TOWN & COUNTRY FORD, LLC 5041 FORD PARKWAY BESSEMER, AL 35022-5279,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 06-493
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Town & Country Ford, LLC ("Taxpayer") for State sales, rental, and use tax for July 1999 through September 2001. 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 13, 2006. Chris Simmons represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Taxpayer.

ISSUES

The Taxpayer sold new and used vehicles and also leased vehicles at its Ford dealership in Bessemer, Alabama during the subject period. The Department audited the Taxpayer and assessed it for State sales, use, and rental tax for the period.

Five issues are in dispute:

(1) The Taxpayer maintained a pool of lease vehicles at its dealership. It routinely allowed customers to use the lease fleet vehicles free-of-charge while the customers' vehicles were being repaired or serviced. The first issue is whether allowing a customer to use a "loaner" vehicle free-of-charge constituted a taxable retail sale pursuant to the sales tax "withdrawal" provision, Code of Ala. 1975, §40-23-1(a)(10). That section defines "retail sale" to include the withdrawal from inventory of property previously purchased at wholesale that is subsequently used or consumed by the wholesale

purchaser;

(2) The Taxpayer allowed a local sports announcer to use a new Ford vehicle as part of the announcer's compensation for being the Taxpayer's spokesman. The second issue is whether the Taxpayer is liable for lease tax on the value ($1,000 per month) attributed to the use of the vehicle;

(3) The third issue is whether the Taxpayer is liable for sales tax under the withdrawal provision on new vehicles it allowed two University of Alabama football coaches to use free-of-charge;

(4) The fourth issue is whether the Taxpayer is liable for use tax on wheel weights it used to balance tires on new vehicles that it subsequently sold, and also on vehicles that it serviced;

(5) The final issue is whether a part of the interest that has accrued on the tax due should be waived or abated because of undue Department delay.

FACTS

The Taxpayer's dealership opened in September 1999. Before opening, the Taxpayer and Ford Motor Company contracted for the Taxpayer to maintain a fleet of new Ford vehicles that it would lease to the public. The Taxpayer maintained the lease fleet vehicles separate from the new vehicles it offered for sale. The vehicles were held in the lease program from 2 to 13 months, and were leased to the public on a daily basis. They were subsequently removed from the lease fleet and sold by the Taxpayer as used vehicles. The Taxpayer collected and remitted sales tax on those sales.

The Taxpayer also sometimes allowed a customer to use a lease fleet vehicle free-of-charge while the customer's vehicle was being serviced or repaired. The customer normally used the loaner vehicle for one or two days.

Pursuant to a Ford Technical Assistance Program ("TAP"), Ford paid the Taxpayer $18 per day when the Taxpayer allowed a customer the temporary use of a loaner vehicle. The Taxpayer's records indicated that the Taxpayer also charged the customer $7 a day for the vehicle. The Taxpayer's president testified, however, that as a goodwill gesture, the customer was in most cases not required to pay the $7. The Department examiner also concluded based on interviews with several of the Taxpayer's employees that the $7 charge was only an accounting entry that the customer never paid.

The Taxpayer also contracted for a Birmingham sports announcer to be its spokesman. The contract specified that the Taxpayer would pay the announcer $2,500 a month, or the announcer could opt for $1,500 a month and the use of a new vehicle. The announcer opted for the vehicle. The vehicle remained for sale in the Taxpayer's new car inventory while being used by the announcer.

The Taxpayer also provided vehicles free-of-charge to two football coaches at the University of Alabama. Those vehicles also remained for sale in the Taxpayer's new car inventory. Several of the vehicles were sold during the subject period for more than their listed retail price.

The Taxpayer purchased wheel weights tax-free during the audit period. It subsequently used the weights to balance the tires on its new vehicles in inventory, and also on vehicles that it serviced for its customers.

On audit, the Department examiner determined that the primary purpose the Taxpayer maintained its lease fleet vehicles was to provide them as loaners to its customers.[1] He thus concluded that the Taxpayer had withdrawn and used the vehicles for its own business purposes, and consequently, that the vehicles were subject to sales tax under the withdrawal provision. He accordingly assessed the Taxpayer for sales tax on its wholesale cost of the vehicles.

Concerning the vehicles provided to the sports announcer, the examiner determined that the Taxpayer was liable for lease tax on the $1,000 monthly value attributed to the announcer's use of the vehicles.

Concerning the vehicles provided to the two football coaches, the examiner concluded that the withdrawal provision applied, and that the Taxpayer was liable for sales tax on its wholesale cost of the vehicles.

