SUTTLES TRUCK LEASING, INC. SUTTLES TRUCK LEASING, LLC 2460 HIGHWAY 43, SOUTH DEMOPOLIS, AL 36732,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayers,	§	DOCKET NO. S. 07-503 S. 07-504
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

These consolidated cases involve State and local use tax final assessments entered by the Department against Suttles Truck Leasing, LLC for December 1999 through July 2002, and against Suttles Truck Leasing, Inc. for October 1996 through November 1999. The LLC and the corporation (sometimes "Taxpayers") appealed the final assessments to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on March 20, 2008. Jim Sizemore represented the Taxpayers. Assistant Counsel Wade Hope represented the Department.

ISSUES

The parties settled various issues relating to both Taxpayers before the March 20 hearing. The Department attorney stated at the hearing that the only remaining dispute involved trailers purchased by the corporation during the subject period. (R. at 4, 5) The Taxpayers stated in their post-hearing briefs, however, that they also dispute the use tax assessed on various trucks purchased in Alabama and assigned to terminals outside of Alabama, but for which Alabama sales tax "drive-out" exemption certificates were not provided.[1] The Taxpayers also contend that the Town of Creola use tax ordinance under

[1] Code of Ala. 1975, §40-23-2(4) specifies that vehicles purchased in Alabama that will be

which the local use tax in issue was assessed is unconstitutional because it does not provide a credit for local sales or use tax that may be paid on the subject property in another state.

The issues are as follows:

(1) Is the corporation liable for Alabama use tax on used trailers it purchased from non-dealers outside of Alabama;

(2) Is the corporation liable for Alabama use tax on new trailers if purchased from a dealer outside of Alabama;

(3) Is the corporation and the LLC liable for Alabama use tax on trucks purchased in Alabama and assigned to terminals outside of Alabama, but for which sales tax drive-out certificates were not provided; and,

(4) Is the Town of Creola use tax ordinance constitutionally defective because neither the ordinance nor Alabama law provide for a credit for local sales or use tax paid on the subject property in another state?

FACTS

The Taxpayers were in the long-haul trucking business throughout the United States and Canada during the period in issue. The corporation maintained 24 terminals during the period. Two of the terminals were in Alabama – a main terminal in Demopolis and a smaller one in Creola. The Taxpayers were also headquartered in Demopolis.

The corporation purchased used trailers from non-dealers outside of Alabama during the subject period. Specifically, it purchased trailers from Scaltech, Inc. in Texas, Pan Am

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registered or titled outside of Alabama and that are removed for first use outside of Alabama within 72 hours are exempt from Alabama sales tax. The exemption must also be

Transport in Florida, and Hynes Trucking in Michigan. The evidence is undisputed that the corporation first used those trailers outside of Alabama in Texas, Florida, and Michigan, respectively. It subsequently used the trailers in its business throughout the U.S., including in Alabama.

The corporation also purchased new trailers from a dealer, Brenner Tank, in Fond du Lac, Wisconsin during the subject period. Those trailers were first dispatched and used out of the corporation's terminal in Chicago, Illinois. The corporation thereafter used the trailers throughout the United States, including in Alabama.

Finally, both Taxpayers purchased trucks in Alabama during the subject period that were prepared for use in Alabama, but then assigned for first use to terminals outside of Alabama. If the corporation or the LLC provided the Department with a valid Alabama sales tax drive-out exemption certificate concerning one of the above trucks, the Department did not assess use tax on the truck. If, however, the corporation or the LLC was unable to provide a drive-out certificate, the Department assessed it for use tax on the truck.

ANALYSIS

(1). The trailers purchased by the corporation from the non-dealers outside of Alabama.

