PARIS JOHN VAN HORN, II THE SOLE MEMBER OF SPORT SHOTS PHOTOGRAPHY, LLC A DISREGARDED ENTITY 1565 E. TRINITY BLVD, STE B MONTGOMERY, AL 36106-2923,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 12-863
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Paris John Van Horn, II ("Taxpayer"), the sole member of Sport Shots Photography, LLC, a disregarded entity, for county and municipal ("local") use tax for January 2009 through July 2011. 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 November 8, 2012. The Taxpayer attended the hearing. Assistant Counsel Christy Edwards represented the Department.

The Taxpayer owned and operated a sports photography business out of a single office located in Montgomery, Alabama during the period in issue. He primarily photographed youth sports teams and the individual team members, and then sold the photographs to the parents of the team members.

The Taxpayer solicited business from youth sports organizations throughout Alabama during the subject period primarily over the telephone from his office in Montgomery. If an organization accepted the Taxpayer's solicitation, the Taxpayer and/or one or more of his employees would travel to and take the requested photographs in the local jurisdiction where the organization was located. He later printed the digital

photographs at his facility in Montgomery, and then delivered the photographs to the individual customers via the U.S. Postal Service or by common carrier.

The Taxpayer testified that potential customers sometimes asked him to travel to the customer's location and make a sales presentation. As discussed below, he did so on four occasions in the 31 month audit period.

The Taxpayer paid Montgomery County and City of Montgomery sales tax when he sold pictures to customers located in the City of Montgomery during the period in issue. He explained that he did not pay local tax to any other county or municipality in Alabama during the period because, according to the Taxpayer, a Department employee had informed his accountant that he would not owe local sales or use tax in any jurisdiction outside of Montgomery if he delivered the pictures into those jurisdictions by mail or common carrier.

The Department audited the Taxpayer and assessed him for local use tax on the sales he made in various municipalities and/or counties outside of Montgomery County during the subject period. The Department examiner explained in his audit that "since the company goes onsite to various cities/counties throughout Alabama to perform the photo shoots, the company has nexus with those locations. . . ." The Taxpayer appealed.[1]

This is the latest in a growing number of cases decided by the Administrative Law Division concerning the local sales and use tax intrastate nexus issue. That is, if a retailer

[1] The local jurisdictions in issue are Butler County, Crenshaw County, Geneva County, and the Cities of Satsuma, Troy, Kinston, Russellville, Pleasant Grove, Greenville, Bayou La Batre, Millbrook, Sardis, and Locust Fork. The Department also assessed the Taxpayer for State sale tax that the Taxpayer did not contest.

with a retail store in one local taxing jurisdiction in Alabama makes retail sales in another local jurisdiction (or jurisdictions) in the State, when is the retailer liable for local sales or use tax in the local jurisdiction (or jurisdictions) where the sales occur.

The controlling Alabama case on this issue is *Yelverton's, Inc. v. Jefferson County, Alabama*, 742 So.23d 1216 (Ala. Civ. App. 1997), cert. denied 742 So.2d 1224 (Ala. 1997). The Administrative Law Division discussed *Yelverton's* in *Crown Housing Group, Inc. v. State of Alabama*, Docket S. 06-399 (Admin. Law Div. O.P.O. 7/26/2002). The taxpayer in *Crown Housing* sold and delivered mobile homes into local taxing jurisdictions in Alabama in which it did not have a physical place of business or salesmen soliciting sales. The issue was whether the taxpayer had nexus with and was thus required to collect local sales or use tax in those jurisdictions.

Relying on *Yelverton's*, the Administrative Law Division held that the taxpayer in *Crown Housing* did not have nexus with the local jurisdictions because it did not have a physical store or salesmen actively soliciting sales in the jurisdictions, as required for nexus pursuant to Department Reg. 810-6-3-.51(2). *Crown Housing* reads in pertinent part as follows:

> This seemingly simple case involves a complicated issue – where and what type of local tax (sales or use) is due on retail sales where the seller and purchaser are located in different local taxing jurisdictions in Alabama.
>
> The seminal Alabama case thus far on the issue is *Yelverton's*. The issue in *Yelverton's* was whether an appliance store (Yelverton's) physically located in Walker County was liable for Jefferson County sales tax on merchandise it sold and delivered to customers in Jefferson County. Yelverton's advertised in Jefferson County, but had no store or salesmen located or operating in the County.

