STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE
	§	ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. INC. 86-230
STEGALL METAL INDUSTRIES, INC. 2825 5th Avenue, South Birmingham, AL 35233,	§	
Taxpayer.	§	

ORDER

This matter involves a disputed preliminary assessment of income tax entered by the Department against Stegall Metal Industries, Inc. (Taxpayer) for the fiscal year ending October 31, 1984. A hearing was conducted in the matter on August 6, 1987. The Taxpayer was represented at said hearing by CPA Grant McDonald. Assistant counsel Mark Griffin appeared on behalf of the Department. Based on the evidence submitted in the case, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

The relevant facts are undisputed. On its amended Alabama return for the fiscal year ending October 31, 1984, the Taxpayer claimed a credit for income tax paid to the State of Tennessee. The Department did not dispute that a tax had been paid to Tennessee, but disallowed the claimed credit on the grounds that the Tennessee tax in question, §67-4-806 T.C.A., was not an "income tax" within the purview of the credit statute, Code of Ala. 1975, §40-18-21. The Taxpayer subsequently instituted its appeal to the

Administrative Law Division.

CONCLUSIONS OF LAW

Code of Ala. 1975, §40-18-21 provides a credit against Alabama income tax "for the amount of income tax actually paid" to any other state or territory. The determinative issue in the present case is whether the Tennessee tax constitutes an income tax under the above section.

In 1969, the Alabama Supreme Court addressed the same issue in State v. Algernon Blair, Inc., 228 So.2d 803, and found that the Tennessee corporation tax in issue (then §67-2701 T.C.A., presently §67-4-806 T.C.A.) which is referred to in the statute itself as an excise tax measured by net earnings, was not an income tax under Tennessee law and thus not subject to the credit provisions of §390, Title 51, Code of Ala. 1940 (presently §40-18-21). The Court based its decision on several Tennessee cases which defined the subject tax as an excise or privilege tax, and not an income tax. Roane Hosiery, Inc. v. King, 381 S.W.2d 265; Woods Lumber Co. v. McFarland, 355 S.W.2d 448. For a more recent case on point, see Cook Exports Corporation v. King, 652 S.W.2d 896. The Court also considered that the Tennessee Constitution, at §28, Article 2, also prohibits the imposition of an income tax.

While the Algernon Blair, Inc. case alone would be dispositive of the present case, in 1985 the Alabama Court of Civil Appeals, in Burton Manufacturing Co., Inc. v. State, 469 So.2d 620, cert.

denied April 26, 1985, ruled that a Florida tax measured by net income, while referred to in the statute as both a privilege and an income tax, constituted an income tax within the purview of §40-18-21. The Court's decision was guided in part by the Multistate Tax Compact (Compact) definition of "income tax", found at §40-27-1, which defines the term as "a tax imposed on or measure by net income."

The Court further based its opinion on the fact that the Florida Constitution was amended in 1971 so as to specifically allow for imposition of a corporate income tax, and that the resulting tax, enacted on December 21, 1971, has been characterized by the Florida Supreme Court as an income tax in Department of Revenue v. Leadership Housing, Inc., 343 So.2d 611.

The Department takes issue with the Burton decision, arguing that the Compact definition of "income tax" should not have been used because the Compact was not properly enacted and adopted by the Alabama Legislature.

The Department points out that the Compact was passed by Act 395, Acts of Alabama 1967, which at Section 8 provides as follows:

> This act shall become effective upon its passage and approval by the Governor or its otherwise becoming a law and upon the passage and approval by the Congress of an act authorizing the various states to enter into such multistate tax compact.

The Department argues that Congress has never taken the appropriate action necessary to trigger operation of the Compact, and thus that

the Compact is not in effect in Alabama.

However, in 1977 the Alabama Legislature, by Act 20, Acts of Alabama 1977, adopted the Code of Ala. 1975, and therewith at Section 4 repealed all statutes no included therein. The recodification did not include Section 8 of Act 395, Acts of Alabama 1967, quoted above, but does contain the substantive body of the Compact. Nonetheless, the Department has consistently taken the position that the Compact is not in effect in Alabama, and has never required or enforced compliance with its terms.

The Department's position, first, is that the Compact is not in effect, and thus, that the Court should not have used the §40-27-1 definition of "income tax" in deciding the Burton case. But, the Department argues, if the Compact was given life through the 1977 recodification, then no credit should be allowed because of §40-18-22, which provides that any multi-state business subject to allocation and apportionment under the Compact shall not be allowed a credit under §40-18-21.