Concerning the wheel weights, the examiner conceded that use tax would not be due on those weights used to balance tires on new vehicles because they were resold with the new vehicles. He nonetheless assessed use tax on all of the wheel weights because the Taxpayer failed to keep records distinguishing between the weights used on new vehicles and those used in servicing vehicles.

Finally, concerning the accrued interest, the examiner completed his audit in November 2001. The Department entered preliminary assessments against the Taxpayer in June or July 2002. The Taxpayer timely petitioned for a review of the preliminary

[1] In reaching the above conclusion, the examiner randomly selected the month of September 2001 for analysis. That analysis indicated that the Taxpayer received rental income approximately 59 percent of the time that a lease fleet vehicle was used. The examiner thus determined that the vehicles were used as loaners 41 percent of the time.

assessments in July 2002. The Taxpayer's attorney inquired several times over the next three years concerning the petition. The Department failed, however, to schedule a conference or otherwise substantively respond to the petition until it entered the final assessments in issue on May 2, 2006.

ANALYSIS

Issue (1). Did the sales tax withdrawal provision apply to the lease fleet vehicles?

The intent of the sales tax withdrawal provision is to tax property purchased at wholesale by a retailer that could not otherwise be taxed because it was personally used and/or consumed by the retailer. "It is clear that (the sales tax withdrawal provision) was enacted to reach transactions which could not be taxed because there was a withdrawal and use or consumption by the purchaser at wholesale but no sale by him to another." *Drennen Motor Co. v. State of Alabama*, 185 So.2d 405, 411 (Ala. 1966), quoting *State v. Kershaw Manufacturing Co.*, 137 So.2d 740, 741 (Ala. 1962). The withdrawal provision applies, for example, if a grocer buys food for resale and then personally consumes some of the food. The grocer is liable for sales tax on the wholesale cost of the items consumed.

The Department argues that the withdrawal provision applied to the lease fleet vehicles because the Taxpayer primarily used the vehicles as free loaner vehicles for its customers. I disagree. Although the Taxpayer's customers were not required to pay anything for the use of the vehicles, the transactions still constituted taxable leases under Alabama law.

Pursuant to the Ford Motor TAP plan, Ford Motor paid the Taxpayer $18 a day for allowing a customer to use a vehicle. That transaction constituted a "leasing" for Alabama tax purposes, which is defined as "a transaction whereunder the person who owns or controls the possession of tangible personal property permits another person to have possession or use thereof for a consideration. . . ." Code of Ala. 1975, §40-12-220(5). The fact that the consideration, i.e., the $18, was paid by a third party, Ford Motor, is irrelevant. As discussed below, the Department examiner considered payments for the lease fleet vehicles by third parties under warranty agreements and insurance policies to be taxable lease proceeds. The same is true concerning the amounts paid by Ford Motor. The fact that the customers were not required to pay the additional $7 daily charge also is irrelevant. The transactions constituted leases, regardless of the amount of consideration paid or who paid it.

Even if Ford Motor had not paid the Taxpayer for allowing the customers to use the loaner vehicles, the vehicles still would not have been subject to the sales tax withdrawal provision based on the Alabama Supreme Court's rationale in *Montgomery Aviation Corp. v. State*, 154 So.2d 24 (Ala. 1963), and *Drennen Motor Co., supra*.

In *Montgomery Aviation*, the taxpayer purchased airplanes tax-free for resale. It also rented the airplanes before they were sold. The Department assessed the taxpayer for sales tax under the withdrawal provision when it used the airplanes for rental purposes, even though the taxpayer had paid sales tax when it later sold the airplanes at retail. The Court held that the taxpayer's use of the airplanes for rental purposes was not a taxable use or consumption of the airplanes under the withdrawal provision.

> It is not contended, nor do we find any evidence to show, that any planes were 'consumed' by rental service. In fact, as we have said, appellee's theory is that any 'withdrawal' gives rise to the sales tax, and further that after withdrawal, however short the time, if sold the taxpayer is obligated to collect another sales tax. Appellant says this is double taxation and that while permissible, is to be avoided wherever possible. Paramount-Richards Theatres v. State, 256 Ala. 515, 55 So.2d 812. Appellee says it is not double taxation, since the taxpayer would pay only the withdrawal tax and the purchaser would pay the sales tax. This is contrary to what we said in both the Helburn and Kershaw cases, which, as we have said above, is in effect that the purpose of (the sales and use tax withdrawal provisions) was to reach transactions which could not be taxed otherwise. As we have shown, there was not such withdrawal as to prevent levy of the sales tax. Moreover, according to appellee's postulate there would be double taxation if appellant paid a 'withdrawal' tax, and then upon selling the plane collected and paid another.

