STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE
	§	ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. F. 90-154
UNION TANK CAR COMPANY 39 South LaSalle Street	§	
Chicago, IL 60603,	§	
Taxpayer.	§	

FINAL ORDER

The Revenue Department assessed franchise tax against Union Tank Car Company (Taxpayer) for the years 1983 through 1986. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted. in the matter an October 15, 1991. Alan Rothfeder and Will Sellers appeared for the Taxpayer. Assistant counsel Dan Schmaeling represented the Department.

FINDINGS OF FACT

The Taxpayer is a Delaware corporation domiciled in Illinois. The Taxpayer manufacturers specialty railroad cars at its facility in Illinois. Approximately 95% of the rail cars are subsequently leased by the Taxpayer. The remaining 5% are sold. The leased rail cars are used by the lessees throughout Canada and the United States. The Taxpayer also maintains several repair and servicing facilities throughout the rail system. The Taxpayer has no employees, owns no property, and maintains no manufacturing or servicing facilities in Alabama. None of the lease agreements, are executed in Alabama. The leased rail cars pass through Alabama in interstate commerce, but none are used exclusively in intrastate

travel within the State. The Taxpayer sometimes bills a lease customer at an Alabama address for the bookkeeping convenience of the customer.

The Taxpayer is qualified to do business in Alabama and filed Alabama franchise tax returns during the subject years. The Taxpayer allocated capital to Alabama on Schedule D of the returns using Items 2 (sales), 6 (salaries and wages), and 7 (tangible property) from Schedule C of the returns.

The Department reviewed the returns and determined that the Taxpayer was primarily engaged in leasing in Alabama during the subject years. Schedule D of the return requires that a corporation primarily engaged in leasing must allocate capital to Alabama using Items 3 (gross income) and 7 (tangible property) only. The Department reallocated the Taxpayer's capital to Alabama accordingly. The Department also included deferred federal income tax as capital in accordance with Department Reg. 810-2-3-.06. The assessments in issue are based on the above adjustments.

The Taxpayer contends that the assessments are incorrect for the following reasons:

(1) The Taxpayer first argues that it is not liable for the Alabama foreign franchise tax because it is engaged exclusively in interstate commerce and has no substantial nexus with Alabama.

(2) The Taxpayer next argues that the Department's method for allocating capital employed in Alabama is arbitrary, unreasonable and inaccurate.

(3) Finally, the Taxpayer contends that the deferred federal income tax account is not capital as that term is defined at Code of Ala. 1975, §40-14-41(b). The Taxpayer points out that deferred federal tax was not listed as a separate item of capital on the Alabama foreign franchise tax return until 1986. The Taxpayer also argues that Reg. 810-2-3-.06 cannot be applied to the subject years because the Department did not have authority to issue franchise tax regulations until Code of Ala. 1975, §40-14-58 was passed in 1990.

CONCLUSIONS OF LAW

The Taxpayer in this case is engaged exclusively in interstate commerce in Alabama. However, a taxpayer engaged in interstate commerce may be subjected to state taxation, but only if (1) the taxpayer or the activity to be taxed has a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to the services provided by the taxing state. See Complete Auto Transit Company v. Brady, 430 U.S. 274, 97 S.Ct. 1076 (1977). The two Alabama cases cited by the Taxpayer that hold that Alabama cannot tax a taxpayer engaged exclusively in interstate commerce, State v. Plantation Pipe Line Company, 89 So.2d 549 (1956) and State v. Transcontinental Gas Pipe Line Corp., 123 So.2d 1972 (1960), were decided prior to the Complete Auto Transit case and are no longer good law.

The Taxpayer argues that it is not subject to the Alabama

foreign franchise tax because it has no substantial nexus with Alabama. However, the threshold question, although perhaps only a restatement of the nexus question, is whether the Taxpayer was "doing business" in Alabama during the subject years and thereby subject to the franchise tax levy in the first place.

The franchise tax is levied on any foreign corporation "doing business" in Alabama. Code of Ala. 1975, §40-14-41. That section does not define what constitutes "doing business" in Alabama, although it does provide that a corporation qualified to do business in Alabama is presumed to be doing business in the State. However, the presumption is rebuttable. State v. City Stores Company, 171 So.2d 121 (1965).

In this case, the Taxpayer had no employees and owned no property in Alabama, maintained no manufacturing or repair facilities in Alabama, and none of the leases were executed in Alabama. The Taxpayer's only connection with Alabama was that its leased rail cars occasionally traveled through Alabama in interstate commerce while under the control of the lessees. The fact that the Taxpayer occasionally billed a lease customer at an Alabama address is inconsequential. Given the Taxpayer's minimal connection with Alabama, the Taxpayer was not "doing business" in Alabama and therefore cannot be held liable for Alabama franchise tax. The above holding is supported by three cases cited by the Taxpayer, Marx v. Truck Renting and Leasing Ass'n, 520 So.2d 1333 (1987);

Williams v. American. Refrigerator Transit Company, 86 S.E.2d 336 (1955); and Kentucky Tax Commission v. American Refrigerator Transit Company, 294 S.W.2d 554 (1956).

In Marx v. Truck Renting and Leasing Association, supra, a corporation domiciled outside of Mississippi leased trucks outside of Mississippi that occasionally traveled through Mississippi in interstate commerce. The foreign corporation had no employees or property in Mississippi and all of the leases were executed outside of Mississippi. The Mississippi Supreme Court ruled that the corporation did not have sufficient nexus with Mississippi to subject itself to Mississippi taxation. The Court stated as follows:

> A review of the record reflects that neither Saunders nor Ryder operated business facilities within the state, domiciled equipment within the state, stationed employees within the state, or entered into leasing agreements within the state. The only apparent connections with Mississippi are that each corporation is qualified to do business within the state and their equipment on occasion passes through the state via the highway systems. Based upon this, the chancellor concluded that no sufficient nexus existed to justify the tax sought to be imposed by Mississippi. The chancellor was correct in his findings. While it is true that the term "minimal connection" is employed in the test articulated by the Supreme Court, subsequent interpretations have noted that the corporation must "substantially" avail itself to the privilege of doing business in the taxing state. Such language certainly would appear to contemplate greater activities than those present in this case.

The Williams and Kentucky Tax Commission cases cited above involved substantively similar facts and issues. In both cases, corporations located out-of-state with no employees, property or

other activities in-state leased railroad cars that occasionally traveled through the state. The Georgia and Kentucky courts, respectively, ruled that the corporations were not doing sufficient business within the state to subject themselves to State taxation.

The Department has not cited and I can find no case law contrary to the above cases. Accordingly, I must hold that the Taxpayer was not "doing business" in Alabama during the subject years and therefore is not liable for franchise tax in those years.

The above holding pretermits a discussion of the other issues raised by the Taxpayer.

The above considered, the Department is directed to reduce and make final the assessments in issue showing no tax due.

Entered on March 19, 1992.

____
BILL THOMPSON
Chief Administrative Law Judge