

ALABAMA POWER COMPANY &  
GEORGIA POWER COMPANY  
c/o Southern Company Services, Inc.  
BIN 10139  
241 Ralph McGill Boulevard, NE  
Atlanta, GA 30308-3374,

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Taxpayers,

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v.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NOS. CORP. 02-254  
CORP. 02-255

### FINAL ORDER

The Revenue Department denied petitions for refund of income tax filed by Alabama Power Company (“APC”) for 1984, 1986, and 1987, and also petitions filed by Georgia Power Company (“GPC”) for 1984, 1985, 1986, and 1987. APC and GPC (together “Taxpayers”) appealed the denied refunds to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(c)(2)a. The appeals were consolidated, and a hearing was conducted on February 3, 2004. Will Sellers and Riley Roby represented the Taxpayers. Assistant Counsel Jeff Patterson represented the Department.

### ISSUE

The Department now concedes that the Taxpayers are due refunds for 1986 and 1987. The issue in dispute is whether APC’s 1984 refund claim and GPC’s 1984 and 1985 refund claims are time-barred. The Taxpayers argue that those refunds were timely claimed pursuant to the special one-year statute for claiming refunds at Code of Ala. 1975, §40-2A-7(b)(2)g.2. That statute allows a taxpayer to claim a refund within one year from when an IRS audit change becomes final. The Department contends that the one-year statute in §40-2A-7(b)(2)g.2. does not apply because the subject years were closed before

the October 1, 1992 effective date of the statute.

### **FACTS**

APC timely filed its 1984 Alabama income tax return in September 1985. GPC timely filed its 1984 and 1985 Alabama returns in September 1985 and September 1986, respectively.

In September 1988, the Department and APC executed the first of several waivers extending the time within which the Department could assess APC for additional 1984 tax. The last waiver relating to APC's 1984 tax year expired in September 1991. GPC also executed waivers beginning in September 1988 for the tax years 1984 and 1985. The last waiver relating to GPC's 1984 and 1985 tax years expired in December 1991.

In May 1993, the IRS issued a federal audit report concerning various consolidated federal returns of the Taxpayers' parent company, The Southern Company. Adjustments on that federal audit affected APC's 1984 Alabama liability and GPC's 1984 and 1985 Alabama liabilities. APC filed an amended 1984 Alabama return in February 1994 on which it reported and paid tax of \$762,236 on the uncontested IRS audit adjustments. GPC also filed amended 1984 and 1985 Alabama returns in March 1994 and paid additional tax of \$3,442 and \$6,760, respectively, on the uncontested federal adjustments. In February 1996, APC filed a second amended 1984 Alabama return and GPC filed its second amended 1984 and 1985 Alabama returns to correct an error in the federal tax deductions claimed on their first amended returns.

The Southern Company appealed the contested items in the federal audit report to the U.S. Tax Court in September 1994. On September 25, 1998, the Tax Court entered a stipulated Order finally deciding Southern Company's federal liabilities for the subject

years. The Order resulted in an overpayment of Alabama income tax paid by APC in 1984 and GPC in 1984 and 1985. Consequently, APC filed its third amended 1984 Alabama return on September 22, 1999 on which it claimed a refund of \$373,563 based on the final audit changes. GPC also filed its third amended 1984 and 1985 Alabama returns on September 22, 1999 on which it claimed refunds of \$1,268 and \$1,029, respectively. The refunds were deemed denied by operation of law on March 22, 2000. Code of Ala. 1975, §40-2A-7(c)(3). The Taxpayers timely appealed.

### **ANALYSIS**

During the years in issue, Code of Ala. 1975, §40-18-43 required that a petition for refund of income tax must be filed within three years from payment of the tax. Section 40-18-43 was amended by Act No. 90-583 in 1990. That amendment added paragraph (b), which included a new one-year statute of limitations for assessing tax or issuing refunds based on IRS audit changes.

Section 40-18-43 was repealed by Act 92-186, effective October 1, 1992. That Act, now codified at Code of Ala. 1975, §40-2A-1 et seq., and entitled the "Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act," included uniform statutes of limitations for assessing tax, see §40-2A-7(b)(2), and claiming refunds, see §40-2A-7(c)(2). Section 40-2A-7(b)(2) also included a revised version of the special one-year IRS change statute for assessing tax, see §40-2A-7(b)(2)g.1., and claiming refunds, see §40-2A-7(b)(2)g.2. Those provisions still provide generally that the Department may assess a taxpayer within one year after it is notified or learns of an IRS audit change, and also that a taxpayer may petition for a refund within one year after an IRS audit change becomes final.

The 1992 Act also included transitional rules concerning the statute of limitations for

assessing tax and claiming refunds. Section 83(b) of the Act, which is included as a Commissioner's Code Note after §40-2A-7 in Title 40, reads as follows:

“(1) The provisions of this act relating to the time limits for entering assessments and filing petitions for refunds or issuing refunds shall apply to all tax periods for which the time for entering any assessment or issuing any refund has not expired under existing law prior to October 1, 1992. (2) The provisions of this act relating to the time limits for entering assessments and filing petitions for refunds or issuing refunds shall neither cause the re-opening of any tax period which is closed on October 1, 1992, nor accelerate the closing of any tax period which is open on October 1, 1992.”

