



State of Alabama Department of Revenue

Montgomery, Alabama 36132

RALPH P. EAGERTON, JR.
Commissioner

ALABAMA DEPARTMENT OF REVENUE
REVENUE RULING 95-005

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§40-2A-5(a) (1993 Replacement Volume).

TO: Company A

FROM: Commissioner of Revenue
Alabama Department of Revenue

DATE: October 18, 1995

RE: Company A's subjection to Alabama foreign franchise
tax.

FACTS

Company A is a Texas Corporation which has not qualified to do business in the State of Alabama. Company A's primary business activity is the purchasing and taking assignment of retail installment contracts and ultimately the servicing of these contracts. Company A does not make direct loans. Company A participates in the FHA Title I Home Improvement & Manufactured Home Loan Program, under which the indebtedness Company A acquires is insured by the U. S. Department of Housing & Urban Development.

Company A proposes and desires to purchase, service and collect payments resulting from retail installment contracts which originate in Alabama. Under Company A's proposed plan, a mobile home dealer-retailer and a consumer in Alabama enter into a contract to purchase a manufactured home and then execute all financing documents between themselves. The dealer will then sell, assign and transfer the contract to Company A.

As part of this proposed activity, Company A will supply the dealer with various contract forms and other financing documents. However, the manufactured home dealer is not exclusively obligated to sell or assign the contract to Company A nor is Company A obligated to purchase all contracts from a dealer. The dealer must comply with Company A's underwriting and credit guidelines if it intends to sell a contract to Company A and, in turn, Company A will review the consumer's credit application and financing package at its office in Austin, Texas. The decision to finance the transaction will be made in Austin and communicated to the dealer by way of telephone or mail.

Company A will not have an office or employee in Alabama. The Alabama dealer will assign the contract and the lien securing the contract to Company A by returning the executed financing documents to Company A in Texas.

Incidental to the purchase and assignment of the contracts, an Company A employee domiciled in Georgia may occasionally travel to Alabama as a marketing representative for the purpose of soliciting manufactured home dealers. Company A will enter into a dealer agreement with a dealer so as to purchase the dealer's contracts, assist the dealer in implementing a retail financing program as well as furnish the dealer with supplies and equipment necessary for the generation of such contracts. The decision to provide the above financing arrangements for a particular dealer will be made in Texas after Company A reviews the dealer's application. Likewise, the decision to purchase a dealer's contract is made on a case by case basis depending on several factors.

After the initial contact, Company A's personal or direct contact with the dealer will be limited. The representative may contact the dealer in person every 60 days or so with the goal of insuring that the sale, transfer and assignment of retail installment contracts is progressing smoothly and to verify dealer compliance with Company A's financing program.

The primary business activity of purchasing and taking assignments of contracts and then servicing the contracts will be conducted by way of telephone and U. S. mail with Company A's corporate headquarters in Texas. In the event a consumer defaults in the payment of a contract, Company A may be required to bring legal action in Alabama to enforce its security interest in the manufactured home and/or collect on the contract.

ISSUE

Whether the above proposed activity as a foreign corporation subjects Company A to Alabama's foreign franchise tax under Ala. Code §40-14-41?

LAW AND ANALYSIS

Alabama's foreign franchise tax is levied upon corporations doing business in the State of Alabama. Ala. Code §40-14-41; Hollingsworth & Whitney Company v. State, 241 Ala. 96, 1 So.2d 387 (1941). If a foreign corporation is deemed "doing business" in the State of Alabama then its tax liability is measured upon the capital employed in Alabama by that corporation. All assets which have an actual or a legal situs in Alabama and which are

used or employed by the foreign corporation in Alabama in their exercise of any business are to be considered as the determining factor or measure of the tax. Alabama Textile Products Corporation v. State, 263 Ala. 533, 83 So.2d 42 (1955); State v. Pullman-Standard Car Manufacturing Company, 235 Ala. 493, 179 So. 541 (1938).

Alabama courts have addressed a situation similar to the one proposed by Company A and found that the monies generated from such activity is not "capital employed within the State." The activities of Company A under the traditional law would not be deemed as "doing business" in the State of Alabama as the Alabama activities would be incidental to the exercise of their ordinary corporate business. State v. City Stores Company, 277 Ala. 412, 171 So.2d 121 (1965); Investors Syndicate v. State, 227 Ala. 216, 149 So. 83 (1933) See also North Alabama Marine, Inc. v. Sea Ray Boats, Inc., 533 So.2d 598 (Ala. 1988).

