GLENN MCCLENDON TRUCKING COMPANY, INC. P.O. Box 641 Lafayette, AL 36862-0641, Taxpayer, v. STATE OF ALABAMA DEPARTMENT OF REVENUE.	'	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. S. 01-206

FINAL ORDER

The Revenue Department assessed Glenn McClendon Trucking Company, Inc. (ATaxpayer@) for State and City of Lafayette use tax for February 1996 through January 1999, and Chambers County use tax for July 1998 through January 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 July 10, 2001. Jim Hampton represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

ISSUES

The Taxpayer purchased 25 trucks outside of Alabama during the audit period. It subsequently used the trucks in Alabama and other states in its long-haul trucking business. This case involves three issues:

(1) Were the trucks subject to the Alabama use tax levied at Code of Ala. 1975, '40-23-61(c);

(2) If the trucks were subject to Alabama use tax, is Alabama prohibited from taxing the trucks by the Commerce Clause, Article I, '8, cl. 3, of the U.S. Constitution; and

(3) If the trucks were subject to use tax, and taxation was not prohibited by the Commerce Clause, were the trucks nonetheless exempt under Code of Ala. 1975, '40-23-62(2)?

FACTS

The Taxpayer operates an irregular route, long-haul trucking business in the Eastern United States. The Taxpayer=s corporate headquarters are in Lafayette, Alabama. It operates terminals in Lafayette, Montgomery, Alabama, and Charleston, Tennessee. It employed approximately 90 people in Lafayette, 15 people in Montgomery, and 5 or 6 people in Charleston during the subject period.

The Taxpayer owned and operated approximately 400 trucks during the audit period. Each truck was assigned to a driver. The trucks did not run regular routes, and were not based at a particular location. Rather, they were dispatched throughout the Eastern United States as business dictated. The trucks each traveled approximately 130,000 miles a year. The Taxpayer routed the trucks so that the drivers, who lived in the various states in which the Taxpayer operated, could return home for time off every 10 days.

New drivers were initially trained at the Lafayette facility. They were subsequently trained and periodically tested for drugs at any one of the Taxpayer=s terminals. The Taxpayer tracked the trucks from its Lafayette headquarters using a satellite tracking system. It also dispatched the trucks from the Lafayette facility.

The Taxpayer=s terminals serve primarily as routine maintenance facilities for its trucks. The trucks stop at the terminals as necessary for minor engine repairs, trailer repairs, oil changes, etc. They also refuel at the terminals if logistically feasible. Major engine overhauls are performed at the Lafayette facility, although none of the 25 trucks in issue were overhauled during the audit period.

The Taxpayer purchased the 25 new trucks in issue from a Missouri dealer. The

Taxpayer has not paid sales or use tax on the trucks. The dealer delivered the trucks to the Taxpayer=s Charleston, Tennessee terminal in early 1998. The Taxpayer inspected the trucks, applied the necessary ICC, DOT, and other decals, outfitted the trucks with a radio and a satellite tracking system, and otherwise prepared the trucks for service. The drivers picked up the trucks at the Charleston terminal, and were dispatched into surrounding states. Two of the trucks were initially dispatched into Alabama. The remaining trucks may not have traveled into Alabama until two or three weeks after being placed in service.

There is no evidence whether the trucks traveled exclusively in interstate commerce or sometimes hauled intrastate between points in Alabama. Nor is there evidence indicating the specific miles each truck traveled in Alabama. The Taxpayer concedes that based on its fuel tax records, its fleet traveled ten percent of its total miles in Alabama during the subject period. The Taxpayer also concedes that all of the trucks in issue traveled in Alabama on occasion.

The Department assessed the Taxpayer for State and City of Lafayette use tax on its purchase price of the 25 trucks. The Department also assessed State, Lafayette, and Chambers County tax on supplies and other items, which is not disputed by the Taxpayer. The only dispute involves the State and City of Lafayette tax on the 25 trucks.

ANALYSIS

Issue (1) - Are the trucks subject to Alabama use tax?

All states that have a sales tax on property purchased in the state have a corresponding use tax on property used, stored, or consumed in the state. The use tax is intended Ato equalize the burden of the sales tax and to prevent a person from avoiding the sales tax by purchasing goods outside the state.@ *Ex parte Fleming Foods of Ala., Inc.*, 648 So.2d 577,

578 (Ala. 1994), cert. denied 115 S.Ct. 1690 (1995).

