DIVERSIFIED SALES, INC. P.O. BOX 560 TRUSSVILLE, AL 35173-0560,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 06-937
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Diversified Sales, Inc. ("Taxpayer") for local use tax for January 1997 through December 1999. 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 May 30, 2007. Blake Madison represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

ISSUES

The Taxpayer contracted during the period in issue to furnish and install carpet and other flooring materials for customers in various municipalities in Alabama in which it did not have salesmen or a retail outlet. It withdrew the materials from its warehouse located in an unincorporated area of Jefferson County. It then hired independent contractors that delivered and installed the materials at the job sites in the municipalities. Three issues are involved.

Issue (1). Is the Taxpayer liable for municipal use tax in the municipalities where the flooring materials were installed?

Issue (2). Did the Taxpayer have the required nexus with the municipalities so as to be subject to the municipalities' taxing jurisdictions?

Issue (3). If municipal use tax is due, should a part of the accrued interest be abated because of undue Department delay?

PROCEDURAL HISTORY

In mid-2000, the Department entered a preliminary assessment of municipal sales tax against the Taxpayer that primarily involved tax on the furnish and install contracts discussed above. The Taxpayer petitioned for a review of the preliminary assessment, and an informal conference was conducted in October 2000. The Department subsequently entered a local sales tax final assessment against the Taxpayer in May 2002.

The Taxpayer appealed the final assessment to the Administrative Law Division. The Administrative Law Division ruled that the Department had incorrectly assessed the Taxpayer for local sales tax on the furnish and install contracts instead of local use tax. *Diversified Sales, Inc. v. State of Alabama*, S. 02-458 (Admin. Law Div. O.P.O. 3/13/2003). The municipal sales tax assessed on the materials used on the furnish and install transactions was thus dismissed. [1]

In March 2004, the Department entered a preliminary assessment of local use tax against the Taxpayer concerning the same furnish and install transactions on which it had previously assessed the Taxpayer for local sales tax. The Taxpayer timely petitioned for a review in April 2004. The Department failed to respond to the petition until May 2006, when it scheduled a hearing for July 2006. The Department subsequently entered the local use tax final assessment in issue in August 2006.

[1] The Taxpayer was held liable for a small amount of municipal sales tax ($584.84, including interest) that the Taxpayer had collected from its customers but failed to remit to the Department. *Diversified Sales, Inc. v. State of Alabama*, S. 02-458 (Admin. Law Div. 3/8/2004).

FACTS

The Taxpayer conducts business as Don's Carpet One. It sells carpet and other flooring materials at its retail outlets in Vestavia and Hoover, Alabama. It also maintains a warehouse in an unincorporated area in Jefferson County.

The Taxpayer contracted with customers during the period in issue to furnish and install flooring materials in municipalities other than Vestavia and Hoover. The Taxpayer did not have retail outlets or salesmen soliciting orders in the municipalities, although the Taxpayer's employees sometimes visited a job site to measure before installation or inspect the installed materials.

The Taxpayer withdrew the needed flooring materials from its warehouse in Jefferson County. It then hired independent contractors to deliver and install the materials in the municipalities. The Taxpayer charged its customers State and Jefferson County sales tax on the materials used on the furnish and install contracts. It did not charge municipal sales tax because the Taxpayer's warehouse, the point of withdrawal, is not in a municipality. It also did not collect and remit municipal use tax on the transactions to the municipalities where the materials were installed.

The Department audited the Taxpayer and determined that the Taxpayer had nexus with and owed municipal use tax in the municipalities in which the flooring materials had been installed. It assessed the Taxpayer accordingly (see procedural history above).

ANALYSIS

Issue (1). Is Municipal Use Tax Due on the Transactions?

The Taxpayer argues that the taxable event occurred concerning the furnish and install contracts when the flooring was withdrawn from inventory at its warehouse in Jefferson County. It contends that because the warehouse is not located in a municipality,

municipal tax is not due on the transactions. It cites three Administrative Law Division cases in support of its position, *American Carpet Sales, Inc. v. State of Alabama*, S. 97-208 (Admin. Law Div. 4/9/1999); *State of Alabama v. James Carpets of Huntsville, Inc.*, S. 89-174 (Admin. Law Div. 9/21/1993); and *State of Alabama v. Lane Carpet Co.*, S. 89-149 (Admin. Law Div. 4/9/1993). It also cites Dept. Reg. 810-6-1-.30, which is titled "Carpeting and Other Floor Coverings." The Taxpayer claims that paragraph (3) of the regulation "specifically provides that 'State and local taxes are due on withdrawals at the time and place of the withdrawal of the materials from inventory.'" Taxpayer's Post-Hearing Reply Brief at 4.

