

TSITALIA LLC  
501 32<sup>ND</sup> STREET SOUTH  
BIRMINGHAM, AL 35233-3528,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

§

§

§

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. BIT. 12-492

### FINAL ORDER

The Revenue Department assessed Tsitalia, LLC (“Taxpayer”) for business income tax for the year ending December 31, 2009. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on November 6, 2012. Steve Schniper represented the Taxpayer. Assistant Counsel Christy Edwards represented the Department.

The Taxpayer is an Alabama limited liability company (“LLC”) located in Birmingham, Alabama. The LLC had two Alabama resident members and one nonresident member that resided in Greece during the year in issue.

The LLC failed to file a 2009 nonresident composite return and report and pay Alabama tax on the nonresident member’s distributive share of the LLC’s 2009 income, as required by Code of Ala. 1975, §40-18-24.2(b)(1). The Department consequently assessed the LLC for the tax due, plus penalties and interest.

The Taxpayer claims that it failed to file a 2009 composite return based on its good faith belief that the nonresident member intended to file a 2009 individual Alabama return and pay the Alabama tax due on his distributive share of the LLC’s income. The Taxpayer’s representative also “questions whether the State of Alabama can assert that the ownership of an interest in a pass-through entity is sufficient, by itself, to give the State

jurisdiction over the nonresident owners of the entity.” The representative further claims that the composite return and payment requirements at §40-18-24.2 are “an attempt to disguise an actual tax due to the Department’s previous failure to tax a nonresident limited partner,” citing *Lanzi v. Alabama Dep’t of Revenue*, 986 So.2d 18 (Ala. Civ. App. 2006).

The issue is not, however, whether Alabama has jurisdiction to tax nonresident owners of a pass-through entity. Rather, the issue is whether Alabama can require the pass-through entity over which the State clearly has jurisdiction to report and pay Alabama tax on the nonresident’s distributive share of the entity’s Alabama-sourced income. Clearly, it can.

In *International Harvester Co. v. Wisconsin Dep’t of Taxation*, 64 S. Ct. 1060 (1944), the U.S. Supreme Court upheld a Wisconsin statute that required an in-state corporation, International Harvester, to withhold and remit Wisconsin income tax on dividends the corporation distributed to out-of-state stockholders that had no nexus with the State.

The power to tax the corporation’s earnings includes the power to postpone the tax until the distribution of those earnings, and to measure it by the amounts distributed. *Company Curry v. McCannless*, 307 U.S. 357, 370. In taxing such distributions, Wisconsin may impose the burden of the tax either upon the corporation or upon the stockholders who derive the ultimate benefit from the corporation’s Wisconsin activities. Personal presence within the state of the stockholder-taxpayers is not essential to the constitutional levy of a tax taken out of so much of the corporation’s Wisconsin earnings as is distributed to them. A state may tax such part of the income of a non-resident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers. (cites omitted)

*International Harvester*, 322 U.S. 435 at 441, 442.

The above rationale also applies concerning Alabama's nonresident composite return and payment provisions. Alabama can constitutionally tax an Alabama pass-through entity based on a nonresident's distributive share of the entity's income.

I agree with the Taxpayer's representative that Alabama's composite return and payment provisions were enacted after *Lanzi* to avoid the jurisdictional problems involved in taxing a nonresident partner or member. But such provisions are clearly constitutional, and while the tax is measured by the nonresident's distributive share of the entity's income, it is levied on the in-state entity.

The tax and interest as assessed by the Department is affirmed. The penalties are waived for reasonable cause under the circumstances. Judgment is entered against the Taxpayer for \$2,632.51. Additional interest is also due from the date the final assessment was entered, April 16, 2012.

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

Entered February 1, 2013.

---

BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Christy O. Edwards, Esq.  
Stephen H. Schniper  
Angela Cumbie  
Melody Moncrief