Alabama levies a two percent use tax Aon the storage, use or other consumption in this state@ of motor vehicles Apurchased at retail . . . for storage, use or other consumption in this state. . . @ Code of Ala. 1975, '40-23-61(c). For the use tax to apply, a vehicle must be purchased with the intent that is will be used in Alabama.[1] Department Reg. 810-6-5-.25(1) provides that if property is purchased for use outside of Alabama, and is actually used outside of Alabama, Alabama use tax does not apply if the property is later used in Alabama. The regulation specifies that the burden is on the taxpayer to prove Aa real and substantial (prior) use@ of the property outside of Alabama.

The Taxpayer cites Reg. 810-6-5-.25(1) in arguing that the trucks were not subject to Alabama use tax because they were purchased for use outside of Alabama, and were

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[1]California, Massachusetts, Texas, and other states also limit their use tax to property initially purchased for use in the state. Other states such as Pennsylvania require only that the property must be used in the state, regardless of where the purchaser intended to initially use it. For an excellent overview and analysis of the different use tax statutes in the various states, see J. Hellerstein & W. Hellerstein, *State Taxation*, (3d ed.) &16.01, et seq.

substantially used outside of Alabama before entering the State. However, Alabama use tax applies to property purchased for use in Alabama, even if the purchaser also intended to use the property in other states. That is, Reg. 810-6-5-.25(1) applies only if property is purchased for use solely outside of Alabama. The Taxpayer clearly purchased the trucks in issue intending to use them in all the states in which it operated, including Alabama. The Taxpayer thus purchased the trucks for use in Alabama within the purview of '40-23-61(c).

The trucks also were not substantially used outside of Alabama before coming into the State. At least two of the trucks were dispatched directly into Alabama. The remaining trucks entered Alabama within two or three weeks after being placed in service. That brief use of the trucks outside of Alabama did not constitute a substantial use of the trucks before their use in Alabama. In any case, as discussed, '40-23-61(c) only requires that a vehicle must be purchased for use in Alabama. If so, Alabama use tax applies to the subsequent use of the vehicle in Alabama, even if it was previously used in another state.[2]

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[2]California, Massachusetts, and other states have a presumption that if the property is brought into the state within a certain period after purchase, it was purchased for use in the state. The period is 90 days in California, 6 months in Massachusetts. Alabama law contains

no such presumption, but none is needed in this case because the Taxpayer clearly purchased the trucks in issue intending to use them in Alabama.

The Taxpayer argues that the Alabama use tax Ais not intended to be imposed on a truck that simply passes through the state.@ Taxpayer=s Brief at 6. I agree that if a vehicle is not purchased for use in Alabama, as a general rule its later use in the State would not subject it to Alabama use tax.[3] Alabama also exempts from use tax all property used for a nonbusiness purpose by a nonresident while in the State, Code of Ala. 1975, '40-23-62(3), and property being temporarily stored in the State, Reg. 810-6-5-.23. Otherwise, the use tax levy broadly applies to any property purchased for use in Alabama that is subsequently used in the State, for however short a period, subject, of course, to constitutional constraints.

But this appeal does not involve a situation where a nonresident drove a personal vehicle through the State. Rather, the Taxpayer used the 25 trucks in its trucking business in Alabama. The trucks traveled 10 percent of their total miles, or on average 13,000 miles per truck per year, in Alabama. The Taxpayer exercised control over the trucks in Alabama by dispatching them from its headquarters in Lafayette. It is also reasonable to conclude that the trucks picked up and delivered loads in Alabama during the audit period, and occasionally stopped at the Taxpayer=s terminals in Alabama for refueling, minor maintenance, etc. The Taxpayer clearly used the trucks in Alabama within the purview of the use tax levy.[4]

The Taxpayer also argues Athat the Department offered absolutely no evidence that these trucks have ever been used in Alabama. . . .@ Taxpayer=s Brief at 4. I agree. However,

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[3]For an exception to the general rule, see Code of Ala. 1975, '40-23-62(e), which is discussed *infra*, at page 7.

[4]"Use@ is broadly defined for Alabama use tax purposes as the Aexercise of any right or power over tangible personal property incident to the ownership of that property . . . .@ Code of Ala. 1975, '40-23-60(8).

the final assessments in issue are *prima facie* correct, and the burden was on the Taxpayer to prove that the assessments are incorrect. Code of Ala. 1975, '40-2A-7(b)(5)c.

The Taxpayer tracked the trucks with a satellite tracking system, and maintained exact fuel tax records showing total miles traveled in each state. I assume it also maintained records of pick-up and delivery locations. If some of the trucks never entered Alabama, the Taxpayer could have presented evidence of that fact. It failed to do so. Rather, the Taxpayer conceded that all of the trucks in issue traveled in Alabama on occasion. The Taxpayer thus failed to carry its burden of proving that the subject trucks never entered Alabama, i.e. that the tax assessed on the trucks is incorrect.