The Taxpayer is correct that a taxable retail sale occurs under the sales and use tax "withdrawal" provisions when and where property previously purchased at wholesale is withdrawn from inventory for use on a furnish and install contract. See, Code of Ala. 1975, §40-23-1(a)(10), concerning sales tax, and Code of Ala. 1975, §40-23-60(5), concerning use tax. Consequently, State and any applicable municipal sales tax is due at that time. If the place of withdrawal is either not in a municipality, as in this case, or in a municipality that does not levy a sales tax, then no municipal sales tax is due on the withdrawal. It does not follow, however, that a municipal use tax cannot later be assessed if the property is subsequently used, stored, or consumed in a municipality in Alabama that has levied a municipal use tax. [2]

The above Administrative Law Division cases cited by the Taxpayer all involved sales tax, and correctly concluded that sales tax was due at the time and place of withdrawal. See also, *City of Huntsville v. City of Madison*, 628 So.2d 584 (Ala. 1993) (municipal sales tax owed in municipality in which property was withdrawn from inventory,

[2] The rationale applies equally concerning county sales and use tax.

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not in municipality where property was later used); and *Home Tile & Equipment Co. v. State*, 362 So.2d 236 (Ala. Civ. App. 1978), cert. denied, 362 So.2d 239 (Ala. 1978) (Alabama sales tax due on carpet withdrawn from inventory in Alabama and installed in Mississippi). The above cases do not hold, however, that either State or local use tax is due when property is withdrawn from inventory. Rather, the withdrawal of property from inventory for personal use or consumption only triggers the sales tax. Use tax is triggered when and where the property previously purchased at retail (withdrawn from inventory) is later used, stored, or consumed.

The Taxpayer also misquotes paragraph (3) of Reg. 810-6-1-.30. The Taxpayer asserts that the regulation states that "State and local taxes are due on withdrawals. . . ." See again, Taxpayer's Post-Hearing Reply Brief at 4. The paragraph actually reads that "State and local sales taxes are due on withdrawals. . . ." It does not state that State and local use tax is due on withdrawals, nor should it. Rather, as discussed, use tax is due when and where the property is later used or consumed.

Use tax is levied on all property purchased at retail that is later used or consumed in Alabama and any local jurisdictions in Alabama that have enacted a local use tax. The property would, however, be exempt from State use tax if it was sold at retail in Alabama, and State sales tax was paid at that time. See, Code of Ala. 1975, §40-23-62(1).[3]

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[3] Section 40-23-62(1) exempts from the Alabama use tax all property on which Alabama sales tax was previously paid. The exemption illustrates that the use tax levy applies to all property purchased at retail, both in and outside of Alabama, that is later used, stored, or consumed in Alabama. As a practical matter, however, the use tax generally applies only to property purchased outside of Alabama because Alabama sales tax is generally paid on property purchased in Alabama, in which case the property is exempted from Alabama use tax by §40-23-62(1). But for the exemption, property purchased at retail in Alabama and also used in Alabama would technically be subject to both the Alabama sales tax and use tax levies. This was recognized by the Alabama Supreme Court in *Paramount-Richards Theatres, Inc. v. State*, 55 So.2d 812 (Ala. 1951):

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Likewise, if municipal sales tax is paid to an Alabama municipality under a requirement of law when the property is purchased at retail, municipal use tax would not be owed if the property is later used or consumed in another municipality under Alabama's local tax "anti-whipsaw" statute, Code of Ala. 1975, §40-23-2.1. That statute provides in substance that no more than one county and one municipal sales or use tax should be paid in Alabama on the same property or transaction.

If, however, municipal sales tax is not paid on the property at the time of sale, municipal use tax would be due if the municipality in which the property is later used or consumed has enacted a municipal use tax. The above applies regardless of whether the municipal sales tax was not paid because (1) the retailer had improperly failed to collect a duly enacted municipal sales tax, (2) the municipality in which the sale occurred had not enacted a municipal sales tax, or (3) the sale did not occur in a municipality, as in this

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> The technical means of confining the use tax to interstate sales or sales (purchases) made outside of the state for use in the state, is accomplished by exempting from the provisions of the use tax any property sold under such circumstances as would make the sale taxable under the provisions of the Sales Tax Act. In other words, the Use Tax Act is drafted in such manner as to impose a use tax upon the use of tangible personal property within the state, at the same rate as the sales tax. In order to limit the use tax to interstate transactions, the Act is so worded as to exempt from the measure of the tax all retail sales of tangible personal property made within the state. Sec. 789, Title 51, Code 1940 (now §40-23-62(1)). But for this provision, the Use Tax Act would have the effect of imposing an additional tax in the same amount as imposed by the Sales Tax Act. In this way, retail sales made within the state would be subjected to a double tax.

