

JEFFERSON SMURFIT CORP. (U.S.)
As Successor by Merger to
Container Corporation of America
401 Alton Street
Alton, IL 62002,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. CORP.INC. 99-115

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed corporate income tax against Container Corporation of America (AContainer@) for 1984, 1987, and 1988. Jefferson Smurfit Corporation (U.S.) (ATaxpayer@), as successor by merger to Container, appealed to the Administrative Law Division pursuant to Code of Ala. 1975, § 40-2A-7(b)(5)a. A hearing was conducted on May 25, 1999. Bruce Ely and Chris Grissom represented the Taxpayer. Assistant Counsel Jeff Patterson represented the Department.

ISSUE

The issue in this case is whether the Department properly assessed Container for the years in issue within the special one year statute of limitations at Code of Ala. 1975, § 40-2A-7(b)(2)g.1. That statute allows the Department to assess a taxpayer within one year after it is notified or otherwise learns that IRS audit changes concerning the taxpayer have become final.

FACTS

The pertinent facts are stipulated by the parties.

Container timely filed its 1984, 1987, and 1988 Alabama corporate income tax returns in September 1985, September 1988, and September 1989, respectively. The IRS audited Container's federal returns for

those years, which resulted in additional federal tax owed in each year.

Container notified the Department on March 30, 1993 concerning the IRS audit changes made to its 1984 federal liability. The Department entered a 1984 preliminary assessment against Container on March 30, 1994.

Container notified the Department on August 4, 1993 concerning the IRS audit changes made to its 1987 and 1988 federal liabilities. The Department entered 1987 and 1988 preliminary assessments against Container on July 28, 1994.

The Department entered a consolidated final assessment against Container on December 8, 1998 concerning all three years.¹ The Taxpayer appealed.

ANALYSIS

In 1990, the Alabama Legislature passed Act 90-583, effective April 19, 1990. Act 90-583 amended Code of Ala. 1975, § 40-18-45, which contained the statute of limitations for assessing Alabama income tax. The Act did not amend subparagraph (a) of § 40-18-45, which provided generally that the Department could assess income tax within three years from when a return was filed. The Act added new subparagraphs (b)(1) and (b)(2).

¹The Department can enter a final assessment at any time if a preliminary assessment was timely entered pursuant to Code of Ala. 1975, § 40-2A-7(b)(2). The parties did not explain why the Department waited four years to enter a final assessment. There is no evidence the Taxpayer objected to the delay.

Subparagraph (b)(1) provided generally that the Department had three years after an IRS audit change became final to assess additional Alabama tax. Subparagraph (b)(2) limited subparagraph (b)(1) by allowing the Department only one year from when it received notice of IRS audit changes to assess additional Alabama tax. The one year statute in subparagraph (b)(2) could not extend the three year statute in subparagraph (b)(1).

Act 90-583 was poorly written and confusing. It is clear, however, that the 1990 Act for the first time provided a special statute of limitations, either three years or one year, within which the Department could assess additional Alabama income tax based on IRS audit changes. Tax could be assessed under the special statute even if the general three year statute for assessing the tax had expired.

Section 40-18-45 was repealed effective October 1, 1992 in conjunction with passage of Act 92-186, commonly known as the Taxpayers=Bill of Rights and Uniform Revenue Procedures Act, Code of Ala. 1975, § 40-2A-1, et seq. Act 92-186 included a uniform statute of limitations within which the Department is required to assess all taxes. That section is codified at § 40-2A-7(b)(2). Section 40-2A-7(b)(2)g.1. is the successor to § 40-18-45(b), and contains the special statute relating to IRS audit changes. That provision clarified the law by allowing the Department to assess a taxpayer within one year from when it is notified or otherwise learns that IRS audit changes have become final.

Section 83(b) of Act 92-186 also provided:

A(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, 1992.²

It is undisputed that the Department timely entered the preliminary assessments in issue within one year from when it was notified of the IRS audit changes. This case thus turns on whether the Department is prohibited by § 83(b) of Act 92-186 from assessing the Taxpayer. As indicated, § 83(b) provides that the statute of limitations contained in Act 92-186 shall apply to all tax periods open on the October 1, 1992 effective date of the Act, but shall not reopen any tax period which was closed on that date. The issue thus is whether the

²Section 83(b) of Act 92-186 is not included in § 40-2A-7(b)(2), but rather is included as a Code Commissioner's Note after § 40-2A-7. The Administrative Law Division extensively, but unsuccessfully, researched the legal effect of part of an Act being included in the Code as a Code Commissioner's Note. The research included inquiries with Keith Norman, Alabama Bar Association Executive Director, and Bob McCurley, Director of the Alabama Law Institute, co-authors of *Alabama Legislation*, as well as Ray Crosby, analyst at the Alabama Reference Service. Those individuals agree that a Code Commissioner's Note has the force and effect of law. They were unable, however, to provide a cite confirming their belief. I am assuming for purposes of this Final Order that the Code Note containing § 83(b) of Act 92-186 has the force and effect of a statute.

years in issue were open on the effective date of Act 92-186.

The Taxpayer argues that because the general three year statute of limitations had expired before the effective date of Act 92-186, the subject years were closed, and the Department is prohibited by ' 83(b) from reopening those years. I disagree concerning the 1987 and 1988 tax years. As explained below, even though the general three year statute had expired for 1987 and 1988, those years were still open and could have been assessed on the effective date of Act 92-186 based on the special IRS audit change provision in Act 90-583.

