's position concerning the local sales tax issue.

[2] The Taxpayer also sometimes collected local tax on mobile homes delivered into jurisdictions where it did not have a business location, but only for the convenience of the customers.

jurisdiction, the Taxpayer was making a taxable retail sale in the jurisdiction. It also argues that the Taxpayer established nexus with the local jurisdiction when its agents delivered the mobile home into the jurisdiction. The Department assessed the Taxpayer on all mobile homes delivered into a Department-administered local jurisdiction, even if the Taxpayer delivered only one mobile home into the jurisdiction.

The Taxpayer's representative testified that he has been in the mobile home business for many years. He stated that he has always understood that he is required to collect local tax only if he has a sales outlet in the local jurisdiction where a mobile home is delivered. Amici also argue that the Taxpayer is not liable for the local tax in issue because under applicable Alabama law, a retailer is subject to tax in a local jurisdiction in Alabama only if the retailer has a physical business location or salesmen operating in the jurisdiction. Amici cite *Yelverton's, Inc. v. Jefferson County, Alabama*, 742 So.2d 1216 (Ala. Civ. App. 1997), cert. denied 742 So.2d 1224 (Ala. 1999), J. See, concurring specially, J. Cook, dissenting, and several Alabama Attorney General opinions in support of that claim.

This seemingly simple case involves a complicated issue – where and what type of local tax (sales or use) is due on retail sales where the seller and purchaser are located in different local taxing jurisdictions in Alabama.

The seminal Alabama case thus far on the issue is *Yelverton's*. The issue in *Yelverton's* was whether an appliance store (Yelverton's) physically located in Walker County was liable for Jefferson County sales tax on merchandise it sold and delivered to customers in Jefferson County. Yelverton's advertised in Jefferson County, but had no store or salesmen located or operating in the County.

The Court of Civil Appeals first correctly recognized that a sale is closed at the point

of delivery, and that the retail sales in issue were thus closed in Jefferson County when Yelverton's delivered the goods to its customers in the County. It then held, however, that Jefferson County use tax applied, not the County sales tax.

> The tax in this case is not a sales tax because it is not imposed on a business engaged in selling goods in Jefferson County. Instead, it is a use tax because the tax is imposed on the storage, consumption, or use, within Jefferson County, of goods purchased from a business not engaged in selling goods in Jefferson County.

Yelverton's, 742 So.2d at 1220.

The Court next addressed the constitutional issue of whether Yelverton's had nexus with Jefferson County so as to be subject to the County's taxing jurisdiction. The Court noted that in the interstate context, the nexus issue involves both the Due Process Clause and the Commerce Clause, but that in the intrastate context, only due process must be satisfied. The Court then held that for nexus to exist "there must be a [connection] sufficient to provide a business nexus with Alabama – by agent or salesmen, or at a very minimum, by an independent contractor within the State of Alabama." *Yelverton's*, 742 So.2d at 1221, quoting *State v. Lane Bryant, Inc.*, 171 So.2d 91, 93 (Ala. 1965).

The Court determined that the Department had incorporated the above "physical presence" nexus test in Department Reg. 810-6-3-.51(2). Specifically, the Court focused on the following statement in Reg. 810-6-3-.51(2) – "If the seller whose place of business is located outside of the (county) has salesmen soliciting orders within the (county), the seller is required to collect and remit the seller's use tax on retail sales" in the jurisdiction. *Yelverton's*, 742 So.2d at 1221. The Court treated the above statement as the Department's position concerning nexus for local tax purposes; that is, a business physically located outside of a county has nexus with the county only if it has salesmen

soliciting in the county. The Court consequently held that Yelverton's did not have nexus with Jefferson County because it did not have salesmen in the County. [3]

Finally, the Court found that Jefferson County could not interpret the concept of nexus differently from how the Department interpreted nexus in Reg. 810-6-3-.51(2). The Court thus held that Yelverton's was not liable for either Jefferson County sales tax or use tax on the appliances it sold at retail in Jefferson County. The Court recognized that based on its decision, Yelverton's sales in Jefferson County would escape all County taxation, but "that is the result obtained under the state sales and use tax statutes and the Department's regulations." *Yelverton's*, 742 So.2d. at 1223.

The Court of Civil Appeals' decision in *Yelverton's* must be followed because it is the latest Alabama appellate court case on point.[4] However, I respectfully disagree with the decision for the reasons explained below.