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

When *Paramount-Theatres* was decided, the exemption at §40-23-62(1) applied to property subject to Alabama sales tax. The exemption was amended by Act 97-301 in 1997 so that property is now exempt from Alabama use tax only if Alabama sales tax was actually paid on the property. See generally, *Carlisle Engineered Products, Inc. v. State of Alabama*, U. 99-524 (Admin. Law Div. 4/17/2000).

case.

Municipal sales tax was not due in this case because the retail sales occurred at the Taxpayer's warehouse in an unincorporated area of Jefferson County. Because municipal sales tax was not paid, the subsequent use or consumption of the flooring materials in the various municipalities was not exempted from those municipalities' use taxes by the anti-whipsaw statute. The flooring materials were thus subject to municipal use tax in those municipalities.

The Taxpayer concedes that municipal use tax may be due, but contends that only the consumers, its customers, should be liable for the tax. "If any tax can be argued to be due to the municipalities on these transactions, it would have to be consumer use tax from the customers located in their jurisdictions." Taxpayer's Post-Hearing Reply Brief at 6. I disagree.

Municipal sales and use taxes in Alabama must follow the State sales and use tax statutes, regulations, procedures, etc., except concerning the rate. Code of Ala. 1975, §11-51-200, et seq. The Alabama use tax, and thus every municipal use tax, is levied against the consumer. Code of Ala. 1975, §40-23-61(d). And when collected from the consumer, the tax is commonly referred to as a "consumer use tax."

Alabama law also requires, however, that the seller of the property must collect the use tax and remit it to the Department. Code of Ala. 1975, §§40-23-66, 40-23-67, and 40-23-68. Tax collected by the seller and remitted to the Department is known as "sellers use tax." In this case, the Taxpayer, as the "seller" of the flooring materials, was thus required to collect the municipal use tax from its customers and remit it to the Department, as the collecting agent for the municipalities.[4]

[4] This assumes, of course, that the Taxpayer had nexus with the municipalities, and was
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Finally, the Taxpayer relies on certain dicta in *James Carpets* in support of its position. That reliance is misplaced. The taxpayer in *James Carpets* was located in Morgan County but outside the City of Decatur. It withdrew carpet from its inventory in the County and installed the carpet for customers in Decatur. It paid Decatur sales tax on those transactions. The Department subsequently assessed the taxpayer for Morgan County sales tax under the withdrawal provision.

The Administrative Law Division held that the taxpayer was liable for the County sales tax because the taxable event was the withdrawal of the carpet in Morgan County.[5] The Final Order also stated in dicta that "the [t]axpayer should not have paid City of Decatur sales tax because the taxable event occurred when the carpet was withdrawn from the [t]axpayer's inventory outside of Decatur. Unfortunately, the statute of limitations for obtaining a refund of Decatur tax may have expired." *James Carpets* at 4.

Relying on the above statement, the Taxpayer asserts that the Administrative Law Division held that "the taxpayer should not pay City of Decatur tax because the taxable event occurred when the carpet was withdrawn from the taxpayer's inventory outside the City of Decatur. If the Department's position in the present case is correct under Alabama law, this Court would have stated instead that a use tax was due to Decatur. Instead, this Court stated that no Decatur tax was due." Taxpayer's Post-Hearing Reply Brief at 8.

The Administrative Law Division did not state in *James Carpets* that no Decatur tax was due. It only held that Decatur sales tax was not due because the retail sales occurred

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thus subject to the municipalities' taxing jurisdictions. The nexus issue is discussed below.

[5] The Administrative Law Division also held that the anti-whipsaw statute did not apply because §40-23-2.1 does not prohibit a county (Morgan County) and a municipality (Decatur) from taxing the same property.

outside of Decatur. The taxpayer thus erroneously paid sales tax to Decatur. The Administrative Law Division perhaps should not have opined that the taxpayer was entitled to a refund because Decatur use tax was in fact due, and Decatur could have assessed the taxpayer for use tax to offset the sales tax refund due. And as in this case, the anti-whipsaw statute, §40-23-2.1, also would not have prevented Decatur from assessing a municipal use tax because the taxable event for sales tax purposes, i.e., the withdrawal, was in an unincorporated area in Morgan County.

Issue (2). Nexus.

The Taxpayer argues that even if the flooring materials were subject to municipal use tax, it did not have sufficient contact, or nexus, with the municipalities to be subject to the municipalities' taxing jurisdictions. The Taxpayer cites *Yelverton's, Inc. v. Jefferson County*, 742 So.2d 1216 (Ala. Civ. App. 1997) cert. quashed 742 So.2d 1224 (Ala. 1999), in support of its position. In *Yelverton's*, the Court of Civil Appeals relied on Dept. Reg. 810-6-3-.51(2) in holding that a taxpayer located outside of a local taxing jurisdiction in Alabama has nexus with the local jurisdiction for sales and use tax purposes only if it has salesmen soliciting sales in the local jurisdiction.