The Alabama Supreme Court has held that the use tax Aattaches after the act of transportation ends and the property comes to rest in this state for use or consumption.@ *Paramount-Richards Theatres v. State*, 39 So.2d 380, 384 (Ala. 1949). When that case was decided, Alabama was constitutionally prohibited from taxing interstate commerce. *Freeman v. Hewit*, 67 S.Ct. 274 (1946); see also, *Spector Motor Svc. v. O=Connor*, 31 S.Ct. 508 (1951). Consequently, it could only tax property that Acame to rest@ in Alabama.

As discussed *infra*, the U.S. Supreme Court changed its position concerning the taxation of interstate commerce in *Complete Auto Transit, Inc. v. Brady*, 97 S.Ct. 1076 (1977). It thus is no longer constitutionally required that for the Alabama use tax to apply, the subject property must leave interstate commerce and come to rest in Alabama.

The use tax statute also does not require that for the tax to apply, the property must stop or come to rest in Alabama. Section 40-23-61 does not distinguish between property used at

a fixed location in Alabama and property that through design is used while traveling through or moving in Alabama. In either case, the property is being used in Alabama.

Even if the use tax levied at '40-23-61(c) did not apply, the tax levied at '40-23-61(e) would apply. That section levies an Aalternative@ use tax on new or used property that is used, stored, or consumed in Alabama in the performance of a contract. The tax is at the same rate imposed on classes of property as specified in '40-23-61(a) (the general 4 percent rate); '40-23-61(b) (the 1 **2** percent Amachine@ rate); and '40-23-61(c) (the 2 percent motor vehicle rate), and is measured by the sales price or the fair market value of the property when used in the State, whichever is less. See, Dept. Reg. 810-6-5-.25(2).

The intent of '40-23-61(e) is to tax used property not otherwise taxable under the general use tax levy because it was not initially purchased for use in Alabama, but which is subsequently used in Alabama to fulfil a contract. The Taxpayer used the trucks in issue in Alabama to fulfil its hauling contracts with its customers. Consequently, even if the trucks had not been initially purchased for use in Alabama, the Taxpayer would still owe the '40-23-61(e) use tax.

Alabama sales tax would have been due if the Taxpayer had purchased the trucks in Alabama. Code of Ala. 1975, '40-23-2(4). Applying the use tax thus satisfies the purpose of the tax, which is to prevent a purchaser from avoiding Alabama sales tax by purchasing property outside Alabama and later using the property in the State. The Taxpayer has not paid sales or use tax on the trucks to any other state. Consequently, the credit provided at Code of Ala. 1975, '40-23-65 for sales or use tax paid to another state does not apply.

Issue (2). The Commerce Clause.

A state may tax an activity in interstate commerce if (1) there is a substantial nexus between the activity and the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is reasonably related to services and protections provided by the taxing state. *Complete Auto Transit*, *supra*; see also, *Oklahoma Tax Comm=n v. Jefferson Lines, Inc.*, 115 S.Ct. 1331 (1995); *Ex parte Fleming Foods*, *supra*.

The Taxpayer argues that the first prong of *Complete Auto* is not satisfied in this case. That is, the trucks did not have a substantial nexus with Alabama because they were Apurchased out of the State, placed in service out of the State, and only incidentally used in the State.@ Taxpayer=s Brief at 9. I disagree.

First, it is irrelevant that the trucks were purchased and placed in service outside of Alabama. The activity taxed was the Taxpayer=s use of the trucks in Alabama. The trucks traveled in Alabama an average of 13,000 miles a year. They presumably made pick-ups and deliveries in Alabama, and periodically stopped at the Taxpayer=s two terminals in Alabama. That physical presence and use of the trucks in Alabama established a substantial nexus with Alabama.

The Taxpayer also owned real property and had a number of employees in Alabama during the subject period, which clearly satisfied the Commerce Clause physical presence nexus test established in *Quill Corporation v. North Dakota*, 112 S.Ct. 1912 (1992).