Montgomery Aviation, 154 So.2d at 26, 27.

In *Drennen Motor*, the taxpayer, a car dealership, purchased new vehicles for sale. It used some of the vehicles as demonstrators, which included allowing its customers and salesmen to drive the vehicles. The demonstrators at all times remained for sale in the taxpayer's new car inventory.

The Department taxed the taxpayer's use of the vehicles as demonstrators under the withdrawal provision. The Supreme Court rejected the Department's position. "We do not think that the evidence shows that the demonstrators were 'withdrawn . . . from the . . . stock' of taxpayer's new cars . . . We are not persuaded that the language expresses an intention to tax, prior to the sale, the use of a piece of merchandise as a demonstrator when the merchandise remains in stock, is available at all times for sale . . .", and is subsequently sold and sale tax collected thereon. *Drennen Motor*, 185 So.2d at 411.

The holdings in *Montgomery Aviation* and *Drennen Motor* confirm that the withdrawal provision does not apply to property used by the wholesale purchaser if the property

remains for sale in the purchaser's inventory, and is subsequently sold at retail and sales tax collected thereon. That rationale was later applied by the Administrative Law Division in *Wise Forklift v. State of Alabama*, S. 94-420 (Admin. Law Div. 6/15/1995).

The taxpayer in *Wise Forklift* maintained a rental fleet of forklifts that it purchased tax-free. It collected and remitted Alabama lease tax on the forklifts rented in Alabama. It periodically removed the forklifts from the rental fleet and sold them at retail as used forklifts. It collected and remitted sales tax on those sales.

The taxpayer sometimes also rented forklifts outside of Alabama. The Department attempted to tax the taxpayer for sales tax on those forklifts under the withdrawal provision. The Administrative Law Division held that the withdrawal provision did not apply.

> What the Department has failed to consider is that the same forklift rented outside of Alabama, and which the Department is attempting to tax in this case under the withdrawal provision, may also be subsequently rented in Alabama and rental tax paid thereon. For example, the Taxpayer may rent a forklift to a customer in Alabama for a year. Alabama rental tax would be due on the gross proceeds derived from the rental. The forklift may then be rented outside of Alabama for a two month period. The Taxpayer would collect and remit rental tax to the state in which the forklift was rented, either Georgia or Florida. The Department would also charge the Taxpayer a sales tax on the wholesale cost of the forklift. If the forklift is returned to Alabama and rented again, the Taxpayer would again be liable for Alabama rental tax on the rental gross proceeds, even though sales tax has already been paid. Finally, when the Taxpayer eventually sells the used forklift at retail, which it has done in all cases, the Taxpayer would owe another sales tax on the retail sales price charged for the forklift. I do not believe the Legislature intended to impose sales tax on a taxpayer twice on the same property. Rather, Alabama rental tax is due on the rental of the forklift in Alabama, and Alabama sales tax is due on the final sale of the forklift in Alabama. Code of Ala. 1975, §40-12-224 specifies that the subsequent sale of tangible personal property previously purchased at wholesale for rental purposes in Alabama shall be a taxable retail sale.

Wise Forklift at 4 – 5.

The above rationale applies in this case. If the Department's position is accepted, the Taxpayer would owe sales tax under the withdrawal provision when it used a lease fleet vehicle as a loaner. It would then owe lease tax when it rented the vehicle to a lease customer. It would also owe another sales tax on the same vehicle when it sold the used vehicle at retail. Sales tax may be paid on the same vehicle more than once, but only if the vehicle is sold at retail more than once. However, the Taxpayer's use of the vehicles as loaners was not a taxable retail sale under the withdrawal provision because they were not converted from their original intended purpose, i.e., their use as rental vehicles. Rather, the Taxpayer sold the subject vehicles at retail only once, as used vehicles after they were removed from the lease fleet. The following statement by the Supreme Court in *Montgomery Aviation* is on point.

> We do not have before us a situation of complete consumption of personal property, as in the Kershaw case. We do not have a case where the property cannot be taxed because there was no sale to another, to obviate which we have observed was the purpose of the act. To repeat, the State's real position is that the statute comprehends a real imposition of two taxes on the same property. With this we are unable to agree.