To begin, I disagree with the Court's finding that Jefferson County sales tax did not apply. Alabama's sales tax is levied on every person or entity "engaged or continuing within this state, in the business of selling" tangible personal property at retail. Code of Ala.

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[3] The Court noted that the U.S. Supreme Court held in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), that a physical presence is no longer required for due process nexus. It declined, however, to apply the *Quill* due process nexus standard. "However, the question whether the Department's regulations should be amended to reflect the changes in due process analysis enunciated in *Quill* is not before us." *Yelverton's*, 742 So.2d at 1221, n. 3.

[4] The Alabama Supreme Court quashed Jefferson County's petition for certiorari as improvidently granted. It noted, however, that in doing so "this Court should not be understood as approving all the language, reasons, or statements of law in the opinion of the Court of Civil Appeals." *Ex parte Jefferson County (Re Yelverton's, Inc. v. Jefferson County, Alabama*), 742 So.2d 1224 (Ala. 1999).

1975, §40-23-2(1). Local sales tax levies are modeled after the State levy, and specifically, the Jefferson County sales tax is levied "on account of business done (by a retailer) in the county. . . ." Act 405, §3(b), Acts of Alabama 1967.

The Court correctly held in *Yelverton's* that the sales in issue were closed in Jefferson County. The Court incorrectly concluded, however, that Yelverton's was not in the business of selling goods at retail in Jefferson County. Yelverton's business was selling goods at retail, and it conducted that business in Jefferson County when it made numerous retail sales closed in the County. If Yelverton's was in the business of making retail sales for State purposes when it made the sales closed in Jefferson County, which it was because those sales were subject to State sales tax, then it was likewise in the business of making retail sales in the County for County purposes. I agree with the following analysis by Justice Cook in his dissent in *Yelverton's*.

> Jefferson County's right to collect these taxes is clear and straightforward. It is based on (1) Act No. 405, 1967 Ala. Acts 1021 (Regular Session); and (2) Ala. Code 1975, § 40-23-1(a)(5) and (11). Act No. 405, § 3(b), authorizes counties to collect a sales tax from "every person required to pay, on account of *business done by him in the county*, the *State* sales tax." (Emphasis added.) Section 40-23-1(a)(11), which is contained in the article of the Code dealing with *sales* taxes, defines "business" as: "All activities engaged in, or caused to be engaged in, with the object of gain, profit, benefit, or advantage, either direct or indirect. . . ." Section 40-23-1(a)(5) defines a "sale" as being "completed . . . *when and where title is transferred by the seller or seller's agent to the purchaser or purchaser's agent*." (Emphasis added.) According to these provisions, once Yelverton's has delivered an appliance into Jefferson County to a customer, it has "completed" a sale in Jefferson County, for tax purposes. See *State v. Service Engraving Co.*, 495 So.2d 695, 697 (Ala. Civ. App. 1986) ("For tax purposes, the sales taxes apply to sales that are 'closed,' that is, they apply when title to the goods has passed to the purchaser, which occurs as of the time and place of the physical delivery of the goods, unless otherwise explicitly agreed."). Such activity fits the definition of "business" as set forth in § 40-23-1(a)(11). Jefferson County is, therefore, entitled to collect county sales tax on this exchange, pursuant to Act No. 405, § 3(b), because the sale was subject to the *state* sales tax.

Yelverton's, 742 So.2d at 1226, 1227.

The Court apparently concluded that Yelverton's was not in the business of selling at retail in Jefferson County because it did not have a physical business location in the County. But a physical location in a taxing jurisdiction is not required for a retailer to be in the business of making retail sales in the jurisdiction.

Out-of-state mail order sellers, i.e., L.L. Bean, Cabela's, etc., that advertise in Alabama and make numerous sales to customers in Alabama are clearly in the business of making retail sales in Alabama, even though they are not physically located in the State. Just as Quill was doing business in North Dakota by selling and delivering goods to North Dakota residents, out-of-state retailers that make retail sales closed in Alabama are doing business in Alabama.[5] Likewise, retailers located outside of a local taxing jurisdiction in Alabama that make retail sales to customers in the jurisdiction are also doing business in the local jurisdiction.

