

AMEREX CORPORATION §
2900 HWY. 280 S., SUITE 300 §
BIRMINGHAM, AL 35223-2453, §

Taxpayer, §

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
ALABAMA TAX TRIBUNAL

DOCKET NO. BPT. 14-504

FINAL ORDER

The Revenue Department assessed Amerex Corporation (“Taxpayer”) for 2006, 2007, and 2008 business privilege tax. The Taxpayer appealed to the Department’s Administrative Law Division, now the Tax Tribunal, pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. The case was submitted on a joint stipulation of facts and briefs. Tom Brinkley and David Humber represented the Department. Assistant Counsel Mary Martin Majors represented the Department.

The stipulated facts are as follows:

1. On or about October 28, 1999, McWane, Inc. formed a wholly owned acquisition subsidiary, James Manufacturing, Inc., a Delaware corporation (“James”).

2. On or about November 4, 1999, James acquired all of the outstanding stock of Amerex, with James and Amerex immediately making an election under I.R.C. § 338(h)(10) in order for the stock purchase to be treated as an asset purchase by Amerex for federal and state income tax purposes (the “Amerex Acquisition”).

3. As a result of the stock purchase followed by the I.R.C. § 338(h)(10) election, goodwill of \$63,920,192 from the Amerex Acquisition was reflected on the balance sheet of Amerex, the Taxpayer (the “1999 Goodwill”).

4. On November 30, 1999, James merged downstream with and into Amerex (the “James-Amerex Merger”).

5. At the time of the James-Amerex Merger, all of the stock of James was owned by a wholly owned subsidiary of McWane, Inc.

6. In 2010, this subsidiary merged with and into McWane, Inc., leaving Amerex as a wholly owned subsidiary of McWane, Inc.

7. The 1999 Goodwill remained on the balance sheet of Amerex after the James-Amerex Merger and after the merger described in Fact #6 above.

8. Separately, on December 3, 1999, Amerex incorporated Amerex Supply, Inc., an Alabama corporation ("Amerex Supply").

9. On March 16, 2000, Amerex Supply acquired substantially all of the assets of the following four corporations (collectively, the "Supply Subsidiaries"): Accurate Metal Products, Inc., a New Jersey corporation; Automating Brazing Co., a New Jersey corporation; Interstate Industries of New Jersey, Inc., a New Jersey corporation; and Automatic Industries, a New Jersey corporation (collectively, the "Supply Acquisitions").

10. As a result of the direct purchase of the assets of the Supply Subsidiaries by Amerex Supply, goodwill of \$10,087,498 was reflected on the balance sheet of Amerex Supply (the "2000 Goodwill").

11. On December 28, 2000, Amerex Supply merged upstream with and into its parent, Amerex, effective January 1, 2001 (the "Supply-Amerex Merger").

Alabama's business privilege tax is based on a taxpayer's net worth in Alabama. Code of Ala. 1975, §40-14A-22(a). Code of Ala. 1975, §40-14A-23(g)(3) allows a deduction in computing net worth for the "unamortized portion of goodwill . . . appearing on the taxpayer's balance sheet by reason of a direct purchase of another corporation or limited liability entity."

The Taxpayer deducted the 1999 Goodwill (paragraphs 2 and 3 of stipulated facts) and the 2000 Goodwill (paragraphs 9, 10, and 11 of stipulated facts) in computing its net worth on its 2006, 2007, and 2008 Alabama business privilege tax returns. The Department

disallowed the goodwill deductions, increased the Taxpayer's net worth accordingly, and entered the final assessments in issue. This appeal followed.

The §40-14A-23(g)(3) goodwill deduction was addressed by the Department's Administrative Law Division in *Rheem Manufacturing Co. v. State of Alabama*, Docket B.P. 03-1086 (Admin. Law Div. 6/14/2005). In that case, Rheem's corporate great grandparent was involved in a stock purchase that resulted in goodwill on the great grandparent's books. That goodwill was pushed down to Rheem pursuant to an accounting mechanism known as "push down accounting." Rheem subsequently deducted the goodwill on its 2000 business privilege tax return pursuant to §40-14A-23(g)(3). The Administrative Law Division held that for the deduction to apply, there must be a direct purchase of another corporation by the taxpayer on whose books the goodwill appears. Rheem thus could not deduct the goodwill because it did not appear on Rheem's books because of a direct purchase by Rheem of another corporation.

