STATE OF ALABAMA, DEPARTMENT OF REVENUE, vs. U. S. DIE CASTING AND DEVELOPMENT COMPANY, INC. 2019 Ford Road Sheffield, AL 35660, Taxpayer.	§ § § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. L. 91-208

FINAL ORDER

The Revenue Department assessed lease tax against U. S. Die Casting and Development Company, Inc. (Taxpayer) for the period January, 1987 through December, 1990. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted at the Taxpayer's facility in Sheffield, Alabama on April 5, 1993. David Avery, Gerald Hartley and Jesse Keller represented the Taxpayer. Assistant counsel Wade Hope represented the Department.

The issue in this case is whether the Taxpayer is liable for Alabama lease tax on the gross proceeds derived from certain leases between the Taxpayer, as sublessor, and two sublessees, U. S. Reduction Company and Doehler-Jarvis/Farley (DJF). That issue turns on whether the Taxpayer was engaged in the business of leasing tangible personal property during the period in issue.

The Taxpayer was incorporated in 1985 for the stated purpose "[T]o own and operate manufacturing facilities to create, manufacture, buy and sell castings and parts for the automotive, airplane and other related industries."

The Taxpayer purchased a large manufacturing facility in Sheffield, Alabama in August, 1985 for the above stated purpose. The facility covers approximately 42 acres and was constructed by Ford Motor Company in 1958 and thereafter operated by Ford until it was closed in 1983. The facility housed 78 large die cast machines and related equipment.

The Taxpayer financed the facility in part by transferring title to the facility to the City of Sheffield and then leasing the facility back from the City. Sheffield in turn issued an Industrial Development Revenue Bond for $6,000,000.00. The bond proceeds were used to purchase the facility, and also, along with approximately $7,865,000.00 in other grants and loans, to refurbish and renovate the facility.

The Taxpayer renovated and started operating the facility in 1986 for the intended purpose of manufacturing castings.

In 1986, U. S. Reduction Company approached the Taxpayer concerning the leasing of a small (5%) portion of the facility. The Taxpayer agreed to the lease because it was not using the space or equipment in question. U. S. Reduction honored the lease for 2½ years and then abandoned the premises.

In 1987, DJF approached the Taxpayer about leasing one-half of a building at the facility known as the "300 Building". The Taxpayer agreed to the lease because it was not then using the 300 Building. The lease included 3 die cast machines.

DJF approached the Taxpayer again in 1988 about leasing the other one-half of the 300 Building. The Taxpayer agreed, and as required by the lease moved 3 more die cast machines into the Building.

The Taxpayer continued to make inroads in the casting industry, but was still losing money when DJF offered to lease the entire facility and equipment (less the executive offices and a Butler building) in 1989. The Taxpayer decided to quit the casting business and lease the entire facility to DJF as the best way of meeting its long term debt obligations. The lease agreement was executed on April 1, 1989.

DJF subsequently assigned the lease to a limited partnership, ICM, Ltd., with the consent of the Taxpayer. Farley Industries, the parent company of DJF and general partner in ICM, Ltd., subsequently filed for bankruptcy in July, 1991. The facility has been idle and the Taxpayer has received no lease payments under the April 1, 1989 lease since February, 1992.

The Department audited the Taxpayer and assessed Alabama lease tax on the gross receipts from the leases to U. S. Reduction and DJF. Because the lease agreements did not distinguish between real property and tangible personal property, the Department estimated that 75% of the lease proceeds was derived from the leasing of tangible personal property, and thereby subject to lease tax, with the remaining 25% allocated to real property. The assessment in

issue is based on the above allocation. The Department also assessed a 25% late filing and late payment penalty against the Taxpayer.

The Taxpayer disputes the assessment as follows:

(1) The Taxpayer first argues that the leases were "casual" or "isolated" transactions and that it was not in the business of leasing tangible personal property so as to be subject to the Alabama lease tax.

(2) The Taxpayer argues in the alternative that if the leases were not casual or isolated transactions, then the die cast machines and most of the related equipment located at the facility were fixtures, i.e. real property, and thus outside the scope of the lease tax. The Taxpayer offered two expert witnesses on this point who estimated that approximately 98% of the lease proceeds related to real property, with the remaining 2% relating to tangible personal property. The experts concluded in their analysis that the die cast machines and most of the related equipment were fixtures, not tangible personal property.

(3) The Taxpayer next argues that at least a part of the lease proceeds are exempt under either the sale - leaseback exemption set out at §40-12-223(14), or under the Industrial Development Board exemption found at §11-54-31.

(4) Finally, the Taxpayer argues that the 25% penalty should not apply in this case.

Alabama's lease tax is levied "on each person engaging or continuing within this state in the business of leasing or renting tangible personal property". §40-12-222. The Taxpayer argues that lease tax is not due because it was not in the business of leasing tangible personal property. I agree.