The Court of Civil Appeals did not address the issue of whether the Compact had been properly enacted, apparently assuming that it is in effect. Given the Compact's inclusion in the 1975 Code without that section requiring congressional approval, it would appear that the provisions of the Compact are operative, especially in light of Code of Ala. 1975, §1-1-10 and the cases cited herein. However, even assuming that the Compact is

operative, it does not follow that §40-18-22 would prohibit allowance of a credit in the instant case.

As stated, §40-18-22 provides that a domestic corporation that is engaged in multi-state business so as to be subject to the Compact shall allocate and apportion its deductions and exemptions, and that such corporation shall not be allowed a credit under §40-18-21. That is, a credit for taxes paid to a foreign state is not allowable under §40-18-21 if the corporation in fact allocates and apportions its income, deductions and exemptions as required by the Compact. In that the Department has never required compliance with or recognized the Compact, and there is no evidence that the instant Taxpayer reported in accordance with the Compact, there is no credence in the Department's argument that the credit should be disallowed, even if technically the Compact is in effect and the Taxpayer should have complied with its terms. The fact that the Taxpayer did not report as required under the Compact would make §40-18-22 inapplicable.

The above discussion concerning the status of the Compact aside, the determinative issue remains whether the Tennessee tax in issue is an income tax within the purview of §40-18-21. The Algernon Blair, Inc. case would clearly control but for the Burton decision. Thus, the question turns on whether the facts and circumstance surrounding the Tennessee tax are sufficiently similar to the Florida tax involved in the Burton case so as to make that

case controlling.

An analysis of Burton shows that the majority opinion was based not only on the conclusion that the Florida tax was an income tax under the Compact definition, but also that the tax was an income tax under Florida law. The Compact definition of income tax was used only as an "extrinsic aid" because the Florida statute is ambiguous. The other factors considered by the Court were (1) that the subject tax was enacted immediately after a constitutional amendment allowing for passage of a corporate income tax, (2) that the statute itself refers to the tax as an income tax, and (3) the Florida Supreme Court has characterized the tax as an income tax. Department of Revenue v. Leadership Housing, Inc., supra.

The relative weight given each of the above factors is unclear. But the fact that the Court considered several factors is in itself evidence that a determination should not be based solely on whether the tax is measured by net income or net earnings and thereby fits the compact definition of "income tax". Judge Holmes, dissenting, did not address whether the tax was an income tax under Alabama law, and instead based his dissenting opinion on the fact that the Florida statute is clear in stating that the tax was intended as a privilege tax.

Concerning the Tennessee tax, it is measured by "net earnings", which is defined at §67-4-805 T.C.A. as federal taxable income with various adjustments. Assuming that "net earnings" is

equivalent to "net income", then the Tennessee tax would constituted an income tax under the Compact definition of that term.

But there the similarity between the Florida tax and the Tennessee tax ends. As state, Tennessee tax is referred to throughout the statute as an excise tax. Finally, the Tennessee Supreme Court has declared that the tax is not an income tax, but rather, an excise tax on the privilege of doing business in the state. Cook Export Corporation v. King, 652 S.W.2d 896.

Thus, clearly the subject Tennessee tax is not an income tax under Tennessee law. The laws of the foreign state in question must govern. State v. Robinson Land & Lumber Co. of Alabama, 77 So.2d 641. As stated by Judge Homes in his dissenting opinion in Burton, "We must give due regard to the laws of our sister state of Florida", citing Bond v. Hume, 243 U.S. 15, 21, 37 S.Ct. 366, 368. The same is true for the laws of Tennessee.

The above considered, it is hereby determined that the Tennessee tax in issue is not an income tax within the purview of §40-18-21. That determination is buttressed by the fact, as previously stated, that the Alabama Supreme Court, in the Algernon Blair, Inc. case, has specifically ruled against allowing a credit for the Tennessee tax in issue. An unambiguous decision of the Alabama Supreme Court directly on point cannot be ignored or circumvented based on a subsequent case involving a differently

worded taxing statute from a different state.

The above considered, the Revenue Department is hereby directed to make final the preliminary assessment in issue as originally entered, with applicable interest as required by statute.

Done this 13th day of August, 1987.

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BILL THOMPSON
Chief Administrative Law Judge