COHENS ELECTRONICS AND APPLIANCES, INC. 2515 EASTERN BLVD. MONTGOMERY, AL 35403-3206,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 10-989
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Cohens Electronics and Appliances, Inc. ("Taxpayer") for local tax for October 2005 through September 2008. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. The parties submitted the case on stipulated facts and briefs. Blake Madison represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

FACTS

The Taxpayer sells consumer electronics and appliances at its retail store in the City of Montgomery, Alabama. The Taxpayer does not have a store or other physical facility outside of the City of Montgomery.

The Taxpayer has repairmen that make service calls and repair the electronics and appliances previously sold to its customers, including those customers that reside outside of the City of Montgomery and Montgomery County. The repairmen are sometimes required to provide a new part or parts as needed to complete the repairs. In those cases, the Taxpayer issues the customer an invoice that separately states the charge for the repair part or parts and the charge for the repair labor. The Taxpayer does not charge the customer sales tax on the parts.

The Department audited the Taxpayer for local sales and use tax for the period in issue. It determined that the Taxpayer was selling at retail the repair parts that its repairmen provided to its customers in six local taxing jurisdictions whose taxes were being administered by the Department. The Taxpayer had previously paid local sales tax to the City of Montgomery and Montgomery County on its cost of the repair parts.

The Department entered a preliminary assessment for "local tax" against the Taxpayer on June 1, 2009. The Taxpayer filed a petition for review with the Department concerning the preliminary assessment on June 29, 2009. The Department conducted a hearing on the petition on August 4, 2009. It subsequently entered the final assessment in issue for "Local Tax" on September 16, 2010. Attached to the Taxpayer's copy of the final assessment was a billing summary which identified the six local jurisdictions for which the tax was being assessed, and also the type of tax being assessed as "Seller's Use Tax." This appeal followed.

ISSUES

The Taxpayer has raised five issues on appeal: (1) It first argues that it did not have sufficient contact or nexus with the six local jurisdictions so as to be subject to the taxing authority of the jurisdictions, citing the Alabama Court of Civil Appeals' decision in *Yelverton's, Inc. v. Jefferson County, Alabama*, 742 So.2d 1216 (Ala. Civ. App. 1997), cert. denied 742 So.2d 1224 (Ala. 1999); (2) It also contends that it properly paid local sales tax on the repair parts to the City of Montgomery and Montgomery County under the sales tax "withdrawal" provision at Code of Ala. 1975, §40-23-1(a)(10), citing *City of Montgomery v. City of Madison*, 628 So.2d 584 (Ala. 1993); (3) It next asserts that the preliminary and final assessments in issue are defective because they failed to specify the type of tax

being assessed; (4) It argues that the final assessment is invalid because it violated the "anti-whipsaw" statute, Code of Ala. 1975, §40-23-2.1(c); and (5) It claims that if the final assessment is affirmed, some accrued interest should be waived due to undue delay by the Department, citing Code of Ala. 1975, §40-2A-4(b)(1)c.

ANALYSIS

(1) The Nexus Issue.

The bellweather case in Alabama concerning the authority of a county or municipality to assess its local sales and/or use tax against a retailer without a physical place of business in the jurisdiction is *Yelverton's*. Succinctly stated, the Alabama Court of Civil Appeals held in *Yelverton's* that a retailer without a physical store located in a local taxing jurisdiction in Alabama has nexus with, and is thus subject to the jurisdiction's taxing authority, only if it has salesmen soliciting sales in the jurisdiction, citing Department Reg. 810-6-3-.51(2).

The Administrative Law Division has decided two cases involving the local jurisdiction nexus issue since *Yelverton's* was finally decided in 1999. In *Crown Housing Group, Inc. v. State of Alabama*, Docket No. S. 06-399 (Admin. Law Div. O.P.O. 7/26/2007), the issue was whether an Alabama mobile home retailer was liable for local sales tax when it sold and delivered mobile homes into municipalities and counties in Alabama in which the retailer did not have a physical place of business or salesmen soliciting sales. In *Diversified Sales v. State of Alabama*, Docket No. S. 06-937 (Admin. Law Div. 9/4/2007), the issue was whether an Alabama carpet retailer was liable for local tax in those municipalities and counties in Alabama where it delivered and installed carpet but did not have a physical place of business or salesmen soliciting sales.