The fact that a retailer is subject to sales tax on retail sales in a jurisdiction in which it is not physically located is illustrated by the holding in *State v. Dees*, 333 So.2d 818 (Ala. Civ. App. 1975), cert. denied, 333 So.2d 821 (1976). In that case, an out-of-state retailer with no physical location, salesmen, etc., in Alabama sold and delivered an airplane to a customer in Alabama. The Department assessed the customer, Dees, for Alabama use tax. The Court of Civil Appeals held that the sale occurred upon delivery in Alabama, and consequently, that the out-of-state seller was in the business of selling at retail in Alabama.

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[5] Foreign retailers without a physical presence in Alabama are not obligated to collect and remit Alabama sales or use tax on their Alabama sales only because they do not have nexus with Alabama for Commerce Clause purposes, i.e., they do not have a physical presence in the State, as required by the U.S. Supreme Court in *Quill*.

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The Court concluded that the sale in Alabama was subject to Alabama sales tax, and thus exempt from Alabama use tax. [6]

> Though (the seller) is a Mississippi Corporation, does not maintain a place of business in Alabama and is not licensed under the provisions of the Sales Tax Act, it nevertheless, at least on the occasion of this transaction, engaged in the business of selling an airplane in this state at retail to a resident of the state. By doing so it fell squarely within the terms of the Sales Tax Act and specifically, (the sales tax levy now at Code of Ala. 1975, §40-23-2). The sale of property at retail within the state of Alabama being subject to sales tax, its use or consumption is exempt from the provisions of the Use Tax Act.

Dees, 333 So.2d at 820.

Applying the above rationale, by making retail sales closed in Jefferson County, Yelverton's was "engaged in the business of selling (appliances) in (Jefferson County) at retail to a resident of (Jefferson County)." *Dees*, 333 So.2d at 820. Consequently, just as the sale by the Mississippi seller in *Dees* was subject to Alabama sales tax, the numerous retail sales by Yelverton's in Jefferson County were subject to that County's sales tax.[7]

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[6] The airplane was exempt from Alabama use tax based on the use tax exemption at Code of Ala. 1975, §40-23-62(1), which, at the time, exempted from use tax all property that when sold was subject to Alabama sales tax, i.e., all property sold at retail in Alabama. That exemption was amended by Act 301 in 1997 so that currently only property on which Alabama sales tax is actually paid is exempt from Alabama use tax. The exemption also confirms that use tax is levied on all property used or consumed in a taxing jurisdiction, including property purchased at retail in the jurisdiction, and not just property purchased outside of the jurisdiction that is later brought into the jurisdiction. Otherwise, there would be no need to exempt from the use tax property on which the jurisdiction's sales tax was paid. But for the use tax exemption, both sales and use tax would apply to property purchased at retail and used in Alabama. For an analysis of the §40-23-62(1) exemption and the relationship between the Alabama sales tax and use tax, see, *Bluegrass Bit Co., Inc. & Demolition Technologies, Inc. v. State of Alabama*, U. 96-294 & S. 96-287 (Admin. Law Div. O.P.O. 1/16/1997). See also, *Carlisle Engineered Products, Inc. v. State of Alabama*, S. 99-524 (Admin. Law Div. 4/17/2000).

[7] Ironically, because Yelverton's sales were subject to the County sales tax, the appliances were exempt from the County use tax pursuant to the exemption at §40-23-62(1), as it read

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Reg. 810-6-3-.51(2) also states that "sellers located in (a county or municipality) are required to collect the sales tax on retail sales of tangible personal property" in the county or municipality. That statement is correct as far as it goes, but it should not be construed as meaning that only sellers located in the local jurisdiction are required to collect sales tax on retail sales in the jurisdiction. As discussed, a retailer located outside of a jurisdiction is also subject to sales tax on its retail sales in the jurisdiction. The question then becomes whether the out-of-jurisdiction retailer has nexus with the jurisdiction.

I also respectfully disagree with the Court's nexus analysis in *Yelverton's*. The Court correctly noted that only "the due process portion of the nexus analysis is applicable to transactions in intrastate commerce." *Yelverton's*, 742 So.2d at 1220. The Court then cited Reg. 810-6-3-.51(2) as the Department's position that an out-of-county seller has nexus with the county only if it has salesmen in a county. That statement is correct – an out-of-county retailer has nexus with the county if it has salesmen soliciting in the county. But the regulation does not state, and should not be construed as stating, that an out-of-county seller has nexus only if it has salesmen in the county. Rather, as discussed below, that is only one situation in which an Alabama retailer located outside of a local taxing jurisdiction could have due process nexus with the local jurisdiction.

