

ELMER DEAN GITHENS  
37 Bayshore Drive  
Pensacola, Florida 32507,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 95-365

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

ORDER DENYING MOTION TO SET ASIDE ASSESSMENT  
AND ORDER SETTING HEARING

The Department assessed a 100% penalty against Elmer Dean Githens, as a person responsible for paying the delinquent sales tax liability on behalf of Superior Sleep Shop, Inc., for the period December 1992 through March 1993. Githens appealed to the Administrative Law Division.

Githens filed a Motion To Set Aside Assessment, claiming that he is a resident of Florida and that Alabama does not have jurisdiction to subject him to Alabama tax. Both parties filed briefs in support of their positions. Githens' motion is denied for the reasons stated below.

The issue is whether the Department has jurisdiction to tax an individual that resides outside of Alabama. That issue is in substance a due process question.

The United States Supreme Court has held that due process "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." Miller Brothers Co. v. Maryland, 347 U.S. 340, 344, 74 S.Ct. 535, 539 (1954).

Physical presence in the taxing state is not required. Rather, jurisdictional nexus is established for due process purposes if the out-of-state taxpayer is given "fair warning" or "notice" that his activities in the state may subject him to the state's taxing jurisdiction. Quill Corporation v. North Dakota, 504 U.S. 298, 312, 112 S.Ct. 1904, 1913 (1992). A taxpayer subjects himself to a state's taxing jurisdiction for due process purposes if he "purposefully avails (himself) of the benefits of an economic market in the taxing state." Quill, at p. 1910.

The issue of whether an out-of-state individual may be subjected to Alabama's taxing jurisdiction is analogous to whether an out-of-state resident can be subjected to the jurisdiction of Alabama's courts under Alabama's "long-arm" statute. Rule 4.2, A.R.Civ.P.

Alabama's courts have jurisdiction over a nonresident individual if the individual has "sufficient contacts" with Alabama. "Sufficient contacts" is defined at Rule 4.2(a)(2)(I) to include any minimum contacts not inconsistent with constitutional due process.

The Alabama Court of Civil Appeals enunciated the test for *in personam* jurisdiction under Rule 4.2 in Garret v. Key Ford, Inc., 403 So.2d 923, 925 (Ala.Civ.App. 1981) as follows:

"The ultimate test of *in personam* jurisdiction is 'reasonableness' and 'fairness' and 'traditional notions of fair play and substantial justice.'" Oswalt v. Scripto, Inc., 616 F.2d 191, 200 (5th Cir. 1980). That case merely restated the rule announced in the leading case of *International Shoe Co. v. State of Washington, etc.*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), that an *in personam* judgment may be rendered against

a nonresident if he has certain minimum contacts so that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." 326 U.S. at 316, 66 S.Ct. at 158.

Jurisdiction is established if the individual "purposefully avails himself of the privilege of conducting activities within the foreign state, thus invoking the benefits and protection of its laws." Murray v. Alfab, Inc., 601 So.2d 878, 884 (Ala. 1992), citing Hansen v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239 (1958). An individual subjects himself to jurisdiction in Alabama if he "purposefully directed" his activities toward Alabama. Horn v. Effort Shipping Company, Ltd., 777 F.Supp. 927, 930 (S.D.Ala. 1991). "If there are substantial contacts with the state, for example a substantive and continuing business, and if the cause of action arises out of the business done in the state, jurisdiction will be sustained." Ex parte Paul MacLean Card Services, 613 So.2d 1284, 1287 (Ala. 1993).

The Taxpayer in this case claims that Alabama does not have jurisdiction to tax him because he resided outside of Alabama during the period in issue. But as indicated above, actual physical presence in Alabama is not required. See also, Duke v. Young, 496 So.2d 37 (Ala. 1986). Rather, if the Taxpayer availed himself of Alabama's economic market and purposefully directed his activities toward Alabama as a responsible party on behalf of Superior Sleep Shop under Alabama's 100% penalty statute, then he had sufficient nexus with Alabama for due process purposes to be subject to Alabama's taxing jurisdiction.

The Taxpayer claims he had no minimum contacts with Alabama. However, the

extent of the Taxpayer's activities and contacts with Alabama can only be determined after a full evidentiary hearing. Consequently, a hearing is set on the merits of this case for 1:00 p.m., January 9, 1997 at Barlow & Associates, Court Reporters, 3217 Executive Park Circle, Mobile, Alabama.

Entered December 4, 1996.

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BILL THOMPSON  
Chief Administrative Law Judge