The Court of Civil Appeals first correctly recognized that a sale is closed at the point of delivery, and that the retail sales in issue were thus closed in Jefferson County when Yelverton's delivered the goods to its customers in the County. It then held, however, that Jefferson County use tax applied, not the County sales tax.

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

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

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

The Court determined that the Department had incorporated the above "physical presence" nexus test in Department Reg. 810-6-3-.51(2). Specifically, the Court focused on the following statement in Reg. 810-6-3-.51(2) – "If the seller whose place of business is located outside of the (county) has salesmen soliciting orders within the (county), the seller is required to collect and remit the seller's use tax on retail sales" in the jurisdiction. *Yelverton's*, 742 So.2d at 1221. The Court treated the above statement as the Department's position concerning nexus for local tax purposes; that is, a business physically located outside of a county has nexus with the county only if it has salesmen soliciting in the county. The Court consequently held that Yelverton's did not have nexus with Jefferson County because it did not have salesmen in the County. (footnote omitted)

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. (footnote omitted)

Crown Housing 3 – 5.

I explained in *Crown Housing* that I respectfully disagree with the Court's holding in *Yelverton's*. Specifically, I disagree that Yelverton's was not doing business in Jefferson County. Yelverton's sold and delivered furniture to numerous customers in Jefferson County, and as correctly decided by the Court, the sales were closed upon delivery in the County. Yelverton's was clearly doing business, i.e., making retail sales, in the County, and was thus subject to the County's sales tax, see *Crown Housing* at 5 – 9. See also, Justice Cook's well-reasoned dissent in *Yelverton's*, 742 So.2d 1222, 1227, which is quoted in part and discussed in *Crown Housing*, at 13 – 15. I also disagree with the Court's local nexus analysis, see *Crown Housing* at 9 – 15. For other cases in which the Division disagreed with but followed the Court's rationale in *Yelverton's*, see *Cohen's Electronics & Appliances, Inc. v. State of Alabama*, Docket S. 10-989 (Admin. Law Div. 7/21/2011) (A Montgomery-based retailer that sold repair parts to customers in local jurisdictions outside of Montgomery was not subject to local sales or use tax in those jurisdictions re *Yelverton's* because it did not have a physical store or salesmen soliciting sales in those jurisdictions.); *Diversified Sales, Inc. v. State of Alabama*, Docket S. 06-937 (Admin. Law Div. 9/4/2007) (A flooring retailer sold flooring materials and hired independent contracts to delivery and install the materials in various local jurisdictions in which the retailer did not have a store or salesmen soliciting sales. Although the retailer

clearly had due process nexus with the local jurisdictions re *Quill Corp. v. North Dakota*, 112 S. Ct. 1904 (1992), the Division relied on *Yelverton's* and Reg. 810-6-3-.51(2) in holding that the retailer did not have nexus with the jurisdictions. *Diversified Sales* at 13, 14).

As stated in *Cohen's Electronics*, at 9, the Court of Civil Appeals in *Yelverton's* practically invited the Department to amend Reg. 810-6-3-.51(2) to conform to the *Quill* due process nexus standard. The Court held in *Quill* that for due process purposes, "if a (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. The Court further indicated that due process nexus is satisfied if the taxpayer has "'fair warning that [its] activity (in the jurisdiction) may subject it to the (taxing) jurisdiction of the foreign (jurisdiction).'" *Quill*, 112 S. Ct. at 1911, quoting *Shaffer v. Heitner*, 97 S. Ct. 2569, 2587 (1977). That is, a taxpayer has sales/use tax nexus for due process purposes if the taxpayer should reasonably know and have fair warning that his activities in the jurisdiction may subject him to the jurisdiction's taxes. Yelverton's clearly had due process nexus with Jefferson County under *Quill*.