Relying on *Yelverton's*, the Administrative Law Division held in both *Crown Housing* and *Diversified Sales* that the retailers did not have nexus with the municipalities and counties in issue, and thus were not subject to the taxing authority of those local jurisdictions. The Final Order in *Diversified Sales* reads in pertinent part as follows (footnotes omitted):

> 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.
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> 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.
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> 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.
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> > The Court (of Civil Appeals) next addressed (in *Yelverton's)* 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.

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. However, I respectfully disagree with the decision for the reasons explained below.

* * *

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. *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.

* * *

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.

* * *

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.

Crown Housing at 4 – 5, 9 – 15.

Following the prior holding in *Crown Housing*, the Administrative Law Division also held in *Diversified Sales* that while the carpet retailer clearly had due process nexus with the local jurisdictions under *Quill*, *Yelverton's* still controlled. Consequently, because the retailer did not have a physical business location or salesmen soliciting sales in the local jurisdictions, it did not have nexus with the jurisdictions.

> 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*.
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> 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.

Diversified Sales at 13 – 14.

In this case, the Taxpayer's repairmen visited the six local jurisdictions in issue to perform repairs. The stipulated facts do not show the number of repairmen that the Taxpayer employed during the period in issue, or the number and frequency of visits they made to the various local jurisdictions. That latter question – the number and frequency of visits made by the repairmen to the local jurisdictions – would be relevant in deciding if the

Taxpayer had sufficient activity in or contact with the local jurisdictions to constitute due process nexus under *Quill*.[1]

But the number and frequency of the visits the repairmen made to the local jurisdictions is irrelevant under *Yelverton's* because there is no evidence, and no claim by the Department, that the repairmen in any way acted as salesmen and solicited sales on behalf of the Taxpayer. Rather, it is presumed that the Taxpayer's customers in the local jurisdictions contacted the Taxpayer in Montgomery about the need for repairs, and the Taxpayer then scheduled a visit by a repairman. Without evidence that the repairmen solicited sales for the Taxpayer in the various local jurisdictions, it cannot be found that the Taxpayer had nexus with the jurisdictions pursuant to *Yelverton's* and Reg. 810-6-3-.51(2).

In *Yelverton's*, the Court of Civil Appeals as much as invited the Department to amend Reg. 810-6-3-.51(2) to conform to the *Quill* due process nexus standard – "The (*Quill* due process) inquiry is whether the retailer's contacts with the (taxing jurisdiction) gives the retailer 'fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign.' (cites omitted) 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 1221 at n. 3. To date, the Department has failed to amend the regulation.[2] Consequently, the regulation as it read and was

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[1] If the Taxpayer had initially delivered some of the electronics and appliances to the customers in the local jurisdictions in its own vehicles, those contacts would also be relevant in determining if the Taxpayer had nexus with the jurisdictions. As discussed in detail below, I submit that if a retailer with a retail outlet outside of a local jurisdiction routinely sells and delivers goods to customers in the jurisdiction, the retailer is doing business in and has nexus with the jurisdiction.

[2] The Department could easily amend Reg. 810-6-3-.51(2) by adopting the *Quill* "fair

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interpreted in *Yelverton's* still controls on the issue of local jurisdiction nexus. Because the Taxpayer did not have nexus with the local jurisdictions in issue pursuant to Reg. 810-6-3-.51(2), the final assessment in issue must be voided. Judgment is entered accordingly.

The remaining issues are pretermitted by the above holding. I will nonetheless address those issues in case a reviewing court disagrees with the above holding concerning the nexus issue.

(2) Where did the Taxable Sales Transactions Occur?

The Taxpayer contends that it correctly paid local sales tax on the repair parts to the City of Montgomery and Montgomery County when it withdrew the parts from its inventory in those jurisdictions, citing the sales tax "withdrawal" provision at Code of Ala. 1975, §40-23-1(a)(10). I disagree.

