INTERGRAPH CORPORATION One Madison Industrial Park Huntsville, Alabama 35894-0001,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. F. 91-171
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER
ON APPLICATION FOR REHEARING

A Final Order was entered in this case on May 10, 1995 setting out the Taxpayer's franchise tax liability for the years in issue, 1987 through 1991. The Taxpayer timely applied for a rehearing on May 25, 1995. The issues raised by the Taxpayer are discussed below:

(1) The Department has accepted the Taxpayer's final amended returns as filed; except, the Department disallowed an exclusion of deferred income tax from capital in 1987 through 1990, and also disallowed a treasury stock adjustment in 1988.

The Department contends that the deferred income tax and treasury stock adjustments cannot be allowed because the Taxpayer failed to timely file petitions for refund relating to those issues for the subject years. I disagree.

The Taxpayer initially filed its 1987, 1988 and 1989 franchise tax returns on October 8, 1987, September 12, 1988, and September 12, 1989, respectively.

The Taxpayer subsequently filed amended returns for all three years on August 8, 1990. More amended returns for the same years

were filed at the suggestion of the Department on December 20, 1990.

The Department denied the refunds on June 12, 1991. The Department also billed the Taxpayer for additional tax for 1990. The Taxpayer subsequently appealed to the Administrative Law Division on June 26, 1991.

A hearing was conducted on September 24, 1991, after which the Department again reviewed the Taxpayer's books and records. As a result, the Department assessed additional tax due for 1988, 1989 and 1990. The Department also included 1987 and 1991 in the audit and assessed additional tax in those years. By agreement, the years 1987 and 1991 were consolidated and made a part of the appeal.

After a second hearing, an Opinion and Preliminary Order was entered relating to all years 1987 through 1991. As indicated, a Final Order was entered on May 10, 1995, from which the Taxpayer filed this application for rehearing.

During the subject years, Code of Ala. 1975, §40-1-34 required that any petition for refund must be filed within three years from when the tax was paid. The Taxpayer filed amended returns for 1987, 1988 and 1989 on August 8, 1990, clearly within three years from when the original returns for those years were filed and the tax paid. An amended return claiming a refund of tax previously paid constitutes a petition for refund for the subject tax period.

Department Reg. 810-14-1-.18(2) states that "[A]n amended return reflecting a refund of taxes due shall be considered a petition for refund". Consequently, the Taxpayer timely filed petitions for refund when it filed amended returns for 1987, 1988 and 1989 on August 8, 1990.

A petition for refund need not specify every issue in dispute. Rather, if a petition is timely filed, the subject period is open, and on appeal a taxpayer, or the Department, can raise any issues relevant to the taxpayer's liability for the period.[1] See, Barry v. Commissioner, 1 BTA 156, Dec. 68 (Acq.); Gutterman Strauss Co. v. Commissioner, 1 BTA 243, Dec. 97 (Acq.); Frickhorn v. Commissioner, 7 BTA 431, Dec. 2560 (Acq.); Mutual Assurance, Inc. v. United States, 1995 WL 360473 (11th Cir. (Ala.)) (July 3, 1995). The following statement by the United States Board of Tax Appeals in Barry is appropriate in this case:

> "We find nothing in the law which would operate to defeat the taxpayer's right to raise for the first time on his appeal to this Board any question relating to the correctness of the deficiency, whether the taxpayer did or did not protest in any respect the proposed deficiency before final determination thereof by the Commissioner.
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> The Board must decide each case upon the record made at the hearing before it, and, in order that it may properly do so, the taxpayer must be permitted to fully present any questions relating to his tax liability which may be necessary to a correct determination of the deficiency. To say that the taxpayer who brings his case before the

[1]The only exception is that a petition for refund allowed pursuant to the special one year federal change statute is limited to the items changed on the federal return. Code of Ala. 1975, §40-2A-7(b)(2)g.2.

> Board is limited to questions presented before the Commissioner, and that the Board in its determination of the case is restricted to a decision of issues raised in the Internal Revenue Bureau would be to deny the taxpayer a full and complete hearing and an open and neutral consideration of his case."