In this case, the Taxpayer and/or his employees traveled into the various local jurisdictions to take photographs of the youth sports teams and the individual team members. The Department examiner assessed the Taxpayer for the local tax in issue based on those visits. I agree that depending on the number of trips the Taxpayer and/or his employees traveled into each jurisdiction over a given period, it could be argued that

the Taxpayer had purposely availed himself of the economic market and had fair warning that he may be subject to tax in those local jurisdictions sufficient to satisfy the *Quill* due process nexus standard. But the *Quill* nexus standard still does not apply because to date the Department has not amended Reg. 810-6-3-.51(2). Consequently, that regulation, as interpreted by the Court in *Yelverton's*, still applies.

The Taxpayer did not have a retail location in any of the local jurisdictions in issue. Consequently, if the Taxpayer only solicited business via telephone from Montgomery and did not have salesmen actively soliciting business in a jurisdiction, then clearly the Taxpayer did not have nexus with the jurisdiction pursuant to Reg. 810-6-3-.51(2).

As discussed, however, a potential customer sometimes asked the Taxpayer to come into a local jurisdiction and make a sales presentation, or at least explain how his business operated. After the November 8 hearing, the Taxpayer submitted a list of the local jurisdictions in which he personally solicited business during the audit period. The list shows that he solicited business one time in person during the audit period in Butler County and in the Municipalities of Satsuma, Pleasant Grove, and Greenville. He subsequently took photographs on six occasions in Butler County during the 31 months in issue that resulted in total sales of $6,048. He took photographs in Satsuma four times during the period that resulted in total sales of $6,124. He took photographs once in Pleasant Grove that resulted in sales of $1,952. And finally, he took photographs in Greenville twice that resulted in $1,675 in sales.[2]

[2] The City of Greenville is also in Butler County. Consequently, the Greenville sales totals should be added to the Butler County sales totals in the Taxpayer's list.

As discussed, it could be argued that by personally soliciting sales in the above jurisdictions and then traveling to and conducting business, i.e., taking photographs, in the jurisdictions, the Taxpayer exceeded the due process threshold established in *Quill*. But again, the guideline for local nexus in Alabama, as established in *Yelverton's*, is Reg. 810-6-3-.51(2). Consequently, the Taxpayer had nexus with the above four jurisdictions pursuant to Reg. 810-6-3-.51(2) only if he had salesmen soliciting sales in the jurisdictions.

The Taxpayer clearly solicited business in the four jurisdictions. I do not believe, however, that a single solicitation by a single "salesman" over a 31 month period is sufficient to establish nexus with the jurisdictions. This is confirmed by Reg. 810-6-3-.51(2), which specifies that a seller whose business is located outside of a local jurisdiction has nexus with the jurisdiction only if the seller "has salesmen soliciting orders within" the jurisdiction. By using the plural "salesmen," the regulation itself contemplates that more than one salesman and a single solicitation in a jurisdiction is required.

Because the Taxpayer did not have nexus with the local jurisdictions in issue pursuant to Reg. 810-6-3-.51(2), as interpreted in *Yelverton's*, the Taxpayer was not subject to the jurisdictions' taxing authority, and thus is not liable for local tax on the photographs it sold in the jurisdictions.

The Taxpayer also inquired at the November 6 hearing that if he did have nexus with any or all of the local jurisdictions in issue, would he be required to continue filing monthly sales/use tax returns with the jurisdictions, even if he never or rarely did business again in the jurisdictions.

The above question – the "trailing nexus" issue – has never been addressed by Alabama's courts, and to my knowledge, by any other court of record in the country. Some few states have enacted laws providing that once a taxpayer establishes nexus in the state, nexus will continue as a matter of law for a specified period. In a recent article in State Tax Notes, "Is Trailing Nexus Constitutional," Vol. 66, No. 10, at 763, the author persuasively argues that in the sales and use tax context, once a taxpayer no longer has a physical presence in a jurisdiction, the taxpayer would no longer have nexus with the jurisdiction pursuant to *Quill*. *Quill's* physical presence test is, however, based on the Commerce Clause, U.S. Const. Art. I, §8, cl. 3, which does not apply to intrastate transactions.

In any case, the trailing nexus issue need not be decided in this case because based on *Yelverton's* and Reg. 810-6-3-.51(2), the Taxpayer did not have nexus during the subject period with the local jurisdictions in issue.

The local use tax final assessment in issue is voided. Judgment is entered accordingly.

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

Entered January 3, 2013.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: Christy O. Edwards, Esq.
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Joe Walls
Mike Emfinger