REL: March 5, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2200050

Black Eagle Minerals, LLC

v.

Alabama Department of Revenue

Appeal from Montgomery Circuit Court
(CV-18-900328)

MOORE, Judge.

Black Eagle Minerals, LLC ("Black Eagle"), appeals from a judgment of the Montgomery Circuit Court ("the trial court") sustaining a January

23, 2018, decision of the Alabama Tax Tribunal ("the tribunal") insofar as it affirmed certain tax assessments that had been issued by the Alabama Department of Revenue ("the department") to Black Eagle. We affirm the trial court's judgment.

Facts and Procedural History

Black Eagle is a Virginia limited-liability company that earned income from its business operations in a facility located near Tuscumbia from 2008 to 2011. In 2009, the Alabama Legislature enacted § 40-18-24.2, Ala. Code 1975, which requires that a composite income-tax return be filed by a pass-through entity on behalf of its nonresident members. A "pass-through entity" is defined by § 40-18-24.2(a)(3), in pertinent part, as "[a] partnership or other entity classified as a Subchapter K entity under [§] 40-18-1[, Ala. Code 1975]." The parties do not dispute that Black Eagle falls within the definition of a pass-through entity or that it has nonresident members, as defined in § 40-18-24.2. Section 40-18-24.2(b)(1) provides:

> "Except as provided in subsection (c), a pass-through entity shall file with the Department of Revenue, at the time the entity's annual return is required to be filed with the

> Department of Revenue for each taxable year, a composite income tax return on behalf of its nonresident members and shall report and pay the income tax imposed by this chapter [i.e., Title 40, Chapter 18, "Income Taxes'] at the highest applicable marginal rate provided in [§] 40-18-5[, Ala. Code 1975,] on the nonresident members' distributive shares of the income of the pass-through entity apportioned and allocated at the entity level to this state under Chapter 27 of this title [i.e., the Multistate Tax Compact]."

Section 40-18-5, Ala. Code 1975, outlines the tax rates imposed on taxable income for individuals in the State of Alabama. Following the enactment of § 40-18-24.2, the department issued assessments to Black Eagle pursuant to that statute for the 2008 through 2011 tax years.[1]

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[1]Act No. 2009-144, Ala. Acts 2009, which added § 40-18-24.2, provided that that act would "become effective for all tax years beginning after December 31, 2008, following its passage and approval by the Governor," which occurred on March 24, 2009.

Black Eagle argued before the trial court, among other things, that the 2008 tax assessment should be invalidated because, it said, "it relates to a tax year preceding the effective date of § 40-18-24.2(b)(1)." In its notice of appeal to the tribunal, however, Black Eagle failed to assert that argument, relying instead on its constitutional arguments. Accordingly, the trial court could not have considered that argument. See Ex parte Williamson, 907 So. 2d 407, 416 (Ala. 2004) (quoting Joyner v. City of Bayou La Batre, 572 So. 2d 492, 493 (Ala. Civ. App. 1990)) ("In a review of an administrative agency's decision, 'the circuit court's jurisdiction [is] limited to a consideration of the issues properly raised and made of record before the [agency].' "). Black Eagle does not argue on appeal that the

On December 16, 2011, Black Eagle filed notices of appeal to the tribunal, challenging the Alabama income-tax assessments it had been issued by the department for the 2008, 2009, and 2010 tax years insofar as those assessments required Black Eagle to remit taxes on behalf of its nonresident members. Black Eagle asserted, among other things, that the tax assessments issued to Black Eagle for the 2008, 2009, and 2010 tax years, pursuant to § 40-18-24.2(b)(1), were invalid because, it argued, the express language of § 40-18-24.2(b)(1) violates the Due Process Clause and the Commerce Clause of the United States Constitution. See Amend. XIV, § 1, and Art. I, § 8, cl. 3, United States Constitution. Black Eagle also asserted that the assessments were invalid because, it argued, those assessments violate the Due Process Clause and the Commerce Clause as applied to the facts in the present case. The department filed an answer to Black Eagle's notices of appeal, asserting, among other things, that, for

