

STATE OF ALABAMA §
DEPARTMENT OF REVENUE, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

v. §
239

DOCKET NO. INC. 90-

INC. 90-240

MANDERSON AND ASSOCIATES, INC. §
c/o Andrea Wicher, Esq.

P.O. Box 55727 §
Birmingham, AL 35255-5727, §

MGH MANAGEMENT, INC. §
c/o Andrea Wicher, Esq. §

P.O. Box 55727 §
Birmingham, AL 35255-5727, §

Taxpayers. §

FINAL ORDER

On December 13, 1990, a Recommended Order was submitted to the Commissioner of Revenue by the Administrative Law Judge for the Department of Revenue in the above-styled action. Pursuant to §41-22-16(a)(2) Code of Alabama 1975, the Commissioner of Revenue has reviewed the record, consisting of stipulations, exhibits, briefs and the Recommended Order and it is the opinion of the Commissioner that the Recommended Order of the Administrative Law Judge is due to be reversed, and therefore the following Order is due to be entered.

PRELIMINARY STATEMENT

Manderson and Associates, Inc. (Manderson) and MGH Management, Inc. (MGH) both filed petitions for refund of income tax for the tax year 1986. The Revenue Department denied the refunds and the Taxpayers appealed to the Administrative Law Division. The appeals

were consolidated and submitted for decision on a joint stipulation of facts. Andrea L. Witcher, Esq. represented the Taxpayers and assistant counsel Dan Schmaeling represented the Department. This Recommended Order is based on the stipulated facts and briefs filed by both parties.

FINDINGS OF FACT

Manderson and MGH (Taxpayers or corporations) are both domestic Alabama corporations and both corporations had the same three Georgia residents as shareholders In 1986.

Both corporations operated primarily In Georgia during 1986. Manderson had no Income allocable or apportionable to Alabama in 1986 and only 6.8339% of MGH's income would have been apportioned and none would have been directly allocated to Alabama in 1986.

Manderson and MGH both filed regular Alabama corporation Income tax returns for 1986 and reported income from all sources both within and outside of Alabama. Manderson reported and paid tax of \$372,141.00 and MGH reported and paid \$25,052.00. The MGH return reflected a credit for income taxes paid to Virginia and Pennsylvania.

Both corporations filed S corporation returns with the State of Georgia in 1986. As a result, each shareholder included his distributive share of the income, losses, deductions and/or credits of both corporations on his individual 1986 Georgia return. Each shareholder also claimed a credit on his individual Georgia return

for his proportionate share taxes paid by both corporations to Alabama.

The Georgia Revenue Department disallowed the credit claimed by the individual shareholders for the tax paid by the corporations to Alabama, and accordingly assessed additional Georgia tax against each of the shareholders on February 15, 1990.

On March 13, 1990, both corporations filed amended 1986 returns with the Department and claimed a credit against their Alabama liability for the tax assessed by Georgia against the individual shareholders. As a result, Manderson claimed a refund of 4177,175.00 and MGH claimed a refund of \$9,128.00.

Also on March 13, 1990, both corporations filed a second amended 1986 Alabama return electing to be taxed as an S corporation in Alabama for that year. Both corporations filed a petition for refund along with the amended S corporation return claiming a refund of all taxes previously paid to Alabama for 1986 (\$372,141.00 for Manderson and \$25,052.00 for MGH).

The parties agree that if the corporations had been foreign corporations in 1986 or were taxed as S corporations in Alabama for 1986, then Manderson would owe no tax and MG" would owe tax only on the small amount of Income apportionable to Alabama in that year.

The parties also agree that if the corporations had filed regular corporation returns in Georgia instead of S returns, then Alabama would have allowed a credit for the tax paid by the corporations to

Georgia.

CONCLUSIONS OF LAW

The Taxpayers argue (1) that they should be allowed a credit against Alabama tax under Code of Ala. 1975, §40-18-21 for the tax paid by the individual shareholders to the State of Georgia In 1986 and (2) that they should be allowed S corporation treatment In 1986 based on their election to file amended 1986 S corporation returns on March 13, 1990. The Taxpayers are wrong on both points.

A tax credit Is granted by legislative grace and must be strictly construed against the taxpayer. 71 Am. Jur. 2d, State and Local Taxation, §549, et seq. The credit allowed by §40-18-21 can only be claimed by the person or corporation that actually pays the income tax to the foreign state. The Taxpayers did not pay Income tax to the State of Georgia in 1986, and thus cannot be allowed a credit in Alabama under §40-18-21.

Also, the Taxpayers cannot be treated as S corporations for 1986 because they failed to timely elect S corporation treatment as required by Code of Ala. 1975, §40-18-160 and related federal provision 26 U.S.C.A. §1362. See, Fulk and Needham, Inc. v. U.S., 208 F.Supp. 39; Simons v. U.S., 208 F.Supp. 744.

By virtue of the requirements of Alabama's credit statute and the untimely election of Taxpayers to seek "S" treatment, the Department's denial of Taxpayers' Petitions for Refund of income tax for tax year 1986 Is due to be upheld. This is a Final Order

and may be appealed pursuant to §41-22-20 Code of Alabama 1975.

DONE AND ORDERED on this the 7th day of January, 1991.

JAMES M. SIZEMORE, JR., Commissioner