The Department has not otherwise disputed that the deferred income tax should be removed from capital in accordance with West Point Pepperell v. Department of Revenue, 624 So.2d 579 (Ala.Civ.App. 1992), cert. denied Ex parte State Department of Revenue, 624 So.2d 582 (Ala. 1993), or concerning the treasury stock adjustment in 1988. Consequently, those adjustments should be allowed by the Department.

(2) The Taxpayer next argues that the penalties included in the assessment should be waived. I disagree.

During the period in issue, the discretion to waive a penalty was solely with the Department. State v. Leary and Owens Equipment Co., 304 So.2d 604 (1974). The only exception was if the Department materially contributed to a taxpayer's failure to report or pay the proper tax due. State v. Mack, 411 So.2d 799 (Ala.Civ.App. 1982). That did not happen in this case.

The Taxpayer was informed by the Department that certain alternative methods for apportioning capital to Alabama may be allowed. However, the Department never agreed that it would accept or be bound by any alternative method used by the Taxpayer. The Taxpayer thus filed its 1990 and 1991 returns using the alternative income tax formula at its own risk.

(3) The Taxpayer next argues that the Department agreed to

allow the Taxpayer to use an alternative apportionment method or methods, and that the Department should be held to that agreement.

The Department had allowed some corporations to use alternative apportionment formulas in prior years. The Department, in fact, even suggested that the Taxpayer file amended returns using both the summation and the income tax formula, which the Taxpayer did. But again, the Department never agreed that it would accept those alternative returns in lieu of the formula on the return.

There is also no evidence that those corporations allowed to use summation or the income tax factors in prior years were similar to the Taxpayer insofar as the type of business activity, the amount and type of capital employed, and other relevant financial data. The Department no longer allows foreign corporations to use alternative apportionment methods, at least prior to the effective date of Act 95-564, January 1, 1996. The fact that some unidentified corporations were allowed to use either summation or the income tax factors does not require the Department to also allow the Taxpayer to use either of those methods during the subject years. The Taxpayer was properly required to use the appropriate apportionment formula set out on Schedule D of the return.

(4) Code of Ala. 1975, §40-14-41(c) reads in part as follows:

> ". . . provided, that in the case of organizations whose accounts and records are kept according to rules prescribed by a regulatory agency or instrumentality of the United States or by the Alabama Public Service Commission, or by a state insurance department, the actual amount of capital employed in this state as so determined shall in no event exceed the value of the sum of its tangible property located in this state and its intangible property employed in the conduct of its business in this state".

The Taxpayer claims that the above cited provision applies because it has significant government contracts and thus is required to keep its books in accordance with the rules of several federal boards, and also because it is a publicly traded corporation, and thus subject to the accounting rules of the Securities and Exchange Commission.

This issue has never been addressed by the Administrative Law Division, or, to my knowledge, by any court in Alabama. In my opinion, the provision applies only to corporations that are inherently regulated by a federal agency or board, or by the Alabama Public Service Commission or the Insurance Department. For example, utilities are regulated by the Public Service Commission, and insurance companies by the Insurance Department.

The provision does not apply to a corporation not otherwise required to keep its books in accordance with federal agency guidelines, but which from time to time may be required to comply with government accounting standards because of some periodic business activity. The Taxpayer in this case is not inherently required to comply with the accounting standards of a federal agency. Rather, it is subject to federal accounting regulations

only when and if it contracts to do work for the federal government. The above cited portion of §40-14-41(c) was not intended to apply in that situation.

In addition, if the Taxpayer's argument concerning the Securities and Exchange Commission is accepted, then the provision would apply to all publicly traded corporations. Again, that was not the intent of the statute.

(5) Finally, the Taxpayer argues that it should be allowed an opportunity to establish that the apportionment formula on the Alabama return does not properly apportion its capital to Alabama. However, the Taxpayer has had sufficient opportunity to present its case concerning capital employed in Alabama during the subject years. No additional hearing is necessary.

The above considered, the Department is directed to recompute the Taxpayer's liability by excluding deferred income tax in all relevant years, and also by making the treasury stock adjustment in 1988. The Department should notify the Administrative Law Division of the Taxpayer's adjusted liability. A Final Order on Application for Rehearing will then be entered.

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

Entered August 30, 1995.

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BILL THOMPSON
Chief Administrative Law Judge