The remaining three prongs of *Complete Auto* are also satisfied. To be fairly apportioned, a tax must be both Ainternally consistent@ and Aexternally consistent.@ *Goldberg v.*

Sweet, 109 S.Ct. 582 (1989); *Container Corp. of America, Inc. v. Franchise Tax Bd.*, 103 S.Ct. 2933 (1983). To be internally consistent, there must be no threat of multiple taxation if other states imposed a similar tax. The Alabama use tax is internally consistent because it provides a credit for sales and use tax paid to any other state on the property, thus eliminating the threat of multiple taxation. AThe Commerce Clause does not require apportionment in addition to a tax credit. The rule of *Complete Auto*, *supra*, requiring a tax on interstate commerce to be >fairly apportioned= is satisfied here. The state has provided a tax credit in lieu of apportionment.@ *KSS Transp. Corp. v. Baldwin*, 9 N.J. Tax 273, 286 (1987); see also, *D.H. Holmes Co., Ltd. v. McNamara*, 108 S.Ct. 1619 (1988); *Miller v. Comm=r of Revenue*, 359 N.W.2d 620 (Minn. S.Ct. 1985); and *Whitcomb v. Comm=r*, 479 A.2d 164 (Vt. S.Ct. 1984).

A tax is externally consistent if it does not apply Abeyond that portion of value that is fairly attributable to economic activity within the taxing State.@ *Jefferson Lines*, 115 S.Ct. at 1338. A use tax such as Alabama=s has been held to be externally consistent because it applies to a discrete transaction within the State. AWe have therefore consistently approved taxation of sales without any division of the tax base among different States, and have instead held that such taxes are properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future.@ *Jefferson Lines*, 115 S.Ct. at 1339.

The third prong of *Complete Auto* is satisfied because the Alabama sales tax/use tax scheme does not discriminate against interstate commerce. Property purchased in Alabama

is subject to Alabama sales tax. Property purchased outside of Alabama and subsequently used in the State is subject to an equal Alabama use tax.

Finally, the use tax was fairly related to services provided by the State. Alabama provided the Taxpayer with fire and police protection, the use of its highways, and numerous other services. A Atax measured by a reasonable percentage of the sale price is not unreasonably related to the benefits provided by the state.@ *KSS Transport Corp.*, 9 N.J. Tax at 283, citing *Washington Revenue Dept. v. Stevedore Ass=n*, 95 S.Ct. 1388 (1978). Nor is it necessary to relate the activity being taxed with the services provided. AIf the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event. Interstate commerce may thus be made to pay its fair share of state expenses. . . .@ *Jefferson Lines*, 115 S.Ct. at 1345.

The Alabama Supreme Court upheld the constitutionality of a use tax on trucks used in Alabama in interstate commerce in *Fleming Foods*, *supra*. At issue in *Fleming Foods* was whether the second and third prongs of *Complete Auto* had been satisfied. The Court held that they had, and affirmed the tax.

The nexus issue, which is the primary constitutional argument raised by the Taxpayer in this case, was conceded by the taxpayer in *Fleming Foods*. The Taxpayer attempts to factually distinguish *Fleming Foods* from this case. Specifically, unlike the trucks in issue, the trucks in *Fleming Foods* were initially placed in service in Alabama and were based in Alabama.

I agree that the facts in *Fleming Foods* are slightly different from this case. But the

differences are not constitutionally significant. The Taxpayer and the activity taxed, the use of the trucks in Alabama, both had a physical presence in Alabama sufficient to establish substantial nexus with Alabama. The fact that the trucks in *Fleming Foods* had a more substantial nexus with Alabama than the trucks in issue is irrelevant.[5]

The burden is on a taxpayer to show that a state tax is constitutionally invalid. *Container Corp.*, 103 S.Ct. at 2945. The Taxpayer failed to carry that burden in this case.

Issue (3). Are the trucks exempt under Code of Ala. 1975, ' 40-23-62(2)?

Section 40-23-62(2) exempts from Alabama use tax the use, storage, or consumption of any property which Alabama is prohibited from taxing under the U.S. Constitution. As discussed, since *Complete Auto* in 1977, states have been allowed to tax interstate commerce under certain conditions. However, ' 40-23-62(2) was enacted in 1959, before *Complete Auto* was decided.

In *Ex parte Dixie Tool and Die Co., Inc.*, 537 So.2d 923 (Ala. 1988), the issue was

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[5]Likewise, in *PPG Industries, Inc. v. Tracy*, 659 N.E.2d 1250 (1996) and *Kellogg v. Dept. of Treasury*, 516 N.W.2d 108 (1998), both of which are cited by the Department, the facts were also slightly different from the facts in this case. But again, the factual distinctions are constitutionally meaningless.

whether tangible property sold in Alabama that was immediately shipped in interstate commerce was exempt from Alabama sales tax under Code of Ala. 1975, '40-23-4(a)(17). That sales tax exemption, like the use tax exemption at '40-23-62(2), prohibits Alabama from taxing property or transactions that cannot be taxed under the U.S. Constitution.