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warning" due process nexus standard applicable in intrastate transactions. It could also provide retailers with guidelines by formulating a "bright-line" threshold of activity in a local jurisdiction above which the retailer would have nexus, and thus be required to report and remit local sales and/or use tax to the jurisdiction. The threshold could be a minimum dollar sales amount in a given month, or a minimum number of visits by the retailer's employees or agents in the month, or a combination, plus other factors. Once a retailer met the minimum nexus threshold in a month, the retailer could thereafter be required to continue reporting and remitting sales and/or use tax to the local jurisdiction for a reasonable period. As long as the minimum threshold complied with the *Quill* due process nexus standard and was reasonable, it would be affirmed. See generally, *Ex parte White (Re Shellcast Corporation v. White)*, 477 So.2d 422 (Ala. 1985), holding that a Department regulation will be affirmed if reasonable and not contrary to a statute.

The §40-23-1(a)(10) withdrawal provision applies when a retailer purchases tangible personal property at wholesale and subsequently withdraws the property from inventory and uses or consumes the property for its own purposes, without selling it to another. See generally, *City of Huntsville v. City of Madison*, 628 So.2d 584 (Ala. 1993), and cases cited therein.

The withdrawal provision does not apply in this case because the Taxpayer was not using or consuming the repair parts for its own purposes. Rather, it was selling the parts to its customers in conjunction with the repair services. Alabama law is clear that when a repairman transfers repair parts to the customer when making repairs, the repairman is selling the parts to the customer at retail.[3] If the repairman separately itemizes the taxable parts and the non-taxable labor or service charges on an invoice, only the parts are taxable.

Dept. Reg. 810-6-1.95, entitled "Materials Used in Repairing," reads in pertinent part as follows:

> (1) Materials used in repairing, for tax purposes, fall into the following classes:
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> (a) Materials which pass to the repairman's customer and which do not lose their identity when used by the repairman and which are a substantial part of the repair job (such as auto repair parts, radio tubes, and condensers) are sold at retail by the repairman. He must collect and report sales tax on such sales, including tax on the service incidental thereto. He may, however, if making a separate agreement to sell the repair parts and to perform the labor and service required, collect and remit the tax only upon the price of the parts if his records and his invoices clearly show a

[3] An exception involves materials such as paint, solder, etc., that are substantially used up or consumed by the repairman when making the repairs. In those cases, the materials are being used or consumed by the repairman, and are taxable when and where they are purchased by the repairman. Dept. Reg. 810-6-1-.95(1)(b).

> separation of the amounts received from sales and parts and from rendering service.

Dept. Reg. 810-6-2-.78 entitled "Repairs, Machine," also provides in pertinent part in paragraph (5):

> When both materials and services are used in repairing machines taxed at the (4 percent) general rate and when there is no separation in the billing, both materials and services are to be included in the measure of tax to be paid . . . When the materials are shown separately on the invoice, the materials only are taxable.

The above regulations are directly on point in this case. The Taxpayer's repairmen made service calls in the local jurisdictions in issue and sold the repair parts to the customers in those jurisdictions in conjunction with the repairs. Title passed, and the sales were thus closed, in those jurisdictions.[4]

The Department assessed the Taxpayer for local use tax on the repair parts sold in the six local jurisdictions. As explained below, however, local sales tax also applied and could have been assessed on the retail sales closed in the jurisdictions.

The Court of Civil Appeals held in *Yelverton's* that the applicable Jefferson County tax on the transactions in issue was use tax, not 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." *Yelverton's*, 742 So.2d at 1220. I respectfully disagree with the Court's conclusion.

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[4] Even if the withdrawal provision applied, which it did not, it could be argued that if the repairmen maintained an inventory of repair parts in their trucks or vans, then the taxable withdrawals may have occurred in the local jurisdictions when the repairmen withdrew the needed parts from their vehicles in the jurisdictions. There is no evidence, however, showing whether the repairmen carried an inventory of parts in their vehicles, or whether they obtained the required parts from a central inventory in Montgomery, or both.