Alabama courts have held that transactions in Alabama by a nonqualified foreign corporation involving no more than the sale, transportation and delivery of materials into this State are acts of interstate commerce to which Alabama laws are not applicable. Mere business solicitation and incidents relative to such solicitations do not constitute the transaction of business by a foreign corporation within the State of Alabama for purposes of the statutory and constitutional provisions pertaining to foreign corporations. Swicegood v. Century Factors, Inc., 280 Ala. 37, 189 So.2d 776 (1966); Loudonville Milling Company v. Davis, 251 Ala. 459, 37 So.2d 659 (1948).

The cases cited above and their respective holdings represent recognized statements of law pertaining to a determination of a company's "doing business" and "nexus" for taxing purposes. However, they must be read in light of more recent pronouncements from the United States Supreme Court and other state Supreme Courts.

In Quill Corporation v. North Dakota, 112 S.Ct. 1904 (1992), the United States Supreme Court stated that the nexus requirement of the due process clause can be satisfied even where the corporation has no physical presence in the taxing state if the corporation has purposefully directed its activity at the state's economic forum. One could argue that Company A does have a physical presence in Alabama due to the fact that it has a marketing representative visit the State to verify dealer compliance with Company A's financing program and also to solicit other manufactured home dealers for purposes of entering into a dealer agreement with the dealer to purchase the dealer's contracts. In addition, Company A assists the dealer by implementing a retail finance program and furnishing the dealer with the supplies and equipment necessary for the generation of such contracts. A review of the documentation included with this

Revenue ruling request reveals numerous documents that already have Company A's name preprinted. They are the same documents that would be executed by a buyer in the initial sale.

The Quill case additionally discussed Commerce Clause requirements and stated that physical presence in the state was required in order for a business to have "substantial nexus" with the taxing state for sales tax purposes. Since that ruling there have been several State court cases which have expanded upon the Quill decision. In Geoffrey, Inc. v. South Carolina Tax Commission, 437 So.E.2d 13 (S.C. 1993) cert denied 114 S.Ct. 550 (1993), the Supreme Court of South Carolina dealt with a trademark and held that by licensing such an intangible for use in South Carolina and deriving income from its use, Geoffrey had "substantial nexus" with South Carolina.

Recently on June 14, 1995, New York's highest court in Orvis Company, Inc. v. Commissioner, No. 138, and Vermont Information Processing, Inc. v. Commissioner, No. 139, ruled that systematic or planned visitation of a taxing state's market constitutes more than a "slightest presence", and would suffice for substantial nexus so as to impose a tax collection obligation under the commerce clause. Thus these two cases have further defined the Quill decision so as to determine that a "substantial physical presence" is not required in order to satisfy the "substantial nexus" threshold for commerce clause purposes. In these two cases, the companies involved were essentially mail order operations with occasional visits by nonresident employees of interstate, wholesale customers.

In reviewing the facts provided by Company A, there is no question that it is doing business in the State of Alabama. It has a physical presence in the State by virtue of its marketing representatives, solicitation of manufactured home dealers, and the providing of preprinted retail installment contract supplies and equipment. Any due process requirement is satisfied since its activities are purposely directed at this State's economic forum.

It is also my opinion that Company A's activities in Alabama satisfy commerce clause requirements in view of the recent Geoffrey, Orvis, and Vermont Information Processing cases. Company A's activities and presence in the State of Alabama establishes nexus and subjects them to Alabama's taxing statutes. The United States Supreme Court in Quill stated that an "economic presence would be sufficient to require the payment of an apportioned income or franchise tax and that these types of tax liabilities likely will not be dependent upon a showing of 'physical presence'".

Accordingly, Company A's business activities in Alabama are not solely interstate in character and their business activities

or transactions are such as to subject Company A to Alabama's foreign franchise tax.

HOLDING

Company A contemplates purchasing, servicing and collecting monies from retail installment contracts which originate between a dealer-retailer and a consumer in Alabama from the purchase of a manufactured home. As part of this anticipated activity, Company A will send a marketing representative from Georgia to solicit participation from manufactured home dealers as well as provide them with the documentation necessary to generate contracts which may be purchased by Company A, depending upon a consumer's credit application, which determination will be made in Texas. Based on the above analysis, the Department issues the following ruling:

Company A is "doing business" in Alabama for Alabama foreign franchise tax purposes and is subject to Alabama Code 1975 §40-14-41.

RALPH P. EAGERTON, JR. /

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