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during the years in issue. See again, *Dees*, *supra*. That State exemption applies to the Jefferson County use tax because the County levy specifically adopts and makes applicable to the County all State use tax exemptions, see Act 405, §4(c). The property would not be exempt from County use tax under current law because since 1997, the §40-23-62(1) exemption only applies if County sales tax is actually paid on the property.

In any case, the "physical presence" due process nexus standard applied by the Court in *Yelverton's* was no longer applicable when the case was decided in 1997. As noted, the U.S. Supreme Court held in *Quill* in 1992 that for due process nexus purposes, a physical presence is not required. Rather, the test is only whether the taxpayer had "fair warning" that its activities may subject it to tax in the jurisdiction. [8] *Yelverton's*, 742 So.2d at 1221, n. 3, quoting *Quill*, 112 S.Ct. at 2587. The U.S. Supreme Court held in *Quill* that because Quill advertised in North Dakota and regularly delivered goods to North Dakota customers, it had "purposefully directed its activities at North Dakota residents," and thus had nexus with the State for due process purposes. *Quill*, 112 S.Ct. at 1911.

The *Yelverton's* Court refused to apply the *Quill* due process nexus standard because the issue of whether the Department should change its regulation in accordance with *Quill* was not before it. See again, *Yelverton's*, 742 So.2d at 1221, n. 3. However, even if Reg. 810-6-3-.51(2) did constitute the Department's definitive nexus position, that position – that a foreign taxpayer must have salesmen in a local jurisdiction to have nexus with the jurisdiction – is clearly contrary to the prevailing due process nexus standard as pronounced in *Quill*, and should be rejected. Just as a Department regulation must be rejected if it is contrary to a statute, *Ex parte City of Florence*, 417 So.2d 191 (1982), a regulation that states a position that is contrary to a pronouncement of the U.S. Supreme

[8] The nexus standard is the same for both local sales tax and local use tax, and if a taxpayer has nexus, the local jurisdiction can assess the taxpayer for either local sales tax on retail sales by the taxpayer in the jurisdiction, or, if the local sales tax is not paid, then the local "sellers" use tax would be due. As a practical matter, it is irrelevant which tax is assessed. As discussed, under current (post-1997) law, Yelverton's would owe County sales tax on its retail sales in Jefferson County, but could also be assessed County use tax if no sales tax was paid.

Court should also be rejected.

Yelverton's had due process nexus with Jefferson County under the prevailing *Quill* nexus standard. As stated in *Quill*, if an out-of-jurisdiction taxpayer "purposefully avails itself of the benefits of an economic market in the forum (jurisdiction), it may subject itself to the (jurisdiction's) in personam jurisdiction even if it has no physical presence in the (jurisdiction)." *Quill*, 112 S.Ct at 1910. Due process is satisfied if a taxpayer has "fair warning that (its) activity may subject (it) to the jurisdiction of a foreign sovereign." *Quill*, 112 S.Ct. at 1911, quoting *Shaffer v. Heitner*, 433 U.S. at 218 (Stevens, J. concurring in judgment).

Yelverton's repeatedly and purposefully availed itself of the economic market in Jefferson County by advertising in the County, making numerous sales to customers in the County, and delivering its merchandise to those customers in the County. Yelverton's substantial activities in Jefferson County clearly gave it fair warning that it would be subject to the County's taxing jurisdiction sufficient to satisfy due process.

The above analysis is supported by the Illinois Supreme Court's holding in *Brown's Furniture, Inc. v. Wagner*, 665 N.E.2d 795 (Ill. 1996), cert. denied (1996 Lexis 5449) S.Ct. (1996). Brown's operated a furniture store in Missouri. It advertised in Illinois and sold merchandise to Illinois residents, which it delivered into that State in its own trucks. The Illinois Supreme Court, relying on the U.S. Supreme Court's holding in *Quill*, held that Brown's numerous deliveries into Illinois were sufficient to establish both Commerce Clause and due process nexus with that State. "Through its deliveries, Brown's Furniture is physically present in Illinois on an almost continuous basis, directly competing with in-state retailers in establishing and maintaining a market for its furniture sales in Illinois. We

conclude that Brown's Furniture has met the *Complete Auto* substantial nexus requirement." *Brown's Furniture*, 665 N.E.2d 795 (1996).