Yelverton's was clearly engaged in the business of making retail sales that were closed in Jefferson County. The Jefferson County sales tax was thus applicable, notwithstanding that Yelverton's did not have a retail store in the County. The Administrative Law Division addressed the local sales tax versus local use tax issue in *Crown Housing*, as follows (footnotes omitted):

> 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. 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.
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> 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*.
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> > 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. (The fact that an out-of-state retailer may not have Commerce Clause nexus with a state is irrelevant to the issue of whether the retailer is in the business of making sales in the state.) 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. The Court concluded that the sale in Alabama was subject to Alabama sales tax, and thus exempt from Alabama use tax.

> 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.[5]

> 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.

Crown Housing at 5 – 8.

Justice See, in voting to quash the writ of certiorari in *Yelverton's*, cited the Act that authorized the Jefferson County sales and use taxes, Act 405, Acts of Alabama 1967, in support of the assertion that only a retailer with a physical place of business in the County

[5] The airplane in *Dees* was exempt from Alabama use tax because when *Dees* was decided in 1976, Code of Ala. 1975, §40-23-62(1) exempted from the Alabama use tax any property that when sold was "subject to" the Alabama sales tax. A loophole in Alabama law was later discovered concerning sales in Alabama by out-of-state sellers that were "subject to" the Alabama sales tax, but on which the sales tax could not be collected because the out-of-state seller did not have nexus with Alabama. In that case, neither Alabama sales tax nor the use tax could be collected on the transactions. The loophole was identified by the Administrative Law Division in *Blue Grass Bit, Inc. v. State of Alabama*, Docket No. U. 96-294 (O.P.O. 1/16/1997). The Alabama Legislature soon thereafter statutorily closed the loophole by amending §40-23-62(1) so as to exempt from the Alabama use tax only property on which the Alabama sales tax was actually paid. See, Act 97-301. Consequently, if *Dees* was decided today, the airplane in issue would not have been exempt from Alabama use tax because Alabama sales tax was not paid on the airplane.

was subject to the Jefferson County sales tax – "Although Section 3 (of Act 405) does not specify what constitutes doing 'business' for purposes of imposition of the county sales tax, §4(e) of Act No. 405, which provides for the levy of a county use tax, expressly recognizes that the county sales tax is to be collected only 'from a retailer maintaining a place of business in the county.'" *Yelverton's*, 742 So.2d at 1225. I respectfully submit that Justice See mischaracterized §4(e) of Act 405.

Section 4(e) of Act 405 only provides that any person storing, using, or consuming tangible personal property in Jefferson County shall remain liable for the County use tax on the property until the person provides "a receipt from a retailer maintaining a place of business in the county" showing that the retailer had collected the County sales tax on the property. That is, the use tax is owed until the purchaser proves with a receipt that sales tax was paid on the property, in which case the property would be exempt from use tax pursuant to §40-23-62(1). Section 4(e) does not state that the County sales tax is to be collected only from a retailer maintaining a place of business in the county, as claimed by Justice See. It only provides that if a person using or consuming tangible personal property in the County can prove with a receipt that County sales tax was previously paid on the property, then the County use tax would not be due.[6]

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[6] Section 4(e) of Act 405 was modeled after the corresponding State use tax provision at Code of Ala. 1975, §40-23-61(d). That statute specifies that the purchaser is relieved of liability for use tax if it can provide a receipt from "a retailer maintaining a place of business in this state," or from a retailer licensed by the Department to collect the sales tax, i.e., an out-of-state retailer licensed to do business in the state. The State provision is thus broader in language than the Jefferson County provision at §4(e) of Act 405 because the Jefferson County provision only refers to a receipt from a "retailer maintaining a place of business in the county." But if a retailer outside of Jefferson County made retail sales in the County and collected the Jefferson County sales tax on those sales, the property

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In this case, the Taxpayer, through its repairmen, was in the business of and did sell the repair parts at retail when it transferred title and possession of the parts to its customers in the six local jurisdictions in issue. Those sales thus would have been subject to the local sales taxes in those jurisdictions.[7] The Department assessed the local use tax in this case, but as discussed, that tax would also apply because the local sales tax was not paid, and consequently the §40-23-62(1) use tax exemption did not apply. In any case, neither local tax can be assessed because the Taxpayer did not have nexus with the jurisdictions pursuant to *Yelverton's* and Reg. 810-6-3-.51(2).