Montgomery Aviation, 154 So.2d at 27.

This is a difficult issue because the Alabama Court of Civil Appeals has held that the withdrawal and use of property by the wholesale purchaser may be subject to the withdrawal provision, even though the purchaser may later sell the used property at retail. *State v. Barnes*, 233 So.2d 83 (Ala. Civ. App. 1970). The taxpayer in *Barnes* sold records at retail and also owned and operated coin-operated record players. He randomly withdrew new records from inventory and used them in the coin-operated machines. He later sold the used records at retail for a reduced price. He collected sales tax on those sales. The

Department assessed the taxpayer for sales tax under the withdrawal provision on the records withdrawn and used in the record players.

The Court first held that the fact that the used records sold for substantially less than new records was irrelevant to the issue. "We do not think the fact that the prices of the used records sold were 75% and more below the prices of new records has any bearing whatsoever in this case . . . . Based on the court's opinion in *Drennen*, *supra*, the price a demonstrator sells for does not determine whether or not there has been" a use or consumption subject to the withdrawal provision.[2] *Barnes*, 233 So.2d at 85.

The Court then concluded that the withdrawal and use of the records in the coin-operated record players was a taxable use. The Court reasoned that when the taxpayer used the records in the coin-operated machines, they were no longer being held for sale in the taxpayer's new record inventory. The Court thus concluded that the separate and distinct use of the records by the taxpayer constituted a taxable withdrawal.

Montgomery Aviation and *Drennen Motors* can be distinguished from *Barnes* because in the former cases, the subject property at all times remained for sale in the taxpayers' inventory. That is, the property continued to be held for its original intended purpose. In *Barnes*, however, the records used in the record players were no longer being held for sale by the taxpayer. Rather, there was a taxable conversion or use of the records for another purpose.

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[2] The Department examiner concluded in this case that the withdrawal provision applied in large part because the lease fleet vehicles were sold as used vehicles for substantially less than the Taxpayer's new vehicles. As indicated, however, the amount the used property may sell for is irrelevant.

This case is clearly analogous with *Montgomery Aviation* and *Drennen Motors*, and not with *Barnes*. While the Taxpayer sometimes used the lease fleet vehicles as loaners, they at all times remained in the Taxpayer's rental car inventory and were held for the purpose for which they were initially purchased tax-free, i.e., for leasing purposes. Consequently, pursuant to the rationale in *Montgomery Aviation* and *Drennen Motors*, the use of the vehicles as loaners did not constitute a taxable use or consumption of the vehicles within the purview of the withdrawal provision.

Even if the lease fleet vehicles were otherwise subject to the withdrawal provision, their use by the Taxpayer in its business was specifically excepted from sales tax by Code of Ala. 1975, §40-23-2(4). That statute reads in part – ". . . provided, however, where a person subject to the (sales) tax provided for in this subdivision withdraws from his or her stock in trade any automotive vehicles . . . for use . . . in the operation of the business, there shall be paid, in lieu of the (sales) tax herein levied, a fee of five dollars ($5) per year. . . ." Consequently, even if the Taxpayer's use of the vehicles as loaners triggered the withdrawal provision, only the $5 annual fee would be owed "in lieu of the tax levied herein," i.e., the sales tax that would otherwise be due under the withdrawal provision. The $5 fee does not apply in this case, however, because, as discussed, the loaner vehicles were being leased, and not personally used by the Taxpayer in its business.[3]

[3] For a discussion of the $5 fee levied at §40-23-2(4), see *State of Alabama v. Montgomery Aviation, Inc.*, S. 86-121 (Admin. Law Div. 7/10/1986).

Issue (2). Were the vehicles provided to the sports announcer subject to lease tax?

The Department argues that the Taxpayer is liable for lease tax on the $1,000 attributed by the Taxpayer as the monthly value of the vehicles provided to the sports announcer. I agree.

As previously discussed, "leasing" is defined for Alabama lease tax purposes as a "transaction whereunder the person who owns . . . tangible personal property permits another to have possession or use thereof for a consideration. . . ." Section §40-12-220(5). The announcer's possession and use of the Taxpayer's vehicles constituted a lease as defined above, the consideration received by the Taxpayer being the $1,000 the Taxpayer saved by allowing the announcer to use the vehicles. That $1,000 was the "value proceeding or accruing from the leasing" of the vehicles, and thus constituted taxable "gross proceeds" for lease tax purposes. Code of Ala. 1975, §40-12-220(4). The Taxpayer was also otherwise in the business of leasing tangible personal property, as required for the lease tax to apply. Code of Ala. 1975, §40-12-222.

