STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. U. 85-149
FLEMING FOODS OF ALABAMA, INC. P.O. Box 398 Geneva, AL 36340,	§	
Taxpayer.	§	

ORDER

The Department assessed State and City of Geneva use tax against Fleming Foods of Alabama, Inc. ("Taxpayer") for the period July 1, 1981 through June 30, 1984. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on December 10, 1987. The Taxpayer was represented at said hearing by Kenneth R. McClure, Esq. Assistant counsel J. Wade Hope appeared for the Department. Based on the evidence presented by the parties, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

The Taxpayer is an Alabama corporation with its principal facility in Geneva, Alabama, and is a wholly owned subsidiary of Fleming Companies, Inc. ("Parent"), an Oklahoma corporation. The Taxpayer is in the business of transporting groceries and other commodities between various locations in Georgia, Alabama, Florida and other states in the Southeast.

The Department audited the Taxpayer and assessed use tax based on the Taxpayer's use of one (1) 1981 Polar American trailer, eight

(8) 1983 and 1984 Polar American trailers, and thirteen (13) 1983 and 1984 Peterbilt trucks. The subject vehicles were purchased outside of Alabama by the parent and subsequently transferred to the Taxpayer in Alabama. The Taxpayer paid the parent for the use of the vehicles. During the period in issue the vehicles were based at the Taxpayer's Geneva facility and used by the Taxpayer to transport goods throughout the Southeast.

The 1981 Polar American was purchased by the parent in 1981 and based at the parent's Georgia subsidiary from 1981 to 1983. The vehicle was subsequently transferred to the Taxpayer's Geneva operation in 1983.

The 1983 and 1984 Polar American trailers were manufactured in Texas, inspected and custom modified by the parent in Oklahoma, and subsequently delivered to the Taxpayer's Geneva facility. While in route to Alabama, the vehicles were used to transport goods in interstate commerce.

The 1983 and 1984 Peterbilt trucks were purchased by the parent in Texas and subsequently transported directly to the Taxpayer's Geneva facility.

All the subject vehicles were used by the Taxpayer during the audit period to transport goods in interstate commerce. *No* sales or use tax has ever been paid on any of the vehicles.

CONCLUSIONS OF LAW

The Alabama use tax is levied on the storage, use or other

consumption of tangible personal property that is purchased at retail outside the State. Paramount Theatres v. State, 55 So.2d 812 (1951). Like the sales tax, the use tax is a consumer tax and is levied against the ultimate consumer (user). The tax attaches and becomes due when the, subject property is delivered into and comes to rest within the State. State v. Toolen, 167 So.2d 546 (1964); State v. Algernon Blair Indus. Contractors, 362 So.2d 248, cert. denied 362 So.2d 253 (1978).

In the present case, the trucks and trailers were purchased at retail outside of Alabama and subsequently brought into the State for use by the Taxpayer. Two issues must be decided: (1) Are the vehicles subject to the Alabama use tax and if so, can the Taxpayer be assessed for the tax; and (2) would the imposition of the use tax violate the Commerce Clause of the United States Constitution?

The Taxpayer was not the titled owner of the subject trucks and trailers. However, Alabama's use tax does not apply to only the holder of legal title, but rather to the party that has control over and uses, stores or otherwise consumes the property within the State. Associated Contractors, v. Hamm, 172 So.2d 385. As state in Associated Contractors, at p.387:

> These various provisions do not make crystal clear as to the exact intention of the parties with respect to technical legal. title. However, we are in complete agreement with the trial court in its conclusion that at least insofar as the Alabama Use Tax statute is concerned, the Associated Contractors had sufficient title, control and possession of these various materials when they came to rest in this state to invoke the statute. The language of the statute does not seem to

> indicated that the legislature intended to predicate the tax upon one who had technical legal title and no other. (emphasis added)

As noted in the above case, the term "Use" is defined at Code of Ala. 1975, §40-23-60(8) as "(T)he exercise of any right or power over tangible personal property incident to the ownership of that property, or by any transaction where possession is given . . .'. Further, "Purchase" is defined by Code of Ala. 1975, §40-23-60(9) as "[A]cquired for a consideration, whether such acquisition was effected by a transfer of title, or of possession or of both, or a license to use or consume; Clearly under the above definitions, actual legal title is not required for the use tax to apply.

In the present case, the Taxpayer had possession and exclusive use of the subject vehicles upon their assignment to the Taxpayer's Geneva facility. No sales or use tax had been paid on any of the vehicles prior to their use in Alabama. Consequently, the Taxpayer as the ultimate user of the vehicles would be liable for use tax upon the delivery of the vehicles into Alabama. The tax attached when the vehicles were first brought into Alabama for use by the Taxpayer, see Paramount-Richards Theatres v. State, supra.