2008 tax assessment should be invalidated based on the effective date of § 40-18-24.2(b)(1); accordingly, that argument is waived. See Gary v. Crouch, 923 So. 2d 1130, 1136 (Ala. Civ. App. 2005) ("[T]his court is confined in its review to addressing the arguments raised by the parties in their briefs on appeal; arguments not raised by the parties are waived.").

the tax years in question, the department had a record of the income-tax returns filed by two of the three nonresident members of Black Eagle and that the Department had computed the subject tax assessments against Black Eagle for only the third nonresident member's share of income. The department stated that, if Black Eagle could provide documentation to show that the third nonresident member had filed and paid taxes for the 2008, 2009, and 2010 tax years to the department based on its pro rata share of Black Eagle's Alabama income, then it would credit Black Eagle for those payments.

On October 17, 2012, Black Eagle filed a notice of appeal to the tribunal, challenging the 2011 tax assessment entered against it with regard to the requirement that Black Eagle remit income taxes on behalf of its nonresident members. Black Eagle reiterated its arguments from its previous notices of appeal that § 40-18-24.2(b)(1) and the 2011 tax assessment violated the Due Process Clause and the Commerce Clause of the United States Constitution. The department filed an answer, asserting, among other things, that Black Eagle had failed to file a 2011 composite income-tax return with the department and had not made a corresponding tax payment and that the department had nevertheless computed the tax owed by Black Eagle and had entered a 2011 assessment against it in that amount. The tribunal entered an order consolidating Black Eagle's appeals.

After a number of filings by the parties and the entry of preliminary orders by the tribunal, the tribunal entered an order on February 27, 2017, indicating that the parties had submitted a joint stipulation of facts and setting the case for a hearing, which was conducted on April 11, 2017. On January 23, 2018, the tribunal entered an opinion and final order, concluding, among other things, that it lacked jurisdiction to rule on the constitutional issues raised by Black Eagle and that Black Eagle had failed to raise additional issues related to the tax assessments;[2]

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[2]Section 40-2B-2(g)(6), Ala. Code 1975, provides, among other things, that "[t]he Alabama Tax Tribunal shall decide questions regarding the constitutionality of the application of statutes to the taxpayer and the constitutionality of regulations promulgated by the Department of Revenue, but shall not have the power to declare a statute unconstitutional on its face." In the present case, the tribunal concluded that, to the extent that Black Eagle sought a ruling as to the application of § 40-18-24.2(b)(1) to Black Eagle, Black Eagle's argument was based solely on its being subject to the requirements in the statute because it has nonresident members, an argument that would not distinguish Black

accordingly, the tribunal affirmed the final assessments and entered a judgment in favor of the department. Black Eagle filed its notice of appeal to the trial court on February 22, 2018.

Black Eagle argued before the trial court, among other things, that the tax assessments issued to Black Eagle for the tax years 2008, 2009, 2010, and 2011, pursuant to § 40-18-24.2(b)(1), were invalid because, it said, the express language of § 40-18-24.2(b)(1) violates the Due Process Clause and the Commerce Clause of the United States Constitution. Black Eagle also asserted that the assessments were invalid because, it argued, under the facts of the present case, those assessments violate the Due Process Clause and the Commerce Clause. On July 27, 2020, the trial court entered a final judgment sustaining the final order of the tribunal and entering a judgment against Black Eagle for the 2008 through 2011 tax years. The trial court concluded, in pertinent part, that § 40-18-

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Eagle from other taxpaying entities who are also subject to Alabama's composite reporting and payment requirements because those entities have nonresident members. Accordingly, the tribunal declined to address the constitutional issues raised by Black Eagle with regard to Black Eagle's arguments that § 40-18-24,2(b)(1) is unconstitutional on its face and is unconstitutional as applied to Black Eagle.