The Taxpayer mistakenly failed to file returns and pay lease tax during the subject period. The examiner thus correctly assessed the Taxpayer for lease tax on its lease proceeds, including the $1,000 a month attributed to the vehicles used by the announcer, and also the insurance and warranty proceeds it received from third parties concerning the leased vehicles.

The examiner failed, however, to include in taxable lease proceeds the $18 per day paid by Ford Motor for the loaner vehicles under the TAP plan. That is understandable

based on his position that the vehicles were being used by the Taxpayer, and not leased. As discussed, however, the transactions were leases, and the $18 amounts should also be included in taxable lease proceeds.[4]

Issue (3). Were the vehicles provided to the coaches subject to the withdrawal provision?

The Issue (1) analysis concerning the withdrawal provision also applies to this issue. The vehicles provided to the coaches remained in the Taxpayer's new car inventory, and were at all times held for sale by the Taxpayer. The vehicles were also in some cases sold for more than the sticker price, although as discussed, the amount the used property later sells for is irrelevant. In any case, the Taxpayer collected and remitted sales tax to the Department when it sold the vehicles at retail. As in *Montgomery Aviation*, "[w]e do not have a case where the property cannot be taxed because there was no sale to another. . . ." *Montgomery Aviation*, 154 So.2d at 27. Because the coaches' vehicles were at all times held for sale by the Taxpayer, the withdrawal provision did not apply based on the rationale of *Montgomery Aviation* and *Drennen Motors*..

The Taxpayer's use of the vehicles by providing them to the coaches was, however, subject to the $5 annual fee levied at §40-23-2(4). The vehicles improperly carried dealer tags, and they were not being used as true demonstrators, but §40-23-2(4) does not limit the $5 fee to only vehicles used as demonstrators. Rather, it applies to any vehicle used

[4] If the Taxpayer had not received the $18 or any other amount for allowing a customer to use a loaner vehicle, then obviously the transaction would not have been a lease. But the vehicle still would not have been subject to the withdrawal provision for the reasons explained above.

"in the operation of a business. . . ." Allowing the coaches to use the vehicles created some goodwill for the Taxpayer, and having the coaches drive the vehicles with Town & Country dealer tags on them constituted at least some beneficial advertising.

Issue (4). Did the Department correctly tax all of the wheel weights?

The Taxpayer purchased wheel weights in bulk tax-free. It used some of the weights to balance tires on new vehicles it sold at retail, and some on vehicles that it serviced. The weights used in servicing vehicles were used or consumed by the Taxpayer in performing that service, and thus subject to use tax. The Taxpayer is correct that the weights used to balance tires on new vehicles were not subject to use tax because they were sold with the new vehicles, and sales tax collected thereon. As indicated, however, the Taxpayer failed to maintain records distinguishing how the weights were used.

A taxpayer subject to sales tax is required to maintain records showing its taxable and non-taxable transactions. Code of Ala. 1975, §40-23-9; see also, Code of Ala. 1975, §40-2A-7(a)(1). If such records are not maintained, the taxpayer must suffer the penalty of noncompliance and pay sales tax on the transactions not accurately recorded as exempt or non-taxable. *State v. Ludlum*, 384 So.2d 1089 (Ala. Civ. App.), cert denied, 384 So.2d 1064 (Ala. 1980). The examiner thus correctly assessed the Taxpayer on its wholesale cost on all of the wheel weights.

Issue (5). The interest waiver issue.

The Taxpayer claims that the interest that has accrued on its liabilities should be abated because the Department improperly delayed in entering the final assessments in issue. I agree. The Department failed to act on the Taxpayer's petition for review for over

three and a half years. Some relief is justified.

The Department's Taxpayer Advocate is authorized to abate interest that has accrued because of undue Department delay. Code of Ala. 1975, §40-2A-4(b)(1)c. A copy of this Opinion and Preliminary Order has been submitted to the Taxpayer Advocate for the purpose of determining what portion of the accrued interest should be abated.

The Taxpayer Advocate should notify the Administrative Law Division and the Department attorney of his findings. The Department should then recompute the Taxpayer's liabilities as indicated herein, including the accrued interest not abated by the Advocate, and notify the Administrative Law Division of the adjusted amounts due. A Final 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 April 16, 2007.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
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