The Administrative Law Division recently addressed the holding in *Yelverton's* in *Crown Housing Group, Inc. v. State of Alabama*, S. 06-399 (Admin. Law Div. O.P.O. 7/26/2007). The primary issue in *Crown Housing* was whether a mobile home retailer was liable for local tax on mobile homes sold to customers in various local taxing jurisdictions in Alabama. Citing *Yelverton's*, the taxpayer (and amici) argued that the taxpayer did not have nexus with the various local jurisdictions because the taxpayer did not have a place of business or salesmen soliciting in the jurisdictions.

In deciding *Crown Housing*, I respectfully disagreed with the *Yelverton's* Court's due

process nexus analysis. I nonetheless held that *Yelverton's* was controlling, and consequently, that the mobile home dealer did not have nexus with the various local jurisdictions because it did not have an outlet or salesmen in the jurisdictions. The relevant portion of the Order in *Crown Housing* is quoted below.[6]

> 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).
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> 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]
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> 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.
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> 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.
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[6] The footnotes in the *Crown Housing* quote are listed at the end of this Order as endnotes.

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.

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 1911. 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 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.
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> 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]
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> 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 or county in which it does not have a physical business location or salesmen soliciting in the jurisdiction.[11]

Crown Housing at 4 – 5, 9 – 15.

In this case, the Taxpayer hired independent contractors to deliver and install the flooring materials in the various municipalities. The U.S. Supreme Court has held that a taxpayer that conducts business in a taxing jurisdiction through independent contractors instead of employees has still established nexus with the jurisdiction. *Scripto v. Carson*, 80 S.Ct. 619 (1960). By contracting to furnish and install the flooring materials, and then directing the independent contractors to install the materials in the municipalities, the Taxpayer clearly availed itself of the economic markets in the municipalities and had fair warning that it was subject to tax in the municipalities. The Taxpayer thus clearly had due process nexus with the municipalities pursuant to *Quill*.

Nonetheless, as stated in *Crown Housing*, "*Yelverton's* is still the law of the land and must be followed." *Crown Housing* at 14. Unless and until the Department amends Reg. 810-6-3-.51(2) to conform to the current due process nexus standard set out in *Quill*, or until *Yelverton's* is overruled on the issue, a taxpayer has nexus for local sales and use tax purposes in Alabama only if the taxpayer has a physical place of business or salesmen soliciting sales in the local jurisdiction.

The Taxpayer in this case did not have a retail outlet in the municipalities. An employee of the Taxpayer may have visited a municipality to measure and/or inspect the installed materials, but the employee was not a salesman soliciting orders in the municipality, as required for nexus per *Yelverton's* and Reg. 810-6-3-.51(2). Consequently, because the Taxpayer did not have nexus with the municipalities, as construed by the Court of Civil Appeals in *Yelverton's*, the final assessment in issue must be voided.[7]

Issue (3). The Waiver of Interest.

This issue is pretermitted by the holding in Issue (2) above.

The final assessment in issue is voided. Judgment is entered accordingly.

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[7] As discussed, the final assessment initially entered against the Taxpayer was dismissed because the Department incorrectly assessed the Taxpayer for local sales tax instead of local use tax. The Department subsequently re-assessed the Taxpayer by entering the final assessment in issue in this case. Unfortunately, the final assessment is for "Local Tax." As stated in the prior appeal, Dept. Reg. 810-14-1-.15(3)(c) requires the Department to identify on a final assessment the type of tax being assessed, i.e., local sales tax, local use tax, etc. "The type of tax assessed by the Department is not a mere technicality." *Diversified Sales*, S. 02-458 at 5. Consequently, it could be argued that the final assessment in issue is defective because it fails to specify that the tax involved is local use tax.

The final assessment also identifies the tax period as "12/31/1999." That could be construed as the month or year ending on December 31, 1999, but technically the assessment is for a single day, the last day of 1999. Reg. 810-14-1-.15(3)(d) also requires that a final assessment must include the tax period involved, which also is not a mere technicality. Consequently, if the final assessment was otherwise valid, the Taxpayer would only be liable for the tax due on transactions that occurred on 12/31/1999.

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

Entered September 4, 2007.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: Margaret Johnson McNeill, Esq.
Blake A. Madison, Esq.
Joe Cowen
Mike Emfinger

Footnotes from *Crown Housing* quote.

[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).

[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.

[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.

[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*.

[F]