24.2(b)(1) is merely a method of collecting Alabama income taxes from pass-through entities that have nonresident members, that Alabama's income-tax statutes impose taxes equally on both residents and nonresidents, and that, accordingly, there was no discrimination that would violate the Commerce Clause of the United States Constitution with regard to the department's applying § 40-18-24.2(b)(1) to collect income taxes from Black Eagle. Black Eagle filed a notice of appeal to the Alabama Supreme Court on September 4, 2020; that court transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

Standard of Review

"[An appellate court's] review of constitutional challenges to legislative enactments is de novo." Northington v. Alabama Dep't of Conservation & Nat. Res., 33 So. 3d 560, 564 (Ala. 2009). Additionally, our supreme court has stated, in pertinent part, that

> "'acts of the legislature are presumed constitutional. State v. Alabama Mun. Ins. Corp., 730 So. 2d 107, 110 (Ala. 1998). See also Dobbs v. Shelby County Econ. & Indus. Dev. Auth., 749 So. 2d 425, 428 (Ala. 1999) ("In reviewing the constitutionality of a legislative act, this Court will sustain the act '"unless it is clear beyond

> reasonable doubt that it is violative of the fundamental law." ' White v. Reynolds Metals Co., 558 So. 2d 373, 383 (Ala. 1989) (quoting Alabama State Fed'n of Labor v. McAdory, 246 Ala. 1, 9, 18 So. 2d 810, 815 (1944)).''). We approach the question of the constitutionality of a legislative act " ' "with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of the government." ' " Monroe v. Harco, Inc., 762 So. 2d 828, 831 (Ala. 2000) (quoting Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 159 (Ala. 1991), quoting in turn McAdory, 246 Ala. at 9, 18 So. 2d at 815).
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> " 'Moreover, in order to overcome the presumption of constitutionality, ... the party asserting the unconstitutionality of the Act ... bears the burden "to show that [the Act] is not constitutional." Board of Trustees of Employees' Retirement Sys. of Montgomery v. Talley, 291 Ala. 307, 310, 280 So. 2d 553, 556 (1973). See also Thorn v. Jefferson County, 375 So. 2d 780, 787 (Ala. 1979) ("It is the law, of course, that a party attacking a statute has the burden of overcoming the presumption of constitutionality....").'

"State ex rel. King v. Morton, 955 So. 2d 1012, 1017 (Ala. 2006)."

Bynum v. City of Oneonta, 175 So. 3d 63, 66-67 (Ala. 2015).

Analysis

Black Eagle first argues on appeal that § 40-18-24.2(b)(1) is unconstitutional under the Commerce Clause because, Black Eagle asserts, it facially discriminates against interstate commerce.

> "The Commerce Clause of the United States Constitution states that '[t]he Congress shall have power ... [t]o regulate commerce ... among the several states....' U.S. Const., Art. I, § 8, cl. 3. Notably absent from this text is any explicit prohibition on state regulation of interstate commercial activity. Nonetheless, the United States Supreme Court, in what is referred to as its 'dormant' or 'negative' Commerce Clause jurisprudence, has concluded that such a constitutional principle exists. 'The negative or dormant implication of the Commerce Clause prohibits state taxation ... or regulation ... that discriminates against or unduly burdens interstate commerce and thereby "imped[es] free private trade in the national marketplace." ' General Motors Corp. v. Tracy, 519 U.S. 278, 287, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997) (quoting Reeves, Inc. v. Stake, 447 U.S. 429, 437, 100 S. Ct. 2271, 65 L. Ed. 2d 244 (1980))."

Ex parte Hoover, Inc., 956 So. 2d 1149, 1150 (Ala. 2006).

