

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. F. 91-119

INTERNATIONAL PAPER COMPANY
6400 Poplar Avenue
Memphis, TN 38197,

§

§

Taxpayer.

§

FINAL ORDER

The Revenue Department denied a petition for refund of 1990 franchise tax filed by International Paper Company (Taxpayer). The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on November 6, 1991. D. Charles Holtz and J. Michael Druhan, Jr . appeared for the Taxpayer. Assistant counsel Dan Schmaeling represented the Department. This Final Order is based on the evidence and arguments presented by the parties as well as the transcript of the hearing before the Administrative Law Judge.

FINDINGS OF FACT

This case involves the franchise tax deduction authorized by Act 85-412, now codified at Code of Ala. 1975, §40-14-41(d)(2)d.

That section allowed a foreign corporation to deduct from capital employed in Alabama for franchise tax purposes all amounts invested between April 30, 1985 and April 30, 1990 in "qualifying property in certain high unemployment counties in Alabama. The intent of the law was to encourage foreign corporations to invest in and thereby relieve the high unemployment in those "qualifying counties."

The Act provided that before any amounts invested may be deducted, a qualification certificate must be issued to the taxpayer by a committee composed of the Governor, the Finance Director and the Commissioner of Revenue. The qualification certificate must verify (1) that the county in which the investment is to be made is a qualifying county as defined by the Act, (2) that the ADO has certified that the investment will be beneficial to the State and will reduce unemployment in the subject county, and (3) that the taxpayer and State have entered into such agreement or agreements "as the committee herein provided for shall have determined to be appropriate "

The Act continued that after a qualification certificate was issued, the right of the taxpayer to deduct any amount invested "shall not be subject to revocation and shall continue to be effective so long as and to the extent the taxpayer shall have amounts invested in qualifying property, unless the taxpayer shall fail to comply with the terms of the agreement or agreements with the state hereinabove provided for, in which case the right of a taxpayer to deduct amounts reflecting investment in qualifying property shall cease and determine (sic)."

Effective March 13, 1986, the State issued a qualification certificate to Hammermill Paper Company, a Pennsylvania corporation, certifying that Hammermill would be allowed to deduct

for franchise purposes certain amounts to be expended by Hammermill in Dallas County, Alabama, a qualifying county under Act 85-412.

As required by the Act, Hammermill and the State entered into an Agreement prior to issuance of the qualification certificate setting forth Hammermill's obligation to invest in certain qualifying property in Dallas County and establishing Hammermill's right to deduct the amounts invested for franchise tax purposes.

Paragraph 5 of the Agreement follows the Act and provides that Hammermill's right to the deduction shall not be revoked "unless (Hammermill) fails to comply with the terms of this agreement, in which case (the deduction) shall immediately cease and terminate".

Paragraph 6 of the Agreement provides that the "terms of this agreement may not be amended or altered, nor may the rights of a taxpayer hereunder be assigned or otherwise transferred, without the written consent of the state."

Within one year after the above Agreement, Hammermill invested approximately 0107,000,000.00 in qualifying property in Dallas County in accordance with the Agreement.

Effective August 26, 1987, Hammermill merged into H. P. Subsidiary, Inc., a Delaware corporation. Simultaneously, H. P. Subsidiary, Inc. changed its name to Hammermill Paper Company, resulting in Hammermill Paper Company, a Delaware corporation. Effective January 1, 1989, Hammermill Paper Company, a Delaware

corporation, merged into International Paper Company, a New York corporation, the Taxpayer in this case.

The Taxpayer initially failed to claim the approximately \$107,000,000.00 invested by Hammermill as a deduction on its 1990 Alabama foreign franchise tax return. The Taxpayer subsequently filed an amended 1990 return claiming the amount as a deduction and claiming a refund of tax previously paid. The Department denied the refund and the Taxpayer filed this appeal.

CONCLUSIONS OF LAW

The issue in dispute is whether the right to the deduction was "assigned or otherwise transferred" when Hammermill merged with H. P. Subsidiary, Inc. in 1987, and if so, did the transfer violate Paragraph 6 of the Agreement, in which the case the deduction ended and cannot now be allowed.

Although Hammermill ceased to exist after the merger, Hammermill's rights, including the right to the deduction, passed to the surviving corporation by operation of law. See, Code of Ala. 1975, §§10-2A-145 and 10-2A-240. The Taxpayer argues that the rights were not transferred in violation of the Agreement, but rather that "the status of the rights as to the survivor just is, or continues to be, . . ." (Taxpayer's brief at P. 15). However, if Hammermill ceased to exist but its rights survived in a separate corporation, the rights must have been "otherwise transferred" to the surviving corporation. That transfer without the written

consent of the State violated the Agreement and as a result the deduction ceased to exist and cannot now be claimed by the Taxpayer.

The Taxpayer argues that Paragraph 6 of the Agreement applies only to voluntary transfers, and not to transfers by operation of law, as in a merger. However, paragraph 6 does not limit itself to only voluntary transfers. "Otherwise transferred" is sufficiently broad to cover all transfers. In any case, Hammermill voluntarily merged with H. P. Subsidiary, Inc., which resulted in the transfer by operation of law.

The Taxpayer also argues that the committee was not authorized to include Paragraph 6 in the Agreement. Again I disagree. Act 85-412 provides that the deduction shall be conditioned upon the taxpayer entering into such agreements "as the committee herein provided for shall have determined to be appropriate". A provision prohibiting Hammermill from transferring the deduction by assignment or otherwise to another taxpayer without the consent of the State is reasonable and appropriate.

In any case, the Agreement was freely entered into as a contractual obligation by Hammermill. Hammermill agreed that none of its rights under the Agreement would be transferred without the written consent of the State. Hammermill further agreed that if it violated any provision of the Agreement, its right to deduct the amounts invested in Dallas County would cease and terminate.

Hammermill subsequently transferred the deduction by merging with H. P. Subsidiary and as a result violated the Agreement and lost the deduction. The Taxpayer, as successor to Hammermill's rights and obligations, cannot now disavow or claim as void the binding terms of the contract.

The above finding is supported by the rule of construction that an exemption must be strictly construed against a taxpayer and for the Department, and in case of doubt the deduction must be denied. Brundidge Milling Co. v. State, 228 So.2d 475.

The above considered, the refund in issue was properly denied by the Department and the Recommended Order of the Administrative Law Judge is correct. This Final Order may be appealed pursuant to Code of Ala. 1975, §431-22-20.

Entered on May 1, 1992.

JAMES M. SIZEMORE, JR.
Commissioner of Revenue