The Department claims that the one-year IRS change statute does not apply and that the refunds in issue are time-barred because the three year period for claiming refunds in §40-18-43 had expired concerning 1984 and 1985 before the effective date of Act 92-186. It also argues that the waivers signed by the parties only extended the time within which the Department could assess tax, but not the three-year period within which the Taxpayers could claim refunds.

The Department is correct that the waivers did not extend the time within which the Taxpayers could claim refunds for the subject years. They only extended the time for assessment. The Department is also correct that the three-year statute in §40-18-43 had expired before the effective date of Act 92-186, but only concerning the tax paid by the Taxpayers with their original 1984 and 1985 returns. As explained below, the three-year statute in §40-18-43 had not expired on the October 1, 1992 effective date of Act 92-186 concerning any tax paid within three years before that date, and certainly not concerning any tax paid after the effective date of the Act.

Section 40-18-43 required taxpayers to file a refund claim within three years from when a tax was paid. That is, payment of the tax triggered the three-year statute. The

three-year refund period in §40-18-43 thus closed three years from when the tax was paid, not three years from the end of the tax year involved, or three years from when the original return was filed for the tax year, as argued by the Department.

The Taxpayers in this case paid additional 1984 and 1985 tax when they filed their first amended 1984 and 1985 returns in 1994. The provisions in Act 92-186, including the one-year IRS change provision, were in effect at that time, and thus apply to that tax paid in 1994. I agree with the following statement at page 4 of the Taxpayers' Reply Brief:

Both Alabama Power and Georgia Power paid additional corporate income tax when the First Amended Returns were filed. When these additional taxes were paid by the Taxpayers, the Taxpayers' Bill of Rights undoubtedly applied and the Department gladly accepted the additional payments. When Taxpayers later received a U.S. Tax Court opinion resulting in the overpayment of Alabama corporate income tax, the Taxpayers properly petitioned the Department for a refund of amounts related to the additional taxes pursuant to the special one-year statute of limitations. Logically, Taxpayers' payment of additional taxes triggered a new statute of limitations for purposes of the additional taxes paid by Taxpayers. Without a new statute of limitations for refund purposes in this case, Taxpayers would be effectively denied due process for their overpayment of Alabama corporate income tax.<sup>1</sup>

This holding also does not conflict with the transitional rules in §83(b) of Act 92-186. Section 83(b)(1) provides that the provisions of the Act shall apply to all tax periods for

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<sup>1</sup> The Taxpayers relied primarily on the Administrative Law Division's decision in *Jefferson Smurfit Corporation (U.S.) v. State of Alabama, Corp.* 99-115 (Admin. Law Div. 10/22/99), in their initial brief. *Jefferson Smurfit* is not applicable, and I otherwise disagree with the Taxpayers' arguments in their initial brief. However, an analysis of those arguments, and why I disagree, is not necessary given that the refunds are otherwise due to be granted.

which the time for assessing tax or issuing refunds had not expired before October 1, 1992. Obviously, the time for claiming a refund of the 1984 and 1985 tax paid by the Taxpayers in 1994 could not have expired before October 1992, even though the tax was paid for prior tax years.

Section 83(b)(2) provides that Act 92-186 shall not reopen any tax period that was closed on October 1, 1992. Again, the statutory period for claiming a refund of the tax paid by the Taxpayers in 1994 could not have been closed on October 1, 1992. The fact that refunds of the tax paid by the Taxpayers with their original 1984 and 1985 returns were time-barred, i.e. closed, on the effective date of Act 92-186 is irrelevant.

APC paid additional tax of \$762,236 with its first amended 1984 return in February 1994. GPC paid \$3,442 and \$6,760 with its first amended 1984 and 1985 returns, respectively, in March 1994. As indicated, the one-year IRS change statute at §40-2A-7(b)(2) was in effect at that time.

The IRS audit changes concerning the Taxpayers' 1984 and 1985 liabilities became final pursuant to the Tax Court Order on September 25, 1998. The Taxpayers petitioned for the 1984 and 1985 refunds in issue on September 22, 1999, within the special one-year IRS change statute. The claims were thus timely filed.

The refunds are due to be granted in full because the 1984 refund of \$373,563 claimed by APC is less than the additional 1984 tax paid by APC in 1994, and the 1984 and 1985 refunds of \$1,268 and \$1,029, respectively, claimed by GPC are less than the

additional 1984 and 1985 tax paid by GPC in 1994.<sup>2</sup> The Department is directed to issue APC and GPC refunds in the above amounts, plus applicable interest. And as conceded by the Department, APC is also due a refund of 1986 and 1987 tax in the amounts of \$189,394 and \$8,450, respectively, plus applicable interest. GPC should also be issued 1986 and 1987 refunds in the amounts of \$1,929 and \$14,931, respectively, plus applicable interest.

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

Entered May 4, 2004.

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<sup>2</sup> APC had previously claimed an overpayment of \$54,942 with its second amended return. GPC also claimed overpayments of \$236 and \$1,401 on its second amended 1984 and 1985 returns, respectively. There is no evidence whether the Department refunded or allowed those amounts as credits in other years. But even if refunds or credits were allowed, the balance of the tax paid by the Taxpayers in 1994 was still greater than the refunds claimed in 1999.