

KELLY SEED COMPANY, LLC
P.O. Box 370
Hartford, AL 36344-0370,
DIVISION

§ STATE OF ALABAMA
DEPARTMENT OF REVENUE
§ ADMINISTRATIVE LAW

Taxpayer,

§ DOCKET NO. MV. 02-143

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE

§

FINAL ORDER

The Revenue Department assessed Kelly Seed Company, LLC for motor vehicle tax for October 1, 2000 through September 30, 2001. The LLC appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on April 9, 2002. Assistant Counsel John Breckenridge represented the Department. James E. Kelly, Jr. represented the LLC.

ISSUE

The issue in this case is whether an entity that acquires a motor vehicle by merger in the middle of a license year is required to again pay the annual motor vehicle license tax on the vehicle which the predecessor entity has already paid for the subject year.

FACTS

Kelly Seed Company, Inc. registered and paid the applicable annual motor vehicle license taxes levied at Code of Ala. 1975, §40-12-248 on five motor vehicles for the fiscal year beginning October 1, 2000.

Kelly Seed Company, Inc. merged into Kelly Seed Company, LLC on January 2, 2001. In October 2001, the LLC applied to the Department to register the five vehicles for the fiscal year beginning October 1, 2001. The Department registered the vehicles for that

year. It determined, however, that the LLC was also liable for license tax on the vehicles for the fiscal year ending September 30, 2001 because the LLC acquired the vehicles during that year. The Department assessed the LLC accordingly. The LLC appealed.

ANALYSIS

Section 40-12-248 levies an annual license tax and registration fee on any truck or truck-tractor operating in Alabama. Any person licensing a truck pursuant to §40-12-248 is issued a license plate or tag. Code of Ala. 1975, §40-12-258. Effective January 1, 1998, license plates “shall not be transferable between motor vehicle owners” Code of Ala. 1975, §40-12-260(a). Rather, if a vehicle with a current license plate is “sold or otherwise transferred to a new owner, the license plate shall be removed from the vehicle and retained by the original plate owner.” Section 40-12-260(a)(1).¹

The Department argues that when Kelly Seed Company, Inc. merged into the LLC, the five vehicles in issue were transferred to a new owner, the LLC. Consequently, according to the Department, the LLC owes license tax on the vehicles for the fiscal year ending September 30, 2001 because the vehicles were transferred to the LLC in that year. I disagree based on the Alabama Court of Civil Appeals’ holding in *International Paper Co., Inc. v. Broadhead*, 662 So.2d 277 (Ala.Civ.App. 1995).

In *International Paper*, Hammermill Paper Company qualified for the franchise tax investment credit allowed at Code of Ala. 1975, §40-14-41(d)(2). Hammermill’s contract with the State provided that the credit shall not “be assigned or otherwise transferred” without the written consent of the State.

Hammermill merged into International Paper Company, which subsequently claimed the investment credit obtained by Hammermill. The

¹Before 1998, if a vehicle was sold, the tag stayed with the vehicle for the remainder of the license year.

Department denied the credit because Hammermill had failed to obtain the written consent of the State for the transfer of the credit. The Court of Civil Appeals ruled for International Paper, holding that the merger did not constitute an assignment or transfer of the credit. “We do not interpret the term ‘otherwise transfer’ to include a merger or a transfer by operation of law.” *International Paper*, 662 So.2d at 279. See also, *Linney et al. v. Cellular Alaska Partnership*, 151 F.3d 1234, 1241 (9th Cir. 1998).

International Paper involved the merger of one corporation into another corporation. Such mergers are governed by Code of Ala. 1975, §10-2B-11.06 of the Alabama Business Corporation Act. Section 10-2B-11.06(2) provides that pursuant to a merger, all property, debts, etc. of the predecessor corporation “are taken and deemed to be transferred and vested in the surviving corporation without further act or deed. . . .” As discussed, the Court of Civil Appeals held in *International Paper* that the transfer of property or a right by operation of law pursuant to the above provision is not a transfer of such property or right from one corporation to another.

In this case, the merger of Kelly Seed Company, Inc. into Kelly Seed Company, LLC was governed by the Alabama Business Entities Conversion and Merger Act, Code of Ala. 1975, §10-15-1 et seq, which became effective October 1, 2000.² Section 10-15-4(i)(2) is identical in substance to §10-2B-11.06(2) in that it provides that when two entities merge, all property, debts, etc. of the predecessor entity “are taken and deemed to be transferred and vested in the surviving” entity, without the necessity of a deed or other instrument of conveyance to the surviving entity.

²The Business Entities Conversion and Merger Act allows a business entity to merge with a different form of business entity. The Alabama Business Corporation Act only allows a corporation to merge with another corporation. See, Code Comment after §10-15-4.

Applying the rationale of *International Paper*, the merger of Kelly Seed Company, Inc. into Kelly Seed Company, LLC did not constitute a transfer of the vehicles and license plates of the corporation to a new owner. Rather, in substance the merged entity “lives as a component part of the surviving entity.” *International Paper*, 662 So.2d at 279, quoting *International Paper Co. v. Curry*, 9 So.2d 8 (1942). Because the vehicles and plates were not transferred to a new owner pursuant to the merger, the LLC is not liable for additional license tax on the vehicles for the fiscal year ending September 30, 2001.

The above holding is also consistent with the Department’s motor vehicle titling procedures. For titling purposes, if an entity that owns a motor vehicle merges into another entity, the Department requires only that the surviving entity apply for a name change on the title for the vehicle. A transfer of title from one entity to another is not required.

The final assessment in issue is voided.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered May 7, 2002.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: John J. Breckenridge, Esq.
James E. Kelly, Jr.
Helen C. Wells, Esq.
Terry Lane