Issue (3) The Validity of the Assessments.

The Taxpayer argues that the preliminary and final assessments are defective because they did not identify the type of local tax being assessed, citing *Diversified Sales*. The Administrative Law Division held in *Diversified Sales* that the type of tax identified by the Department on a final assessment is "not a mere technicality." *Diversified Sales* at 5. The Division consequently voided that portion of the municipal sales tax final assessment in issue that in actuality constituted municipal use tax.

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would then also be exempt from the County use tax pursuant to the use tax exemption at §40-23-62(1). As discussed in n. 5 above, that statute exempts from the Alabama use tax all property on which the Alabama sales tax was paid. Section 40-23-62(1) was adopted by Jefferson County in §4(c) of Act 405 – "Each exemption provided for in the state use tax statutes shall, . . . be applicable to the tax levied by this Section (4) (the County use tax), . . ."

[7] Likewise, if the Taxpayer initially delivered the electronics and appliances to the customers in its own vehicles, those sales would have been closed in the jurisdictions, and thus would also have been subject to local sales tax in the jurisdictions.

The Division also held in *Diversified Sales* that a recap sheet or billing summary issued with a final assessment is a part of the final assessment. *Diversified Sales* at 3, 4. In this case, the Department issued a billing summary with the final assessment in issue which identified the local tax in issue as "Seller's Use Tax." It also identified the six local taxing jurisdictions for which the tax was being assessed. The type of local tax assessed was thus properly identified.

Issue (4) The Anti-Whipsaw Statute.

The intent of the "anti-whipsaw" statute at Code of Ala. 1975, §40-23-2.1 is to insure that only one municipal and one county sales, use, or other local tax is paid on the same transaction. If a taxpayer in good faith pays a local tax to the wrong local jurisdiction, "the taxpayer making the erroneous payment must comply with the applicable refund procedures within 60 days of receiving notice from a county, municipality, or its agent of the erroneous payment. If the taxpayer complies with the refund procedure in a timely manner," then the local jurisdiction to which the tax is owed shall not assess the taxpayer until the taxpayer has received a refund of the erroneously paid tax from the jurisdiction to which it was erroneously paid.

The Taxpayer argues that "[i]f it is determined that local tax is due from the (six) jurisdictions administered by the Department, then Cohens should have the right to seek a refund from the City of Montgomery and Montgomery County before any assessment. . . ." Taxpayer's Brief at 10. But the Taxpayer did have the right, and in fact the obligation, to petition the City of Montgomery and Montgomery County for refunds within 60 days from when the Department, as the agent for the six jurisdictions in issue, notified the Taxpayer that it owed use tax on the repair parts to the six local jurisdictions. The Taxpayer failed to

timely petition for refunds with the City of Montgomery and Montgomery County within the 60 days.[8] The Department thus was not barred from assessing the Taxpayer for the local use tax in issue.

Issue (5) Interest Abatement.

If the Taxpayer did owe any tax, the issue of whether accrued interest should be abated because of undue Department delay would be within the sole jurisdiction of the Department's Taxpayer Advocate. See, Code of Ala. 1975, §40-2A-4(b)(1)c.

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

Entered July 12, 2011.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: Lionel C. Williams, Esq.
Blake A. Madison, Esq.
Dan Bass
Mike Emfinger

[8] If the Taxpayer had timely petitioned the City of Montgomery and Montgomery County for refunds, even if it believed that it had properly paid the tax to those jurisdictions, the Department would have been barred from assessing the Taxpayer for the local tax in issue until the Taxpayer received refunds from the City and County. Technically, the statute would have prevented the Department from ever assessing the Taxpayer on behalf of the six jurisdictions if the Taxpayer never received refunds from the City of Montgomery and Montgomery County.