State of Alabama
Department of Revenue
Montgomery, Alabama 36132

GEORGE E. MINGLEDORFF III
Commissioner (Acting)

GEORGE E. MINGLEDORFF III
Assistant Commissioner

LEWIS A. EASTERLY
Secretary

ALABAMA DEPARTMENT OF REVENUE
REVENUE RULING 94-001

This document may not be used or cited as precedent. Code of Alabama 1975, §40-2A-5(a).

TO:

FROM: Commissioner of Revenue
Alabama Department of Revenue

DATE: February 17, 1994

SUBJECT: Financial Investment in Alabama by a Foreign Corporation as a Limited Partner is not an Activity so as to subject the Corporation to Alabama Franchise and Income Taxes

FACTS

Entity A is a state retirement fund organized pursuant to its State statute. Pursuant to the statute which creates the Board which administers the State Retirement Fund, it possesses all the "powers and privileges of a corporation." Nevertheless, Entity A is not a corporation under the laws of its State but, instead, acts as a trust which holds and invests pension fund monies with respect to certain public school employees.

Entity A proposes to make an initial equity investment in Alabama of approximately $64,350,000. The form of the investment will be through a limited partnership. The structure is very complex. Company B, a Delaware limited partnership, will be formed to acquire the mall section of a shopping center in Alabama. Company C will be the general partner of that entity. The limited partner of the entity will be Company D, a Delaware limited partnership. The general partner of Company D will be Company E, an Illinois limited partnership. The limited partner of Company D will be Entity A.

The limited partner of Company E is Company F, an Illinois limited partnership. The general partner of Company E is Company G, an Illinois corporation. In the aggregate, Company G and Company F will contribute to the capital of Company E $650,000. That $650,000 will, in turn, be contributed by Company E to Company D, as the capital contribution of the general partner. Entity A will contribute, as a limited partner

of Company D, $64,350,000 to the capital of Company D. Company D will contribute to Company B in the aggregate $65,000,000 and Company C will contribute to Company B the mall section of the shopping center in Alabama.

In addition, Entity A contemplates investing up to an additional $30 million as a limited partner in Company D which, in turn, will be contributed to Company B, as a result of certain proposed capital improvements. In the event such capital improvements are made, the shopping center will be expanded by approximately 76,000 square feet.

Even though Entity A contends that it is not a corporation under the laws of its State and that it is not "doing business" in Alabama pursuant to its limited partnership investment, Entity A has decided to qualify to do business as a foreign corporation due to the fact that the statute creating Entity A provides that the Fund "possesses powers of a corporation." Therefore, if Entity A goes through with the above transaction, it intends to qualify to do business as a foreign corporation in Alabama so as to render any contracts enforceable within this State.

ISSUES

(1) Whether the above proposed expenditures and qualification to do business as a foreign corporation subjects Entity A to Alabama's foreign franchise tax under Alabama Code, §40-14-41;

(2) Whether Entity A would be subject to Alabama income tax so as to require Entity A, as a limited partner in Company D, to include in taxable income its distributive share of the income of that partnership which, in turn, would be required to include in income its distributive share of the income of Company B.

LAW AND ANALYSIS

Entity A intends to qualify as a foreign corporation in the State of Alabama due to the fact that its enabling statute grants Entity A the "power and privileges of a corporation" even though it is clear from the State statute that Entity A functions as a trust. Its investment powers are defined by the trust laws of its state and even though the Fund will qualify to do business in Alabama, it is not a corporation under its State.

Article XII of the Constitution of Alabama of 1901 pertains to corporations. Specifically, §241 defines "corporation" to include all joint stock companies, and all associations having any of the powers or privileges of a

corporation, not possessed by individuals or partnerships. Based on that broad definition, the Fund is a corporation under Alabama law due to the fact that the enabling statute grants Entity A the power and privileges of a corporation.

The facts presented to the Department, however, reveal that Entity A is not subject to Alabama foreign franchise tax even though it intends to qualify as a foreign corporation pursuant to Alabama Code 1975, §10-2A-226. Alabama Code 1975, §40-14-41, provides that in order for a foreign corporation to be subject to Alabama franchise tax, it must be "doing business" within the State. While that same code section provides that the mere act of qualification is prima facie evidence that the entity is doing business, it is not a conclusive presumption. This presumption is overridden in this situation by Alabama Code, §10-2A-23, which provides that the participation by a corporation as a limited partner is not the act of "doing business" in Alabama.

As part of this requested Revenue Ruling, Entity A requested a determination as to whether it would be subject to Alabama income tax. Entity A, as a limited partner in Company D, if not otherwise exempt from income tax, would be required to include in taxable income its distributive share of the income of that partnership, which, in turn, would be required to include in income its distributive share of the income of Company B.

As part of its Revenue Ruling request, Entity A has provided the Department with a determination letter from the Internal Revenue Service which states that Entity A constitutes an entity that qualifies and is described in §401(a) of the Internal Revenue Code. Alabama Code 1975, §40-18-25(e), exempts from Alabama income tax those entities qualified under §401(a). Accordingly, Entity A's distributive share of income would not be subject to Alabama income tax.

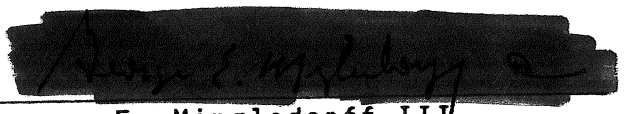
RULINGS

Entity A contemplates making certain investments in Alabama through various limited partnerships. These investments are to be used for the acquisition and expansion of a shopping center in Alabama. As part of its anticipated investments, Entity A intends to qualify as a foreign corporation with the State of Alabama. Entity A has also qualified under the Internal Revenue Code as an entity described in §401(a). Based on the above analysis, the Department issues the following rulings:

(1) Entity A is not "doing business" in Alabama for Alabama foreign franchise tax purposes and is not subject to Alabama Code 1975, §40-14-41. The mere fact

that Entity A is qualified to do business within the State of Alabama does not subject it to Alabama foreign franchise tax by virtue of Alabama Code 1975, §10-2A-23, as it is participating solely as a limited partner;

(2) Any income received by Entity A as a result of its investment in Alabama will be exempt from Alabama income tax pursuant to Alabama Code 1975, §40-18-25(e).



George E. Mingledorff III

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