The Alabama Supreme Court first recognized that since *Complete Auto* in 1977, the U.S. Supreme Court has allowed states to tax interstate commerce. The Court then stated, however, that the issue was not whether the sales could be constitutionally taxed under current case law, but rather, did the Legislature intend to tax the transactions when the exemption was enacted. The Court found that because interstate commerce could not be taxed when the exemption was enacted in 1959, the Alabama Legislature must have intended to exempt transactions in interstate commerce. AWe conclude, therefore, that (the exemption) applies today in the same manner that it did when enacted in 1959, and that it exempts sales of goods in interstate commerce from sales tax.@ *Dixie Tool and Die*, 537 So.2d at 925.

Section 40-23-62(2) was also enacted in 1959, before *Complete Auto*. Consequently, applying the rationale of *Dixie Tool and Die*, '40-23-62(2) must also be construed circa 1959 to exempt from Alabama use tax all property used exclusively in interstate commerce.[6]

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[6]*Dixie Tool and Die* was cited with approval in *Siegelman v. Chase Manhattan Bank (USA), N.A.*, 575 So.2d 1041 (Ala. 1991), and also in *Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc.*, 746 So.2d 966 (Ala. 1999). The Court=s rationale in *Dixie Tool and Die* was based on the presumption that the Alabama Legislature knew the constitutional limits on Alabama=s power to tax when the exemption was enacted in 1959, and also kept abreast of subsequent changes in constitutional tax law as pronounced by the U.S. Supreme Court. I respectfully disagree.

Tax law professors and others highly trained in the field of taxation regularly disagree

concerning the constitutional limits on a state=s power to tax. With due respect, it is not reasonable to presume that legislators largely unschooled on the subject knew what could and could not be constitutionally taxed when the exemption was enacted in 1959. Nor would I presume that the Legislature kept apprised of all subsequent Supreme Court cases involving a state=s power to tax, i.e. *Complete Auto*, and that because the Legislature failed to amend the exemption after *Complete Auto*, it must have intended for the exemption to apply circa 1959.

An exemption from taxation must be strictly construed for the Department and against the exemption. *Ex parte Kimberly-Clark Corp.*, 503 So.2d 304 (Ala. 1987). An exemption should not be allowed based on a presumption as to the Legislature=s intent, especially where the language of the statute is unambiguous, as in this case. *Ex parte Kimberly-Clark, supra*. (Legislature=s intent must be gleaned from the language of the statute, and if unambiguous, the plain language of the statute must be followed). Rather, I would follow the plain language of the statute, and would construe both '40-23-4(a)(17) and '40-23-62(2) as exempting only transactions that could not presently be taxed under the Constitution. There is no language in the statutes indicating an intent to the contrary. See also, *Pilgrim v. Gregory*, 594 So.2d 114 (Ala.Civ.App. 1991) (an Alabama statute that allowed an income tax deduction for sales tax paid to the same extent as allowed by federal law should be construed under current federal law, not the federal law as it read when the Alabama statute was enacted). But despite my

disagreement with the rationale of *Dixie Tool and Die*, that rationale must be followed.

The Taxpayer=s trucks were engaged in interstate commerce when they hauled goods between states. However, if the trucks hauled goods between points in Alabama, they were engaged in intrastate commerce. In that case, they would have effectively Acome to rest@ in Alabama when they picked up and delivered goods in Alabama, or stopped at one of the Taxpayer=s terminals in Alabama. The Alabama use tax would have applied to that exclusively intrastate use of the trucks, and such intrastate use would not have been exempt under '40-23-62(2).[7]

The burden of establishing that the trucks were exempt under '40-23-62(2) was on the Taxpayer. *McDonald v. C.I.R.*, 114 F.3d 1194 (1997); *Crim v. Phipps*, 601 So.2d 474 (Ala. 1992). Because there is no evidence that the trucks were used exclusively in interstate commerce during the subject period, the '40-23-62(2) exemption does not apply.

The final assessments are affirmed. Judgment is entered against the Taxpayer for State use tax of $50,989.78; City of Lafayette use tax of $26,817.21; and Chambers County use tax of $215.05. Additional interest is also due from the date of entry of the final assessments, January 25, 2001.

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[7]In *Complete Auto*, the taxpayer hauled vehicles from one point to another within Mississippi. However, the vehicles initially came from out-of-state. The Court assumed that the in-state hauling was a continuation of the interstate travel, and thus involved interstate commerce. In this case, the hauling of goods from one point to another in Alabama would not have involved interstate commerce unless the Taxpayer could show that the travel in Alabama was a continuation of the movement of the goods into or out of Alabama.

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

Entered November 29, 2001.