The general three year statute at ' 40-18-45(a) had not expired for 1987 and 1988 when Act 90-583 was enacted in 1990. The Alabama Legislature may alter or extend an existing statute of limitations, as long as the Legislature does so before the existing statute expires. Ex parte State, Department of Revenue, 667 So.2d 1372 (1995). Consequently, because the 1987 and 1988 tax years were open when Act 90-583 was passed, that Act extended those years and kept the statute open for purposes of the IRS audit change provision. Those years thus could have been assessed by the Department under ' 40-18-45(b) on the effective date of Act 92-186. Because the 1987 and 1988 tax years were open on the effective date of Act 92-186, they are not being reopened. Section ' 83(b) does not prohibit the Department from assessing those years.

The above rationale does not apply to 1984. The general three year statute for 1984 was closed in September 1988. There was also no statute before Act 90-583 that kept the statute of limitations open for IRS audit change purposes. Because the Legislature cannot reopen a closed statute, Act 90-583 did not reopen 1984. Consequently, that year was closed on the effective date of Act 92-186, and cannot be reopened pursuant to ' 83(b) of the Act. The year also cannot be reopened based on the rationale of Ex parte State, Department of Revenue, supra.

The Taxpayer argues that if the Department is correct, the statute of limitations for income tax purposes would never be closed - ~~A~~Under the ADOR-s argument, a tax year - for income tax purposes - could

be adjusted based on federal RAR adjustments at any time in the future. The general three year statute of limitations at ' 40-2A-7 would be rendered meaningless with respect to federal RAR changes.® (underline in original). Taxpayer's Post-Hearing Brief at 7, 8.

The Taxpayer is correct. The special one year statute allows the Department to assess tax at any time based on IRS audit changes, provided it is assessed within one year from when the Department is notified or otherwise learns of the changes. That was the specific intent and purpose for the special one year statute. The general three year statute is rendered meaningless in the sense that the Department can assess tax within the special one year statute, even if the general three year statute has expired.

As a practical matter, the special one year statute is limited because the IRS has its own statute of limitations within which it must make audit changes and assess tax. See, 26 U.S.C. ' 6501. Obviously, if the IRS is time-barred from making audit changes for a tax year, there can be no federal audit changes for the year which would authorize the Department to assess additional Alabama tax pursuant to ' 40-2A-7(b)(2)g.1.³

³The statute is not limited, however, with respect to taxpayers that fail to file a return or file a fraudulent return. Like Alabama law, federal law allows the IRS to assess tax at any time in those circumstances. See, Code of Ala. 1975, ' 40-2A-7(b)(2)a. and 26 U.S.C. ' 6501(c)(1), (2), and (3). But again, the intent and purpose of the special one year statute is to allow the Department to assess a taxpayer anytime the IRS makes audit changes.

If the Taxpayer's rationale is logically extended, it would also apply to tax years for which a taxpayer failed to file a return or filed a fraudulent return. For example, assume that a taxpayer filed a fraudulent 1988 Alabama return on April 15, 1989. Under both pre-Act 92-186 and post-Act 92-186 law, the Department was and is authorized to assess that year at any time. See, Code of Ala. 1975, § 40-18-46(a) (repealed October 1, 1992), and § 40-2A-7(b)(2)a. (effective October 1, 1992). Applying the Taxpayer's rationale, however, § 83(b) would prohibit the Department from assessing the taxpayer in the example because the general three year statute expired for 1988 on April 15, 1992, before the effective date of Act 92-186. Certainly the Legislature did not intend to allow a taxpayer that filed a fraudulent return to escape liability through such a loophole. Likewise, the Legislature did not intend to limit the scope of the special one year IRS audit change provision to only tax years for which the general three year statute had not expired on October 1, 1992. To the contrary, the purpose of both the pre-October 1992 statute (§ 40-18-45(b)) and the post-October 1992 statute (§ 40-2A-7(b)(2)g.1.) was to allow the Department to assess tax based on IRS audit changes within a specific period, even if the general three year statute had expired.

The Taxpayer also argues that § 83 of Act 92-186 was added with the clear and express understanding that it related to the new and much improved statute of limitations for RAR adjustments. (Taxpayer's Post-Hearing Brief at 7).

I was chairman of the ad hoc committee that drafted Act 92-186. The senior attorney representing the Taxpayer was an active and valuable member of the committee. I recall the committee's general discussions concerning the transitional rules set out in § 83 of the Act. I do not recall, however, that the committee ever specifically discussed § 83 as it related to the statute of limitations for federal RAR adjustments at § 40-2A-7(b)(2)g.1. In any case, the actual language of the statute controls, not what the drafters or the individual legislators that enacted the statute may have intended. Pilgrim v. Gregory, 594 So.2d 119 (Ala.Civ.App. 1991).

In summary, the tax years 1987 and 1988 were not closed on the effective date of Act 92-186 because the Department could have assessed the Taxpayer for those years based on the special IRS audit change provision in § 40-18-45(b). Consequently, § 83(b) does not prohibit the Department from assessing those years. Tax year 1984 was closed before Act 90-583 was enacted, and thus, unlike 1987 and 1988, was not kept open by that Act. That year was thus closed on the effective date of Act 92-186, and cannot be reopened. The 1984 tax year should be removed from the final assessment. The Department should notify the Administrative Law Division of the adjusted amount due for 1987 and 1988. A Final Order will then be entered.

This Opinion and Preliminary Order is not an appealable order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, § 40-2A-9(g).

Entered October 22, 1999.