If an out-of-jurisdiction retailer's numerous deliveries of merchandise into a jurisdiction establish both Commerce Clause and due process nexus with the jurisdiction, as in *Brown's Furniture*, then certainly Yelverton's numerous deliveries of its appliances to customers in Jefferson County constituted (at least) due process nexus sufficient to subject Yelverton's to the County's taxing authority.

Citing *Miller Brothers v. Maryland*, 74 S.Ct. 535 (1954), amici argue that "[m]ere delivery of merchandise into a taxing jurisdiction by a seller does not constitute a sufficient nexus with the taxing jurisdiction to impose a duty on the seller to collect and remit the local sales or use tax, even if the retailer employs its own delivery vehicles." Brief of amici curiae at 6. That statement is correct based on the holding in *Yelverton's*. As indicated, however, the statement is not a correct application of the prevailing and controlling due process nexus standard.

The U.S. Supreme Court held in *Miller Brothers* that a Delaware retailer's occasional delivery of goods into Maryland, without more, did not give the retailer due process nexus with Maryland. But *Miller Brothers* was decided before *Quill*, in which the Court changed its due process analysis so that now a foreign taxpayer's exploitation of a jurisdiction's economic market is sufficient for due process nexus. I agree with the following statement by the Illinois Supreme Court in *Brown's Furniture* – "Because *Quill* made clear that under contemporary due process doctrine a company is no longer required to be physically present within a state before use tax collection duties may be imposed, the continued authority of *Miller Brothers* is in considerable doubt." *Brown's Furniture*, 665 N.E.2d at 803.

In summary, an Alabama retailer located outside of a local taxing jurisdiction is subject to local sales tax in the jurisdiction if it makes retail sales closed in the jurisdiction (or local use tax if the local sales tax is not paid). The harder question is whether the out-of-jurisdiction seller also has due process nexus with the local jurisdiction. That must be decided on a case-by-case basis, and depends on whether the retailer's activities in or relating to the local jurisdiction are sufficient under *Quill* to give the retailer fair warning that its activities would subject it to the jurisdiction's taxing authority.

Applying the above principles to the facts in *Yelverton's*, I would have found that Yelverton's was subject to Jefferson County sales tax on its numerous retail sales in the County. I would have also found that Yelverton's extensive exploitation of the County's economic market gave Yelverton's (at least) due process nexus with the County, as necessary for intrastate transactions. I would have accordingly voided Reg. 810-6-3-.51(2) to the extent it could be construed as being contrary to the above findings; provided, I would have applied the holding prospective only to give Alabama retailers fair warning of when and where local sales or use tax should be collected.[9]

[9] The Alabama Supreme Court took similar "prospective only" action in *Ex parte Sizemore*, 605 So.2d 1221 (Ala. 1992). That case involved the sales tax "withdrawal" provision at Code of Ala. 1975, §40-23-1(a)(10), which had been the subject of much litigation and conflicting appellate court decisions. Stating that "the law with regard to the withdrawal provision is unclear," *Sizemore*, 605 So.2d at 1227, the Court then clarified the provision. It made its clarification prospective only, however, so as not to penalize the taxpayer that had relied on a prior erroneous interpretation of the provision. I would do the same concerning the local nexus issue.

In this case, the Taxpayer made retail sales in the local jurisdictions where its agents, the independent contractors, delivered the mobile homes.[10] Whether the Taxpayer had sufficient contact with the various jurisdictions for due process nexus purposes depends on the particular facts relating to each jurisdiction, which are not in evidence.

The Taxpayer's owner testified that when he delivered a mobile home into a local jurisdiction in which his business did not have a sales outlet, he often collected the local tax due for the convenience of the customer, but only if he could identify the municipality and/or county in which the customer was located. With today's technology, it is generally an easy matter to identify if a location is within a certain county or municipality in Alabama. Arguably, when an Alabama retailer makes a delivery, i.e., a sale, in a particular local jurisdiction in Alabama, the retailer should have fair warning that it is liable to collect the local tax due from the customer. Concerning Department-administered local taxes, it would then be an easy task to report and remit the local tax to the Department because the Department uses a combined local tax return that identifies the various county and municipal jurisdictions administered by the Department, and the applicable rates.