A person is subject to the Alabama lease tax only if engaged in the continuous and regular business of leasing tangible personal property. Casual or isolated lease transactions are not subject to the lease tax. State v. G.M. and O. Land Company, 275 So.2d 687; State v. Bay Towing and Dredge Company, 90 So.2d 743 (relating to sales tax); and, Jones v. State, 149 So. 855 (relating to license tax).

Whether a lessor is engaged in the business of leasing must be decided on the facts of each case. Factors to be considered are whether the lessor intended to engage in leasing on a regular, continuous basis, the number and frequency of the leases, and did the lessor hold itself out or advertise as being in the leasing business. For an in-depth analysis of the criteria to be considered, see 42 A.L.R. 3rd 292.

In this case, the Taxpayer purchased the old Ford facility with the intended purpose of manufacturing castings. The Taxpayer did not intend to lease any part of the facility or equipment, and never held itself out as being in the leasing business. The Taxpayer did not initiate any of the leases in issue, but rather

was approached first by U. S. Reduction in 1986 and then by DJF in 1987 and again in 1988. Finally, after realizing that it could not successfully manufacture castings, the Taxpayer decided to go out of business and lease the entire facility to DJF in April, 1989.

I recognize that a business may purchase machinery for use in manufacturing, but then quit the manufacturing business and go into the business of leasing the machinery. If so, then clearly Alabama lease tax would be due. That did not happen in this case. The lease transactions in issue were entered into piecemeal and were not a series of related leases entered into by the Taxpayer in the regular course of business. The final lease with DJF in April, 1989 was in effect a lease of the entire facility. The lease of an entire business or the entire assets of a business is generally considered to be a casual or isolated transaction. Novak v. Redwine, 81 S.E.2d 222; Commonwealth ex rel Luckett v. Revday Industries, Inc., 432 S.W.2d 819.

The fact that more than one lease was involved also does not establish that the Taxpayer was in the business of leasing tangible personal property. See, State v. Bay Towing and Dredging Company, supra, in which several sales of used barges by a towing company were held to be casual or isolated transactions.

The above holding is reinforced by the rule of construction that a statute levying a tax must be strictly construed against the

Revenue Department and in favor of the taxpayer. Hamm v. Continental Gin Company, 165 So.2d 392; State v. Acker, 233 So.2d 514.

The above is dispositive of this case. However, I would also hold that the die cast machines in issue were fixtures, not tangible personal property, and thus would not be subject to lease tax even if the Taxpayer had been in the leasing business.

In Ex Parte Brown, 485 So.2d 762, Judge Wright, writing for the Court of Civil Appeals, described a fixture as follows, at page 764:

> "A fixture" is an article that was once a chattel, but which, by being physically annexed or affixed to realty, has become assessory to it and 'part and parcel of it.'" *Milford v. Tennessee River Pulp and Paper Company*, 355 So.2d 687 (Ala. 1978). Whether an article is a fixture is a determination that must be made on the particular circumstances of each case. Id. The supreme court has articulated the criteria to be used in making this determination as follows:
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> > "(1) Actual annexation to the realty or to something appurtenant thereto; (2) Appropriateness to the use or purposes of that part of the realty with which it is connected; (3) The intention of the party making the annexation of making permanent attachment to the freehold. This intention of the party making the annexation is inferred; (a) From the nature of the articles annexed; (b) The relation of the party making the annexation; (c) The structure and mode of annexation; (d) The purposes and uses for which the annexation has been made."
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> *Id. (quoting Langston v. State*, 96 Ala. 44, 11 So. 334 (1891).

Applying the above criteria, the court determined that custom-built cabinets anchored to the walls of a house became fixtures. In State Department of Revenue v. Montgomery Woodworks, Inc., 389 So.2d 510, custom-made cabinets were deemed to become a part of the real estate, i.e., fixtures, into which they were installed. See also, Bank of America v. Los Angeles, 224 Cal.App.2d 108, 6 A.L.R.3rd 491, in which a California appeals court held that electronic computer equipment installed in a bank was a fixture.

The die cast machines in this case weighed between 100 and 300 tons each and were specially welded, bolted and/or grouted with concrete into place. The machines were intended to be and functioned as an integral part of the facility. The machines were also attached to the facility by piping and wiring. If the relatively light-weight cabinets in Ex parte Brown and Montgomery Woodworks and the computer equipment in Bank of America were fixtures, then clearly the die cast machines in issue were fixtures. The above finding would not apply to the smaller, free-standing equipment, which would have to be reviewed on an individual basis.

In light of the above, there is no need to discuss the two exemption provisions claimed by the Taxpayer, or the applicability of the 25% penalty.

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

Entered on November 24, 1993.

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BILL THOMPSON
Chief Administrative Law Judge