

9.4% MANUFACTURED HOUSING	§	STATE OF ALABAMA
CONTRACT PASS-THROUGH		DEPARTMENT OF REVENUE
CERTIFICATES SERIES 1989A,	§	ADMINISTRATIVE LAW DIVISION
M & T BANK, TRUSTEE		
1 M & T Plaza	§	DOCKET NO. CORP. INC. 95-162
Buffalo, New York 14203,	§	
	§	
Taxpayer,	§	
	§	
v.	§	
	§	
STATE OF ALABAMA		
DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed corporate income tax against 9.4% Manufactured Housing Contract Pass-Through Certificates Service ("Manufactured Housing" or "Taxpayer") for the years 1991 and 1992. The Taxpayer appealed the assessments to the Administrative Law Division. The Taxpayer also claimed a refund of all corporate income tax previously paid to Alabama.

The matter was submitted on a joint stipulation of facts. Assistant Counsel Mark Griffin represented the Department. Gregory W. Johns signed the joint stipulation of facts for the Taxpayer. The Taxpayer's brief was submitted by Patricia C. Ross.

The issues, as framed by the parties, are as follows:

- (1) The Taxpayer argues that it does not have sufficient nexus with Alabama to be subject to Alabama's taxing jurisdiction;
- (2) If the Taxpayer is subject to Alabama corporate income tax, the issue then is what factors should be used in apportioning the Taxpayer's income to Alabama.

Manufactured Homes, Inc. ("MHI") is a North Carolina

corporation that sells manufactured homes. MHI's subsidiary, MANH Financial Services Corporation ("MANH"), finances MHI's sales and also the sales of other independent manufactured home retailers.

MANH then sells its financing contracts to the Taxpayer in this case.

The Taxpayer is a real estate mortgage investment conduit ("REMIC") as defined at 26 U.S.C.A. §860D. The Taxpayer purchases financing contracts and then sells interests in the pool of contracts through the sale of certificates. The Taxpayer receives interest income from the financing contracts, which is passed through pro-rata to the certificate holders.

The financing contracts held by the Taxpayer are secured by mortgages on the manufactured homes, some of which are located in Alabama. The Taxpayer otherwise has no assets, employees, or contacts in Alabama.

The Taxpayer voluntarily filed Alabama foreign corporation income tax returns for the years 1991 and 1992. The Taxpayer apportioned income to Alabama on those returns using the three factors of property, payroll, and sales. The payroll and property factors were zero percent on both returns.

The Department reviewed the returns and excluded the zero payroll and property factors, which correspondingly increased the Taxpayer's Alabama apportionment factor. The final assessments in issue are based on the above adjustments. The Taxpayer timely

appealed the final assessments, and also requested a refund of all corporate income tax previously paid to Alabama.

The Taxpayer's primary argument is that it does not have sufficient nexus to be subject to Alabama income tax. However, the Taxpayer is not subject to Alabama corporate income tax because there is no evidence that the Taxpayer is a corporation.

Alabama's corporate income tax is levied on every foreign corporation doing business in Alabama. Code of Ala. 1975, §40-18-31. The Taxpayer in this case is a REMIC, not a corporation. A REMIC is a unique entity created by Congress in 1986, see 26 U.S.C.A. §860A, et seq. Pursuant to §860A(a), a REMIC is not subject to federal income tax and shall not be treated as a corporation, partnership, or trust for purposes of federal income tax law. Rather, the income of a REMIC is taxable to the certificate holders to which the interest income is passed.

Alabama has no statutes or regulations governing REMICs or the taxation of REMICs. But under Alabama's general income tax statutes, the pass-through income of a REMIC would be taxable to the certificate holders that receive the income, the same generally as under federal law.

The above is dispositive of this case. But I also agree that the Taxpayer does not have sufficient nexus with Alabama to be subject to Alabama's taxing jurisdiction.

The leading tax case concerning nexus is Quill Corp. v. North

Dakota, 112 S.Ct. 1904 (1992). Quill holds that for Due Process Clause purposes, a taxpayer has sufficient nexus with a taxing state if the taxpayer purposely directs its activities towards residents of the state and avails itself of the economic benefits of the state. Quill, at pages 1910, 1911. The Quill due process standard can be met without physical presence in the state.

However, Quill reiterated that "substantial nexus" as required by the Commerce Clause is established only if the taxpayer has some physical presence in the taxing state.

The Taxpayer's only "contact" with Alabama is that some of its financing contracts are secured by mortgages on property in Alabama. It is questionable whether that indirect "contact" satisfies even the due process "minimum-contact" nexus required under Quill. But clearly, the Taxpayer does not have "substantial nexus" with Alabama as required under the Commerce Clause.

The Department cites Geoffrey, Inc. v. South Carolina Tax Commission, 437 S.E.2d 13 (S.Car. 1993), cert. denied 114 S.Ct. 550 (1993), in support of its argument that the Taxpayer has nexus with Alabama. I disagree.

The South Carolina Supreme Court held in Geoffrey that nexus was created when Geoffrey, an out-of-state corporation, licensed the use of its intangible trademark in South Carolina and derived income therefrom. This case can be distinguished factually from Geoffrey because the Taxpayer is not licensing a trademark in Alabama. I also question whether the ownership of financing

contracts that are secured by mortgages on property in Alabama constitutes the "use" of an intangible in Alabama.

I also disagree with Geoffrey that the "use" or "presence" of intangibles in a state, without at least some physical presence, is sufficient to establish nexus for Commerce Clause purposes under Quill. For a complete analysis of Geoffrey, see Cerro Copper Products, Inc. v. State, Admin. Law Docket F. 94-444, decided December 11, 1995.

The Taxpayer is not a corporation and does not have nexus with Alabama. The final assessments in issue are accordingly dismissed.

The Department is also directed to issue all timely filed refunds as requested by the Taxpayer.

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

Entered December 11, 1995.

BILL THOMPSON  
Chief Administrative Law Judge