Notwithstanding my opinion on the issue, as stated above, *Yelverton's* is still the law of the land and must be followed. Amici are thus correct that based on the holding in *Yelverton's*, the Taxpayer cannot currently be required to collect local tax in a municipality

[10] Amici contend that the independent contractors hired by the Taxpayer to deliver the mobile homes were not agents of the Taxpayer – "The Department is thus attempting to assess local tax in jurisdictions where there is no evidence that any employee or agent of Crown has ever entered. . . ." Amici Brief at 10. The U.S. Supreme Court concluded in *Scripto v. Carson*, 80 S.Ct. 619 (1960), however, that a taxpayer could establish nexus with a jurisdiction through independent contractors operating on its behalf in the jurisdiction. Consequently, the fact that the Taxpayer used independent contractors and not its own employees to deliver the mobile homes is constitutionally irrelevant.

or county in which it does not have a physical business location or salesmen soliciting in the jurisdiction.[11] However, because the Taxpayer failed to appeal the local assessment entered by the Department, it must pay the amount due in full and then petition for a refund. See, Code of Ala. 1975, §40-2A-7(c)(1).

Issue (2). The State Use Tax Issue.

The Taxpayer's owner generally complained at the February 23 hearing that the Department assessed him for State use tax on property that he purchased tax-free from Alabama vendors and subsequently used in his business in Alabama. He claimed that the vendors should have collected sales tax, and that the vendors, not the Taxpayer, should be required to pay the delinquent tax due. He further objected that Tuscaloosa County also assessed him for that County's use tax on all of the property assessed by the Department, even though most of the property was never used in Tuscaloosa County.

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[11] The Department may amend Reg. 810-6-3-.51(2) to conform to the current *Quill* due process nexus standard. In that case, Yelverton's and all similarly situated out-of-jurisdiction taxpayers would be liable for either local sales tax or local use tax when they made retail sales closed in a local jurisdiction. Whether an out-of-jurisdiction retailer has nexus with a local jurisdiction in Alabama must be decided on a case-by-case analysis using the due process criteria established in *Quill*.

I understand amicis' support for the holding in *Yelverton's* because it gives Alabama retailers a bright-line test for determining when local tax should be collected. As explained, however, *Yelverton's* does not apply the current due process nexus standard applicable to intrastate transactions. The Alabama Legislature may, of course, enact legislation that statutorily sets minimum sales activities or contacts that a retailer must have with a local jurisdiction before the retailer becomes liable to collect the jurisdiction's local taxes. Such action would give retailers guidelines as to when they should collect local tax in a jurisdiction. It would also eliminate the administrative burden and uncertainty of having to determine on a case-by-case basis if certain activities in a local jurisdiction were sufficient for due process nexus under *Quill*.

When the Taxpayer purchases tangible personal property in Alabama for use in its business, it should pay State sales tax and also any applicable local sales tax due on the transaction. If a vendor fails to charge the Taxpayer for sales tax, the vendor remains liable and the Department may assess the vendor for the sales tax due. But the Taxpayer is also liable for State (and any applicable local) use tax on its subsequent use or consumption of the property in its business in Alabama.[12] As discussed, tangible property purchased at retail in Alabama and subsequently used in Alabama is exempt from Alabama (and local) use tax only if Alabama (and local) sales tax is actually paid on the property. See, n. 6, *supra*, and §40-23-62(1). Consequently, if an Alabama vendor fails to collect sales tax from the Taxpayer, the Taxpayer would not be exempt from use tax on the property. In any case, the Taxpayer, as the retail purchaser/consumer of the property, is ultimately liable for either the sales or use tax due on the property. See, *Calhoun Pub. Co., Inc. v. State*, 513 So.2d 643 (Ala. Civ. App. 1987), concerning sales tax, and *Lepeska Leasing Corp. v. State, Dept. of Revenue*, 395 So.2d 82 (Ala. Civ. App. 1980), writ denied 395 So.2d 85, concerning use tax. The Department thus correctly assessed the Taxpayer for State use tax on the property in issue.

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[12] Alabama's appellate courts have oft-times stated that "[t]he 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 v. Marmon Industries, Inc.*, 456 So.2d 798, 800-01 (Ala. Civ. App. 1984). That statement is not technically correct because the use tax levy applies to all property used, stored, or consumed in Alabama (or in a local jurisdiction in Alabama), regardless of where it is purchased at retail. See, page 8, n. 6, *supra*. The statement is, however, correct as a practical matter because §40-23-62(1) exempts from the use tax all property purchased at retail in Alabama and on which Alabama sales tax is paid. Consequently, it is true that use tax is generally due only on property purchased outside of Alabama that is subsequently used, stored, or consumed in Alabama.