The Department argues that because the corporation was headquartered in Alabama, it dispatched and otherwise controlled the trailers in Alabama, and thus is liable for Alabama use tax on the trailers. The evidence is undisputed, however, that the above

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documented on forms, i.e., drive-out certificates, approved by the Department.

trailers were put in service and first used outside of Alabama. The trailers thus were not subject to Alabama use tax pursuant to the Alabama Court of Civil Appeals' recent opinion in *Boyd Brothers Transp., Inc. v. State Dep't of Revenue*, 976 So.2d 471 (Ala. Civ. App. 2007).

In *Boyd Brothers*, an Alabama-based trucking company purchased trucks and trailers outside of Alabama. It also first used the vehicles outside of Alabama. The Department assessed the company for use tax on its subsequent use of the vehicles in Alabama because the company had not paid sales or use tax on the vehicles to any state.

The Court of Civil Appeals found that the general use tax levied at Code of Ala. 1975, §40-23-61(c) did not apply for two reasons. First, the Court found that if the company had purchased the vehicles in Alabama and subsequently first used them outside of Alabama, the vehicles would have been exempt from Alabama sales tax pursuant to the "drive-out" provision at §40-23-2(4). The Court, citing *State v. Bay Towing & Dredging Co.*, 90 So.2d 743 (1956), held that because the vehicles would not have been subject to Alabama sales tax if they had been purchased in Alabama, their subsequent use in Alabama also was not subject to Alabama use tax.

The Court also held that the use tax at §40-23-61(c) applies only when the property in issue is initially intended for first use in Alabama, citing Dept. Reg. 810-6-5-.25(1). That regulation provides in substance that if property is purchased outside of Alabama and is first used outside of Alabama, its subsequent use in Alabama will not subject it to Alabama use tax.

In this case, the evidence is undisputed that the subject trailers were put in service

and first used outside of Alabama. And as in *Boyd Brothers*, "there was no evidence indicating that, at the time of purchase, (the corporation) intended to use the . . . trailers in Alabama." *Boyd Brothers*, 976 So.2d at 480.[2] Consequently, the corporation is not liable for Alabama use tax on its subsequent use of the trailers in Alabama.

The Department also argues that while the trailers purchased from the non-dealers involved "casual" sales that would not have been subject to the general sales tax levied at Code of Ala. 1975, §40-23-2 if the sales had occurred in Alabama, see *Bay Towing*, those trailers would have been subject to the "casual" sales tax levied at Code of Ala. 1975, §40-23-100 et seq. That section requires that if a vehicle is purchased from a non-dealer in Alabama, the purchaser must pay sales tax when he or she subsequently registers the vehicle in Alabama. The Department contends that because the corporation would have been liable for the casual sales tax if it had purchased the used trailers in Alabama, the corporation can be assessed use tax on its subsequent use of the trailers in Alabama. I disagree.

The casual sales tax levied at §40-23-101(a) and the casual use tax levied at §40-23-102(a) apply only if the subject vehicle is "required to be registered or licensed with the judge of probate of any county in this state. . . . " The trailers in issue were not required to be registered in Alabama. Rather, they were registered in Oklahoma. The casual sales and use taxes thus do not apply.

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[2] The evidence in *Boyd Brothers* was that when the trucking company purchased the subject vehicles, it intended to use the vehicles throughout the United States, including in Alabama. The Court apparently gave that fact little weight.

Finally, the Court in *Boyd Brothers* addressed the applicability of the use tax levied at Code of Ala. 1975, §40-23-61(e). That section levies a use tax on the use, storage, or consumption of any property used in Alabama in the performance of a contract. The Court held that the use tax at §40-23-61(e), if applied to the trucks in issue, would constitute an unapportioned flat tax, and thus unconstitutionally discriminate against interstate commerce, citing *American Trucking Association, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987). That rationale applies equally in this case. See generally, *Boyd Brothers*, 976 So.2d at 480 – 482.

(2). The trailers purchased by the corporation from the out-of-state dealer.

Because the trailers purchased by the corporation from the Wisconsin dealer were also first used outside of Alabama, the Taxpayer also is not liable for Alabama use tax on those trailers under the rationale of *Boyd Brothers*.