Alabama's business privilege tax is levied on a taxpayer's net worth in Alabama. Code of Ala. 1975, §40-14A-22(a). "Net worth" is defined generally at §40-14A-23. As indicated, §40-14A-23(g)(3) provides for a subtraction from net worth for the "unamortized portion of goodwill and core deposit intangibles appearing on the taxpayer's balance sheet by reason of a direct purchase of another corporation . . ."

Rheem argues that §40-14A-23(g)(3) does not require that the "direct purchase" must be by the taxpayer on whose balance sheet the goodwill appears. Rather, according to Rheem, "all the statute requires is that the goodwill must 'appear . . . on the taxpayer's balance sheet by reason of a direct purchase of another corporation.' Here, the goodwill appeared on taxpayer's balance sheet by reason of the direct purchase of PACE by Paloma, and taxpayer is entitled to the deduction." Rheem's Brief at 11.

* * *

The Department counters that §40-14A-23(g)(3) requires that the direct purchase must be by the taxpayer corporation on whose books the goodwill

appears. “Also, the use of the word ‘direct’ in §23(g)(3) shows that the goodwill must be attributable to a purchase *by the taxpayer*. If, as contended by Rheem, the purchase could be by an entity other than the taxpayer, then the legislature would not have needed to use the word ‘direct.’ That is so, because every purchase (under Rheem’s interpretation) would qualify as a ‘direct purchase.’” Department’s Brief at 8.

I agree that the Legislature must have included the word “direct” for a purpose. Every word in a statute must be given a meaning, if possible. *Custer v. Homeside Lending, Inc.*, 858 So.2d 233 (Ala. 2003). If Rheem’s position is correct, then the word “direct” in the statute would have no meaning. Consequently, the phrase “direct purchase of another corporation” must be interpreted as a purchase of another corporation by the taxpayer corporation on whose books the goodwill appears. The goodwill that was pushed down to Rheem’s books was created by the purchase of PACE by Paloma, not by a purchase, direct or otherwise, by Rheem of another corporation. Rheem thus is not entitled to the deduction provided in §40-14A-23(g)(3). The above conclusion is supported by the rule of construction that a deduction from tax must be strictly construed against the deduction and for the Department. *Ex parte Kimberly-Clark Corp.*, 503 So.2d 304 (Ala. 1987). (footnote omitted.)

Rheem at 3 – 5.

Pursuant to the specific language in §40-2A-23(g)(3), the Taxpayer can deduct the 1999 goodwill in issue only if the goodwill appeared on the Taxpayer’s balance sheet as a result of the direct purchase by the Taxpayer of another corporation. That did not occur because the Taxpayer did not purchase another corporation. Rather, the Taxpayer was itself purchased by another corporation – James.

The 1999 goodwill also did not appear on the Taxpayer’s balance sheet as a result of James’s purchase of the Taxpayer. Rather, it was the subsequent §338(h)(10) election that caused the goodwill to be on the Taxpayer’s balance sheet. Paragraph 3 of the joint stipulation specifies that “[a]s a result of the stock purchase (by James) *followed by* the I.R.C. §338(h)(10) election, the . . . goodwill from the Amerex Acquisition was reflected” on

the Taxpayer's balance sheet. My understanding is that but for the §338(h)(10) election, the goodwill would not have appeared on the Taxpayer's books.¹

Likewise, the Department properly disallowed the Taxpayer's deduction of the 2000 goodwill because it also did not appear on the Taxpayer's balance sheet pursuant to a direct purchase by the Taxpayer of another corporation. Rather, the 2000 goodwill resulted when the Taxpayer merged with another corporation, Amerex Supply, that itself had the goodwill on its books. Goodwill appearing on a taxpayer's balance sheet as a result of a merger does not qualify for the §40-14A-23(g)(3) deduction. I agree with the Department's well-reasoned brief on this issue, which reads in pertinent part, as follows:

The 2000 Goodwill Issue

As noted in the Joint Stipulations of Material Fact, the 2000 Goodwill resulted from Amerex Supply's (footnote omitted) acquisition of substantially all the assets of the following: Accurate Metal Products, Inc.; Automating Brazing Co.; Interstate Industries of New Jersey, Inc.; and Automatic Industries. Joint Stipulations of Material Fact ¶ 9. Amerex Supply's direct purchase of the before mentioned Supply Acquisitions, resulted in goodwill of \$10,087,498 being reflected on the balance sheet of Amerex Supply. Joint Stipulations of Material Fact ¶ 10. Thus, Amerex Supply's direct purchase of other corporations which resulted in goodwill appearing in Amerex Supply's balance sheet is the exact type of transaction for which a goodwill deduction is allowed for business privilege tax purposes pursuant to § 40-14A-23(g)(3) and the Administrative Law Division's final order in *Rheem*, B.P. 03-1086. However, Amerex Supply did not claim any such deduction but instead the Taxpayer claimed the deduction following a merger with Amerex Supply. Joint Stipulations of Material Fact ¶ 11.