The Taxpayer is correct, however, that it does not owe Tuscaloosa County use tax on property that was never used or consumed in that County. Because the Taxpayer is headquartered in Tuscaloosa County, the County apparently assumed that all of the Taxpayer's property subject to State use tax was also subject to the County use tax. It assessed the Taxpayer accordingly based on the Department's audit information. But the Taxpayer would only be liable for Tuscaloosa County use tax on property used by the Taxpayer in that County and on which a sales or use tax was not paid to another county in Alabama under a requirement of law. See, Code of Ala. 1975, §40-23-2.1. Because the Department does not administer Tuscaloosa County's taxes, the Taxpayer must contest the County use tax assessment directly with the County.

Issue (3). The Modular Building Issue.

The Taxpayer purchased modular building components from an Alabama manufacturer. It then resold the components and contracted to have the components affixed to realty as modular buildings in Alabama as directed by the customers.

The manufacturer charged the Taxpayer sales tax based on approximately 68 percent of the amount paid by the Taxpayer for the modular components, which, according to the manufacturer, represented its cost of materials used in manufacturing the units.

On audit, the Department determined that the Taxpayer was liable for sales tax on the full amounts it paid the manufacturer for the components. It accordingly assessed the Taxpayer for additional sales tax on the components.[13]

[13] The Department examiner explained at the February 23 hearing that perhaps the Taxpayer should have been assessed use tax instead of sales tax, but that he assessed sales tax for administrative reasons and so the Taxpayer would not have to obtain a separate use tax account number.

In 1971, the Alabama Legislature amended the sales tax and use tax definitions of "retail sale" to include the following – "Sales of building materials, fixtures or other equipment to a manufacturer or builder of modular buildings for use in manufacturing, building or equipping a modular building ultimately becoming a part of real estate situated in the State of Alabama are retail sales, and the use, sale or resale of such building shall not be subject to the tax." Act 2397, Acts of Alabama 1971; see, Code of Ala. 1975, §§40-23-1(a)(10) and 40-23-60(5) concerning sales tax and use tax, respectively.

The "modular building" provision is poorly written, and consequently, is subject to different interpretations by reasonable people. The provision refers only to "modular buildings." However, a manufacturer first manufactures modular components that only later become modular buildings when they are attached to realty. Consequently, when the statute refers to a "manufacturer . . . of modular buildings," it can only be referring to a manufacturer of modular building components. Further, when the statute provides that the "resale of such building shall not be subject to the tax," see §40-23-60(5), it can only be referring to the resale of the modular components because the sale of a modular building, i.e., a building attached to realty, constitutes real property the sale of which is not subject to sales or use tax to begin with.

The Alabama Supreme Court discussed the "modular building" provision in *Boswell v. Alcoa Construction Systems, Inc.*, 368 So.2d 18 (Ala. 1979). In that case, Alcoa manufactured modular components (kitchens and bathrooms) outside of Alabama and sold them to an Alabama contractor. The contractor incorporated the modular components into completed apartment buildings in Mobile, Alabama. The contractor used conventional building materials to construct the remaining rooms, i.e., the living rooms, dining rooms,

bedrooms, etc., in the apartment buildings.

Alcoa initially paid Alabama use tax on the modular components. It subsequently petitioned for a refund, claiming that the modular components were exempt under the modular building "exemption" at §40-23-60(5). Alcoa argued that its purchase of the raw materials used to make the modular components was the taxable event under §40-23-60(5), and that its subsequent sale of the components was exempt. It conceded that tax was due on the conventional building materials purchased and used by the contractor in constructing the apartment buildings. *Alcoa*, 368 So.2d at 19.

The Supreme Court held that Alcoa's sale of the modular components to the contractor should be treated the same as the sale of the conventional materials used by the contractor in constructing the apartment buildings, and thus taxable. That is, the Court found that when Alcoa sold the modular components to the Alabama contractor, it was selling taxable building materials, not exempt components used to construct modular buildings.