In South Dakota v. Wayfair, Inc., 585 U.S. ___, ___, 138 S. Ct. 2080, 2090-91, 201 L. Ed. 2d 403 (2018), the United States Supreme Court outlined the "principles that mark the boundaries of a State's authority to regulate interstate commerce" and the precedents addressing the validity of state taxes:

> "First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce. State laws that discriminate against interstate commerce face 'a virtually per se rule of invalidity.' Granholm v. Heald, 544 U.S. 460, 476, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005) (internal quotation marks omitted). State laws that 'regulat[e] even-handedly to effectuate a legitimate local public interest ... will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970); see also Southern Pacific [Co. v. Arizona ex rel. Sullivan], [325 U.S. 761], at 779, 65 S. Ct. 1515 [(1945)]. Although subject to exceptions and variations, see, e.g., Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976); Brown–Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986), these two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause.
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> "These principles also animate the Court's Commerce Clause precedents addressing the validity of state taxes. The Court explained the now-accepted framework for state taxation in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). The Court held that a State 'may tax exclusively interstate commerce so long as the tax does not create any effect forbidden by the Commerce Clause.' Id., at 285, 97 S. Ct. 1076. After all, 'interstate

> commerce may be required to pay its fair share of state taxes.' D.H. Holmes Co. v. McNamara, 486 U.S. 24, 31, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988). The Court will sustain a tax so long as it (1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides. See Complete Auto, supra, at 279, 97 S. Ct. 1076."

Black Eagle argues on appeal that § 40-18-24.2(b)(1) is unconstitutional under the Commerce Clause based on the third prong of the test outlined in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977), recited above in Wayfair. Specifically, Black Eagle asserts that, because the tax imposed on the pass-through entity by § 40-18-24.2(b)(1) applies only when the pass-through entity at issue is owned by nonresident members, the statute is facially unconstitutional. Black Eagle also argues that § 40-18-24.2(b)(1) is unconstitutional under the Commerce Clause because, Black Eagle says, it operates with discriminatory effect. Specifically, it asserts that the tax outlined in § 40-18-24.2(b)(1) is imposed on pass-through entities, such as Black Eagle, that have nonresident members.[3] Thus, we consider whether the application of § 40-18-24.2(b)(1) to only entities with nonresident members necessarily results in a conclusion that the statute is either facially discriminatory or operates with discriminatory effect.

Black Eagle maintains in its brief to this court that § 40-18-24.2 imposes "a tax ... on the limited liability company -- not the individual owners"; the department counters that "Alabama does not impose income

[3]Black Eagle asserts tangentially in its brief on appeal, in both its statement regarding oral argument and its statement of jurisdiction, that § 40-18-24.2(b)(1) violates the Due Process Clause of the 14th Amendment to the United States Constitution. Black Eagle fails, however, to explain how the Due Process Clause applies in this case or to further develop any argument related to this issue. Accordingly, we conclude that Black Eagle has waived any argument related to the application of the Due Process Clause to § 40-18-24.2(b)(1) in this appeal. See Rule 28(a)(10), Ala. R. App. P., and Hudson v. Hudson, 178 So. 3d 861, 865 (Ala. Civ. App. 2014). Additionally, because Black Eagle has based its arguments that § 40-18-24.2(b)(1) is unconstitutional as applied to it on the facts that it is owned by nonresidents of Alabama and that similarly situated entities owned by Alabama residents are not subject to the tax imposed therein, we conclude, as did the tribunal, that Black Eagle has failed to distinguish itself from other entities subject to the statute and, thus, has waived any argument that the statute is unconstitutional as applied to Black Eagle. See Gary v. Crouch, 923 So. 2d 1130, 1136 (Ala. Civ. App. 2005) ("[T]his court is confined in its review to addressing the arguments raised by the parties in their briefs on appeal; arguments not raised by the parties are waived.").

tax directly on a subchapter K entity, but instead taxes its owners for their distributive share of the entity's taxable income." Black Eagle cites in support of its argument the holding of the tribunal in Tanner & Guin, LLC v. State of Alabama Department of Revenue, Docket No. BIT. 14-502 (Alabama Tax Tribunal, May 4, 2015 Final Order), in which the tribunal stated, in pertinent part:

> "The levy is against the Alabama entity, see, Code of Ala. 1975, § 40-18-24.2(c)(1), and the entity is required to file a composite return and pay the tax due, even if the nonresident partner is not liable for Alabama tax on the distributive income. In that case, the nonresident can file an Alabama return, receive a credit for the tax paid by the entity on the nonresident's behalf, see Code of Ala. 1975, § 40-18-24.2(b)(2), and obtain a refund of the amount paid."

Citing Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992), Black Eagle asserts that § 40-18-24.2(b)(1) discriminates against out-of-state investment in pass-through entities doing business in Alabama. In Hunt, the United States Supreme Court considered the constitutionality of a hazardous-waste-disposal fee imposed on hazardous wastes generated outside Alabama and disposed of at a commercial facility in Alabama, a fee imposed in addition to a base fee on all hazardous wastes and substances disposed of at commercial facilities in the state. 504 U.S. at 336-38. The United States Supreme Court observed, among other things, that " '[a] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.' " 504 U.S. at 342 (quoting Armco Inc. v. Hardesty, 467 U.S. 638, 642 (1984)).

In the present case, the department asserts that the tax burden owed to the department is not increased by § 40-18-24.2(b)(1) and describes § 40-18-24.2(b)(1) as a withholding mechanism. The department points to § 40-18-24.2(b)(2), which provides that "[a] nonresident member that has been included in a composite income tax return filed pursuant to this section may file its own Alabama income tax return and shall receive credit for Alabama income tax paid on the member's behalf by the pass-through entity."

In Tanner & Guin, supra, the tribunal observed that,

> "[i]f a partner in an Alabama pass-through entity resides outside of Alabama and has no contacts with Alabama other than being a nonresident partner in the entity, the State may not be able to assess and collect the Alabama tax due on the entity's income that is distributed or paid to the nonresident

> member or partner. To resolve the problem, the Alabama Legislature enacted the nonresident composite return requirement at Code of Ala. 1975, § 40-18-24.2(b)(1). See generally Tsitalia, LLC v. State of Alabama, Docket BIT. 12-492 (Admin. Law Div. 2/1/2013)."

Further, the tribunal stated in Tanner & Guin that "the composite return provision is in the nature of a withholding provision whereby the entity is required to pay tax on the income paid to a nonresident partner/member." In the present case, in the joint stipulation of facts filed by the parties before the tribunal, the parties stipulated to the fact that, "[s]tarting with the year 2009, the State of Alabama commenced mandatory withholding at the entity level for nonresidents." Thus, the parties appear to agree that § 40-18-24.2(b) is a withholding mechanism.

In Travis v. Yale & Towne Manufacturing Co., 252 U.S. 60 (1920), the United States Supreme Court considered the constitutionality of a statute that imposed an annual tax upon every resident of the State of New York with respect to his or her net income and that also provided that a like tax was imposed with respect to the net income from all property owned and from every business, trade, profession, or occupation carried on in New York by persons not residents thereof. Additionally, the tax scheme at issue included in the gross income of nonresidents only income from certain sources within the state and allowed for deductions for certain items to the extent that they were connected with income arising from sources within the state. Id. at 73. The United States Supreme Court concluded that the statute at issue did not unconstitutionally discriminate against nonresidents because it did not "in any wise increase the burden of the tax upon nonresidents, but merely recognize[d] the fact that as to them the state impose[d] no personal liability, and hence adopt[ed] a convenient substitute for it." Id. at 76.