The question then becomes whether the Taxpayer and Amerex Supply merger is a "direct purchase of another corporation" pursuant to § 40-14A-23(g)(3). The Department contends that a merger is substantially different in substance than a direct purchase and, thus, the Department

¹ Again, even if the goodwill had appeared on the Taxpayer's balance sheet as a result of James's purchase of the Taxpayer, the §40-14A-23(g)(3) deduction still would not apply because the goodwill did not result from the direct purchase *by the Taxpayer* of another corporation.

properly disallowed the goodwill deductions claimed. Specifically, mergers, asset purchases, and equity purchases are each taxed differently. Moreover, a merger occurs when two companies combine to form one legal entity. As noted in the Taxpayer's brief, with a merger, the surviving entity assumes all the assets, rights, and liabilities of the extinguished entity by operation of law. See § 10-2B-11.06(a)(2), Ala. Code 1975 (the law in effect at the time of the merger at issue). However, the mere fact that the general statute regarding mergers, § 10-2B-11.06(a)(2), seemingly allows the right that Amerex Supply had to claim a goodwill deduction pursuant to § 40-14A-23(g)(3) to flow to the Taxpayer as a result of the merger is not controlling.

It is well settled that a more specific statute, such as the business privilege tax statute, will prevail over a more general rule found in the Business Corporations Code. "Where statutes in pari materia are general and specific, the more specific statute controls the more general statute." *Crawford v. Springle*, 631 So. 2d 880, 882 (Ala. 1993). Thus, § 40-14A-23(g)(3) controls whether the 2000 Goodwill was properly disallowed. Accordingly, like in the previous section, the language of § 40-14A-23(g)(3) must be examined.

"Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says." *IMED Corp. v. Systems Eng'g Assocs. Corp.*, 602 So. 2d 344, 346 (Ala. 1992). Section 40-14A-23(g)(3) clearly and unambiguously states that a taxpayer for business privilege tax purposes may subtract from their net worth the "unamortized portion of goodwill and core deposit intangibles appearing on the taxpayer's balance sheet by reason of a **direct purchase** of another corporation ..." (Emphasis added). The legislature explicitly used the term "direct purchase" without also stating the word merger. Thus, it follows that had the legislature meant to allow a goodwill deduction for goodwill resulting on a taxpayer's balance sheet pursuant to a merger with another corporation then it would have stated so. The legislature employed the term "merger" several times in Title 40, Revenue and Taxation but did not include the term merger in the statutes regarding business privilege tax. See § 40-21-4, Ala. Code 1975 and § 40-22-5, Ala. Code 1975. Therefore, the unambiguous plain language of § 40-14A-23(g)(3) does not allow a goodwill deduction for goodwill appearing on a taxpayer's balance sheet via a merger. Accordingly, the Department contends that the goodwill deductions were properly disallowed as the 2000 Goodwill did not result from Amerex's direct purchase of another corporation as required by the plain language of § 40-14A-23(g)(3) as well as the Administrative Law Division's opinion in *Rheem Manufacturing Company v. State of Alabama Department of Revenue*, B.P. 03-1086.

In *Rheem*, the goodwill deduction was disallowed because the goodwill appeared on Rheem's balance sheet as a result of push-down accounting, not because of the direct purchase by Rheem of another corporation. Likewise, the 2000 goodwill appeared on the Taxpayer's balance sheet as the result of a merger, not because of the direct purchase by the Taxpayer of another corporation.

Because the 1999 goodwill and the 2000 goodwill could not be deducted pursuant to §40-14A-23(g)(3), the goodwill deductions claimed by the Taxpayer were properly disallowed. And as in *Rheem*, the above finding is supported by the rule of statutory construction that a tax deduction must be strictly construed against the deduction and for the Department. *Ex parte Kimberly-Clark Corporation*, supra.

The final assessments are affirmed. Judgment is entered against the Taxpayer for 2006, 2007, and 2008 tax and interest of \$12,439.21, \$11,987.19, and \$8,321.26, respectively. Additional interest is also due from the date the final assessments were entered, April 25, 2014.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2B-1(m).

Entered April 2, 2015.

BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr

cc: Mary Martin Majors, Esq.
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David Humber, Esq.