Although not fully articulated in the Court's opinion, the Court in substance accepted the Department's argument that the "modular building" provision at §40-23-60(5) did not apply because the modular components sold by Alcoa did not become modular buildings within the purview of the statute. The Department's brief to the Supreme Court in *Alcoa* gives insight into the rationale accepted by the Court:

> It should be pointed out also that the building industry has from time immemorial made use of "modular" units in constructing a building. The employment of pre-built door frames, window units, cabinet units, shower and bathtub units, etc. is nothing more than the use of modular or self-contained pre-fabricated units that fit right in with the rest of the building. These units have always been treated as building material and tax has been collected on their sale to the contractor or builder. Surely these are no different than the modular units here in question. It is therefore obvious that the Legislature did

> not exempt from tax the modular units here in question since they are, in effect, nothing more than component parts of the building – building materials sold to a contractor. Had they (the units) been combined with other units to form a building, then there would have resulted a "modular building" exempt from tax.
>
> This is emphasized by the words "sale or resale of such building." Only if the units or parts or equipment become part of a modular building does the statute apply. If, as in this case, the units and equipment are used to construct a conventional apartment complex, then the statute is not applicable and there is no "modular building" to be "not subject to tax." Therefore the sales of the units here involved must be treated as any other building materials and taxed when sold to the contractor for use in constructing a building, as provided by that sentence in §40-23-60(5), infra, immediately preceding the modular buildings exemption.

Department's Brief in *Alcoa* at 4 – 5.

In effect, the Department argued in *Alcoa* that the modular components were not used to construct modular buildings within the purview of §40-23-60(5), but rather were conventional building materials used to construct the non-modular apartment buildings. The Court accepted that position. Thus, although the Supreme Court discussed the "modular building" provision at §40-23-60(5), it distinguished between modular components used to construct modular buildings attached to realty in Alabama, the sale of which are exempt under §40-23-60(5), and modular components such as those in *Alcoa* that are incorporated into conventional buildings, which are taxable as other building materials.

The Department has interpreted *Alcoa* as holding that if a manufacturer manufactures modular building components and also contracts to "install" or attach the components to realty as a modular building in Alabama, the manufacturer owes sales tax on its cost of the materials used to manufacture the components. That is correct. But if the manufacturer instead sells the components to a dealer, who then resells the components and attaches them to realty as a modular building, the Department contends that the

manufacturer's sale of the modular components to the dealer is a taxable retail sale per *Alcoa*. I disagree.

The Department's position fails to recognize that the Supreme Court treated the modular components in *Alcoa* as mere building materials, not as components used to construct a modular building. If a manufacturer builds modular components that are attached (by the manufacturer or another party) to realty as a modular building in Alabama, the materials used to construct the components are taxable pursuant to the specific language of the sales tax and use tax "modular building" provisions at §§40-23-1(a)(10) and 40-23-60(5), respectively. The manufacturer's subsequent sale of the modular building components would not be taxable, again pursuant to the specific wording of the statutes – ", . . . and the use, sale or resale of such building shall not be subject to the tax." See again, §§40-23-1(a)(10) and 40-23-60(5).

Again, the subtle but important distinction is that the "modular building" provision does not apply to modular components that are incorporated into a conventional building, as in *Alcoa*. Rather, the provision applies only if the modular components are used to construct a modular building in Alabama. A modular building may initially consist of various separate component parts, but if the component parts are attached to comprise a modular building in Alabama, the materials used to manufacture the components are taxable, not the subsequent sale of the components.[14]

[14] I understand that this interpretation causes an administrative problem because a manufacturer may not know when it sells modular building components to a dealer in Alabama whether the components will become part of a modular building attached to realty in Alabama, which is required for the "modular building" provision to apply. The provision applies, however, if the building "ultimately" becomes attached to realty in Alabama. Consequently, it is not required that the manufacturer must also attach the building to

(continued)

In this case, the modular building components in issue were ultimately incorporated into modular buildings in Alabama. The "modular building" provision at §40-23-1(a)(10) thus applied, and the manufacturer was liable for sales tax on its cost of materials used in manufacturing the components. The manufacturer's subsequent sales of the components to the Taxpayer were exempt.

That portion of the State sales tax final assessment in issue that represents tax on the modular buildings is voided. The Taxpayer has paid $14,000 toward the final assessment amount. The Department should notify the Administrative Law Division of the adjusted State sales tax owed by the Taxpayer, if any, or whether a refund is 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, §40-2A-9(g).

Entered July 26, 2007.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
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realty. The provision also applies if the manufacturer sells the building to a dealer, who then "ultimately" attaches the building to realty in Alabama. As indicated, the problem is that the manufacturer may not know when it sells a modular building whether it will be attached to realty in Alabama or elsewhere. The manufacturer thus may not know what tax to report and pay on the sale. But a statute must be construed as written, and cannot be construed contrary to its language only because a different construction would be easier to administer.