The department also cites in support of its position Panhandle Producers & Royalty Owners Ass'n v. Oklahoma Tax Commission, 162 P.3d 960, 962 (Okla. Civ. App. 2007), in which the Oklahoma Court of Civil Appeals considered the "constitutionality of an Oklahoma statute requiring operators to withhold income tax from oil and gas royalty payments made to royalty interest owners who do not reside in Oklahoma." Like the department in the present case, the Oklahoma Tax Commission asserted in Panhandle Producers that the statute at issue in that case did not "impose different tax rates based on residency, but instead is only a different method of collecting the taxes due." Id. The Oklahoma Court of Civil Appeals concluded that the withholding statute at issue merely created a method of collecting taxes that did not increase the actual tax burden on nonresidents; that a rational basis for the classification in the statute existed; that the collection method had only an incidental effect on interstate commerce, which was outweighed by the Oklahoma Tax Commission's interest in collecting taxes before the income left the state; and that the statute passed constitutional muster under, among other clauses, the Commerce Clause. Id. Like the statute at issue in the present case, the Oklahoma statute exempted from the withholding requirement those royalty payments made to Oklahoma residents and granted nonresidents credit toward taxes owed for amounts withheld, as well as refunds of amounts withheld that exceed the taxes owed. Id. at 963.

The Panhandle Producers court determined that the statute at issue in that case did "not discriminate on its face because, although it direct[ed] withholding only as to nonresidents, it also grant[ed] nonresidents the right to a credit or refund of any amount withheld that exceeds the taxes due." 162 P.3d at 969. It further concluded that "the burden on interstate commerce caused by a particular tax collection method is only incidental." Id. The Oklahoma Court of Civil Appeals distinguished the statute at issue in that case from other tax laws challenged on Commerce Clause grounds by noting that it "[did] not impose a tax, but instead direct[ed] a method of collecting a tax." Id. Like in the present case, the company challenging the tax at issue in Panhandle Producers did not challenge the tax to which the withholding statute applied; that tax, like the tax involved in the present case (i.e., the income tax), applied equally to residents and nonresidents. Id. Accordingly, the Oklahoma Court of Civil Appeals concluded that the tax at issue in that case did not violate the Commerce Clause as a matter of law. Id. at 970.

The Oklahoma Court of Civil Appeals' reasoning in Panhandle Producers finds support in Associated Industries of Missouri v. Lohman, 511 U.S. 641 (1994), in which the United States Supreme Court considered the State of Missouri's imposition of a uniform, statewide use tax on all goods purchased outside the state and stored, used, or consumed within the state. The use tax at issue was not paired with any sales tax at the state level, although the State authorized political subdivisions to impose a local sales tax, and the Supreme Court noted that "[o]ver 1,000 localities ha[d] used that authority to enact sales taxes ranging from 0.5% to 3.5%, while at least one county ha[d] no local sales tax at all." Id. at 644. The Supreme Court of Missouri had acknowledged in its judgment upholding the use tax that, in just over half of local taxing jurisdictions, the 1.5% use tax exceeded the local sales tax. Id. at 645. The United States Supreme Court concluded that, because the use tax exceeded the applicable local sales tax in that case, the discrepancy imposed a discriminatory burden on interstate commerce. Id. at 649. The United States Supreme Court stopped short, however, of striking the use tax down in its entirety and holding that the tax was facially invalid in every jurisdiction; it stated, in pertinent part:

> "[W]e repeatedly have focused our Commerce Clause analysis on whether a challenged scheme is discriminatory in 'effect,' see, e.g., Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984), and we have emphasized that 'equality for the purposes of ... the flow of commerce is measured in dollars and cents, not legal abstractions.' Halliburton [Oil Well Cementing Co. v. Reily], 373 U.S. [64], at 70 [(1963)]. See also Gregg Dyeing Co.

v. Query, 286 U.S. 472, 481 (1932) ('Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries'). A purely nominal distinction in a State's statutes between the methods of regulating intrastate and interstate commerce, as long as it is not translated into any difference in the substance of regulations imposed, cannot be said to provide 'benefit[s]' to intrastate commerce or to impose discriminatory 'burden[s]' on interstate trade. New Energy [Co. of Indiana v. Limbach], 486 U.S. [269], at 273 [(1988)]. Thus, it would not violate the Commerce Clause.