(3). Trucks purchased by both Taxpayers in Alabama and assigned to out-of-state terminals and for which no drive-out certificates were provided.

The Taxpayers concede that Alabama use tax is owed on trucks that were purchased outside of Alabama and subsequently assigned to a terminal in Alabama because those trucks had their first substantial use in Alabama. The Department concedes that trucks purchased in Alabama and assigned to terminals outside of Alabama were not subject to Alabama use tax, but only if the Taxpayers provided valid drive-out certificates for the trucks. This issue involves trucks purchased in Alabama and assigned to terminals outside of Alabama for which the Taxpayers failed to provide valid drive-out certificates.

The Taxpayers argue that the above trucks were not subject to Alabama use tax

because they were not purchased for initial use, storage, or consumption in Alabama, as required by the holding in *Boyd Brothers*. That is, their first substantial use was outside of Alabama. I must agree.

The Taxpayers purchased and prepared the subject trucks for use in Alabama. However, they were then assigned to a terminal outside of Alabama and first used outside of Alabama for their intended purpose. Their subsequent use in Alabama thus was not subject to Alabama use tax. See, Reg. 810-6-5-.25.

Reg. 810-6-5-.23 also specifies that tangible property intended for use outside of Alabama that is temporarily stored in Alabama and then taken outside of Alabama for its intended use is not subject to Alabama use tax. That regulation applies in this case.

(4). The Town of Creola ordinance.

The Taxpayers argue that the Town of Creola use tax ordinance is unconstitutional because neither the ordinance nor Alabama law provide a credit for local sales or use tax that may be paid on the subject property in another state. They contend that (1) the credit allowed at Code of Ala. 1975, §40-23-65 does not apply because it only relates to sales or use tax paid to another state, and (2) the local tax "anti-whipsaw" statute at Code of Ala. 1975, §40-23-2.1 does not apply because it only relates to local taxes paid in Alabama.

The U.S. Supreme Court has held that a tax must be fairly apportioned. See generally, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 280, 97 S. Ct. 1076 (1977).[3] A tax is fairly apportioned only if it is internally consistent. That is, "if every State were to impose an identical tax, no multiple taxation would result." *Goldberg v. Sweet*, 109 S. Ct.

[3] The *Complete Auto* test also requires a substantial nexus between the activity being taxed and the taxing state, that the tax is nondiscriminatory, and that it is reasonably related to

582, 588 (1989).

The Taxpayers argue that the Town of Creola use tax is not internally consistent because it does not provide a credit for local tax paid outside of Alabama. Consequently, if a taxpayer paid local sales tax when tangible property was purchased outside of Alabama, and then first used the property in Creola, the Creola use tax would also be due and double taxation would occur.

The Taxpayers are correct that the §40-23-65 credit provision and the local tax "anti-whipsaw" statute at §40-23-4.1 do not apply. However, Article V. I. of the Multistate Tax Compact, Code of Ala. 1975, §40-29-1 et seq., provides for a credit for "the combined amount or amounts of legally imposed sales or use tax paid by him or her with respect to the same property to another state and any subdivision thereof." Dept. Reg. 810-6-5-.04 also cites §40-27-1, Article V. I., and specifies in paragraph (2) that "credit for legally imposed sales or use tax paid to any other state or its subdivisions will be allowed . . . even if that state does not allow credit for sales and use taxes paid to Alabama or its subdivisions."

Because the Town of Creola (and any other subdivision of the State) is required by Alabama law to allow for a credit for local tax paid outside of Alabama, the Creola use tax is internally consistent. "[A]labama's use tax is (internally) consistent because of the credit provided for payment of sales or other use tax . . . ." *Ex parte Fleming Foods, Inc.*, 648 So.2d 577, 579 (1994).

The Department is directed to recompute the Taxpayers' liabilities as previously agreed and in accordance with the above findings. A Final Order will then be entered for

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services and protections provided by the taxing state.

the adjusted amounts due.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered July 22, 2008.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
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