The Alabama revenue code does not address the issue of whether used property that is subsequently used, stored or consumed in the State is subject to the Alabama use tax.[1] However, Department Reg.

[1]Code of Ala. 1975, §40-23-61(e) does levy the use tax on any property, new or used, that is stored and otherwise used or consumed in the performance of a contract within the State.

810-6-5-.25 provides that any property previously used outside of Alabama shall not be subject to the Alabama use tax. The burden is on the taxpayer to show real and substantial use of the property in another state.

The 1981 Polar American trailer was based in Georgia from 1981 to 1983 and used extensively outside of Alabama during that period. Consequently, the subsequent use of the vehicle by the Taxpayer in Alabama would not be subject to use tax.

The 1983 and 1984 Polar American trailers were also used prior to being delivered to the Taxpayer's Geneva facility. However, the use was not substantial and apparently involved the hauling of commodities to various destinations while in route from the parent's Oklahoma facility to the Taxpayer's Geneva base. Consequently, those vehicles were not substantially used outside of Alabama and thus would be subject to use tax upon delivery and use within Alabama.

Finally, the 1983 and 1984 Peterbilt trucks were shipped directly from the manufacturer in Texas to the Taxpayer's Geneva facility. There can be no question that those vehicles were new, and thus taxable, upon their delivery to the Taxpayer in Alabama.

The Taxpayer also argues that imposition of the use tax would violate the Commerce Clause, article 1, section 8, cl. 3 of the U. S. Constitution. That argument is rejected on the authority of Great American Airways v. Nevada State Tax Com'n., 705 P.2d 654 (1985).

In Great American Airways, the taxpayer, a Nevada corporation, was engaged in the interstate transportation of charter air passengers. The taxpayer purchased a DC-9 aircraft in Kansas on which no Kansas tax was paid. The aircraft was hangered at the taxpayer's facility in Reno and used in the taxpayer's interstate charter business. The issue was whether the aircraft was subject to the Nevada use tax.

The Nevada Supreme Court decided the case within the guidelines set out in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, reh'g denied 430 U.S. 976, 97 S.Ct. 1669. Complete Auto is the bellweather case concerning the state taxation of interstate commerce and provides that a state tax will be upheld if the tax is applied to an activity that has a substantial nexus with the state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the taxing state.

To begin, in Great American Airways the taxpayer's nexus with Nevada was conceded. Similarly, there can be no question that the present Taxpayer has sufficient and substantial nexus with Alabama.

The Nevada court then dismissed the threat of double taxation because no tax had been paid to Kansas or any other state. Likewise, in the present case there is no question that neither sales nor use tax has been paid on the subject vehicles to any other state.

The Nevada taxpayer next argued that the tax should be

apportioned between in-state versus out-of-state mileage. That argument was rejected as follows, at page 658:

> (A)use tax is imposed upon an out-of-state purchase by a state resident when the object of the purchase is used, stared or consumed within the taxing state. NRS 372.185. The incidence of taxation of the use tax is the residency of the purchaser, the out-of-state purchase, and use, storage or consumption of the purchased object within the state. If these three incidents occur in one state, that state may assess a use tax on the entire purchase price. id. Under these circumstances, there is no danger of multiple state taxation of the same tax incidences. The use tax is a fairly apportioned tax. (emphasis as in original)

The Nevada court next addressed and rejected the taxpayer's argument that application of the use tax was discriminatory and unduly burdened interstate commerce. As stated by the court, again at page 658:

> Nevada's use tax, like the gross proceeds of sales tax in Chicago Bridge and Iron v. State, Dept. of Rev. 98 Wash.2d 814, 659 P.2d 463, 472 (1983), appeal dismissed _____ U.S. _____ 104 S.Ct. 542, 78 L.Ed.2d 718 (1983) "treats intrastate and interstate businesses equally, making no distinction between them". Any air carrier headquartered in Nevada whether intrastate or interstate, making an out-of-state purchase of an airplane which will be used, consumed or stored in Nevada, is potentially subject to use taxation. Under such circumstances, there is no discrimination because intrastate or interstate commerce are equally burdened.

The above rationale of Great American Airways can be applied to Alabama's use tax. The use tax attached when the vehicles were brought into Alabama. A tax levied on the entire purchase price applies equally to the use of the vehicles both within and outside of the State. There is no burden on interstate commerce.

Finally, the Nevada court rejected the taxpayer's argument that the tax was not fairly related to services provided by Nevada. The taxpayer had clear nexus with Nevada and received the benefits related thereto. Again, there can be no question that the present Taxpayer received a substantial benefit from the State of Alabama.

The Revenue Department is hereby directed to make final the assessments in issue, with applicable interest as required by law.

Done this 1st day of April, 1988.

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BILL THOMPSON
Chief Administrative Law Judge