"For similar reasons, the mere fact that determining the compensatory character of the use tax in this case requires consideration of the sales taxes levied by hundreds of local jurisdictions does not mean that the use tax should be rejected in toto as facially discriminatory. A compensatory tax and the tax for which it compensates need not be promulgated in the same provision of state law, or even through the same governmental entity, to survive Commerce Clause scrutiny. Such matters of form do not determine in substance whether the tax merely requires interstate commerce to 'pay its way,' Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 281 (1977) (internal quotation marks omitted), or discriminates against interstate trade. 'The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power.' Gregg Dyeing, supra, 286 U.S., at 480. See also Maryland [v. Louisiana], 451 U.S. [725], at 756 [(1981)]; Halliburton, supra, 373 U.S., at 69. If a State may

> place the provisions perfecting a compensatory tax scheme in two or more statutes passed by the state legislature, there is no logical reason to think that a State's decision to implement its sales/use tax scheme through provisions promulgated at different levels of government within the State makes the system invalid."

Lohman, 511 U.S. at 654-56 (footnote omitted).

In the present case, § 40-18-24.2(b)(1) requires a pass-through entity to file a composite income-tax return on behalf of its nonresident members and requires it to pay the income tax imposed on the nonresident members' distributive shares of the income of the pass-through entity attributable to Alabama at the rate provided in § 40-18-5. Section 40-18-24.2(b)(2) provides for a nonresident member on whose behalf the tax is paid to receive a credit for the tax paid by the pass-through entity. Thus, measuring the flow of commerce in dollars and cents, as stated in Lohman, the final amount paid by residents and nonresidents for their distributive shares of an entity's taxable income is equal, despite the distinction in the manner of collection. To the extent that Black Eagle defines the alleged "burden" on interstate commerce as the requirement that only entities with nonresident members are required to file a composite income-tax return while entities with only resident members are relieved of that additional requirement, there is no evidence before the court indicating that that filing requirement affects the ultimate amount collected by the State. Thus, that argument speaks only to a matter of form, which, as stated by the United States Supreme Court in Lohman, does not determine in substance whether the tax discriminates against interstate commerce. 511 U.S. at 655. Like the tax scheme in Travis, § 40-18-24.2(b)(1) does not ultimately increase the tax burden imposed on nonresidents as compared with residents of the State of Alabama.

Black Eagle clarifies its argument in its reply brief to state that it is challenging the assessment of the tax imposed by § 40-18-24.2(b)(1) based on the obligation of the pass-through entity to remit the tax amount regardless of whether the nonresident member remits Alabama personal income tax. That assertion, however, merely elucidates the reasoning behind the statutory scheme. Section 40-18-24.2(b)(1) requires the pass-through entity to pay the income tax, on behalf of its nonresident members, on the nonresident members' distributive shares of the income of the pass-through entity, apportioned and allocated at the entity level.

Plainly stated, if the nonresident members of the entity are to receive no distributive shares of the entity's income, there is no obligation on the entity itself. Thus, the entity's obligation is tied to the distributive shares of its individual members and cannot be separated therefrom. Like in Panhandle Producers, the burden on interstate commerce by the operation of § 40-18-24.2(b)(1), if any, is only incidental.

We conclude that § 40-18-24.2(b)(1) is not facially unconstitutional in light of the language of the entire statute and statutory scheme and that the statute does not operate with discriminatory effect. Having concluded that the statute does not violate the Commerce Clause and is due to be sustained pursuant to the test outlined in Complete Auto Transit, Inc. v. Brady, we decline to address the remaining arguments raised on appeal by Black Eagle, which are based on the assumption that the statute is facially unconstitutional.

AFFIRMED.

Thompson, P.J., and Hanson and Fridy, JJ., concur.

Edwards, J., recuses herself.