

USX CORPORATION  
600 Grant Street, Room 2477  
Pittsburgh, PA 15230,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. F. 94-254

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed foreign franchise tax against USX Corporation (ATaxpayer@) for 1989 through 1992. The Taxpayer appealed the final assessments to the Administrative Law Division pursuant to Code of Ala. 1975, ' 40-2A-7(b)(5)a. The Department also denied franchise tax refunds requested by the Taxpayer for 1993 and 1994. Those denied refunds were consolidated with the Taxpayer's appeal of the 1989 through 1992 final assessments. Assistant Counsel Dan Schmaeling represented the Department. Robert Shattuck, Jr. represented the Taxpayer.

The parties agree that the Taxpayer's 1989 through 1994 Alabama franchise tax liabilities are as follows, disregarding any tax paid and not including interest:

<u>Franchise Tax Year</u>	<u>Tax Liability</u>
1989	\$1,558,037.82
1990	1,345,414.64
1991	1,215,358.19
1992	1,739,595.65
1993	1,029,366.76
1994	1,140,957.01

The disputed issue is how should the Department compute interest pursuant to Code of Ala. 1975, § 40-1-44.

The Taxpayer argues that simple interest should accrue from the due date of the tax until the tax is paid, even if a final assessment is entered for the amount due. If the Taxpayer is correct, the interest due in this case, through April 30, 1998, is \$242,360.22. The Department agrees that simple interest accrues from the due date of the tax. However, the Department's long-standing position is that after a final assessment is entered, interest accrues on the final assessment amount, including the interest incorporated in the final assessment. If the Department is correct, the interest due through April 30, 1998 is \$567,255.39.

Section 40-1-44(a) provides generally - ~~Interest shall be added...to any tax or other amount due the department which is not paid by the due date.~~

~~Tax~~ is defined at Code of Ala. 1975, ' 40-2A-3(18) to include ~~Any amount, including applicable penalty and interest, levied or assessed against a taxpayer...~~

That definition does not apply to ' 40-1-44 because the definitions in ' 40-2A-3 apply only to Chapter 2A of Title 40, not to Title 40 generally. In any case, penalty and interest were included in the ' 40-2A-3(18) definition of ~~tax~~ only to ensure that penalty and interest could be assessed and collected the same as tax. See also, Code of Ala. 1975, ' 40-2A-11(i).

The phrase ~~or other amount due~~ in ' 40-1-44 does not refer to penalty and interest. That phrase was included as a catch-all to ensure that interest would also accrue on motor vehicle registration fees, franchise tax permit fees, and other amounts due the Department that are designated as something other than ~~tax~~.

The key to interpreting ' 40-1-44 is the phrase "not paid by the due date". By including that phrase, the Legislature clearly intended that interest would accrue only on those amounts (tax) that have a due date.<sup>1</sup> Interest per se has no due date. Rather, it accrues at simple interest from the due date (or delinquent date) of any tax or fee owed the Department.

Importantly, neither ' 40-1-44 nor any other Alabama statute authorizes the Department to compound interest, or charge interest on interest included in a final assessment. This can be contrasted with the federal interest provisions at 26 U.S.C. ' 6601, et seq. Section 6601 provides generally for the payment of interest on any underpayment. The rate of interest is prescribed at ' 6621, which is also followed for Alabama purposes. Unlike Alabama law, however, federal ' 6622 specifically provides for the daily compounding of interest.<sup>2</sup>

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<sup>1</sup>There are some exceptions in ' 40-1-44 where the tax or fee has a due date and also a delinquent date. Interest is due in those cases from the delinquent date. See ' ' 40-1-44(a)(1), (2), and (3).

<sup>2</sup>Section 6622 was enacted as part of the Tax Equity And Fiscal Responsibility Act of 1982. TEFRA also repealed ' 6601(e)(2), which had provided that no interest

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shall be charged on interest. See generally, R. J. Nabisco, Inc. v. U.S., 955 F.2d 1457 (11th Cir. 1991).

Section 40-1-44 is in the nature of a tax levy, and thus should be construed for the taxpayer and against the government. City of Birmingham v. AmSouth Bank, N.A., 591 So.2d 473 (Ala. 1991); Lepeska Leasing Corporation v. State, Dept. of Revenue, 395 So.2d 82 (1981). An ambiguous statute should also be construed to give a fair result. State v. Russell County Tag Comm., 575 So.2d 1146 (Ala.Civ.App.1991). Certainly, requiring a taxpayer to pay interest on interest is not fair. The Legislature clearly expressed its intent that interest on overpayments shall be computed at the same rate as provided herein for interest on underpayments. § 40-1-44(b)(1). The Department is only required to pay simple interest on overpayments. The Legislature thus intended to charge only simple interest on underpayments.

The Alabama Supreme Court has also recognized the general American rule that when interest is allowed, it is to be computed on a simple rather than compound basis in the absence of express authorization otherwise. Burlington Northern R. Co. v. Whitt, 611 So.2d 219, 224 (Ala. 1992), quoting Stovall v. Illinois Central Gulf R.R., 722 F.2d 190, 192 (5th Cir. 1984).

A policy argument could be made that compound interest (or a one-time compounding of interest, as in this case) is necessary to encourage taxpayers to promptly pay any tax due. But the delinquent payment penalties at Code of Ala. 1975, § 40-2A-11 serve that purpose. In any case, the setting of interest rates is a (policy) matter within the discretion of the Legislature. Burlington Northern, 611

So.2d, at 224.

The Department is directed to compute the Taxpayer's outstanding franchise liabilities for 1989 - 1994 by adding simple interest to the tax due. 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 August 13, 1998.

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BILL THOMPSON  
Chief Administrative Law Judge

BT: ks

cc: Dan E. Schmaeling, Esq.  
Robert T. Shattuck, Jr., Esq.  
Voncile Catledge