SAMUEL S. & LINDA W. MOODY P.O. BOX 1715 BAY MINETTE, AL 36507-1715,	§	STATE OF ALABAMA ALABAMA TAX TRIBUNAL
Taxpayers,	§	DOCKET NO. INC. 15-797
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER ON DEPARTMENT'S APPLICATION FOR REHEARING

This case involves a final assessment of 2013 Alabama income tax entered against the above Taxpayers. The issue involves the proper method for computing the credit allowed Alabama taxpayers at Code of Ala. 1975, §40-18-21 for income tax paid to another state.

The Tribunal entered a Final Order on September 29, 2016 that rejected the Department's method for computing the credit as set out in Department Reg. 810-3-21-.03. Specifically, the Tribunal rejected the percentage limitation in Reg. 810-3-21-.03(2), which provides:

> That portion of a taxpayers income tax liability which is attributable to non-Alabama sources shall be determined by multiplying the taxpayer's Alabama income tax liability before consideration of any credit described in Ala. Code § 40-18-21 by a fraction, the numerator of which is total non-Alabama source adjusted gross income and the denominator of which is total Alabama adjusted gross income

The Department timely applied for a rehearing. It contends that the computation method set out in the September 29 Final Order would result in Alabama residents being treated more favorably than Alabama nonresidents. The Department articulately explained its position, with illustrative examples, in its Response to Taxpayers' Brief filed on February 10, 2017.

I understand and appreciate the Department's position, but the Tribunal is bound by the specific wording of the statute and prior Alabama case law.[1]

As stated in the September 29 Final Order, §40-18-21(a)(1) specifies that the credit shall be allowed for "the amount of income tax actually paid" to another state. The only limitation is in paragraph (a)(2) of the statute, which limits the credit to the amount of tax that would have been due on the same income computed using Alabama's tax rates. The percentage limitation in Reg. 810-3-21-.03 is not in the statute, and is contrary to the plain language of the statute that the amount of tax actually paid to another state must be allowed. The plain language of the statute must be followed. *Ex parte Madison County, Alabama*, 406 So.2d 398 (1981). A Department regulation also cannot add to or change the specific language used in a statute. *Ex parte Jones Mfg. Co.*, 589 So.2d 208, 210 (Ala. 1991). Because the percentage limitation in Reg. 810-3-21-.03(2) improperly adds to the plain language in §40-18-21, it must be rejected.

As discussed in the September 29 Final Order, at 3 – 5, the Alabama Supreme Court considered and rejected the Revenue Department's attempted application of the same percentage limitation in issue in this case in *Robinson Land*. In that case, an Alabama taxpayer incurred an income tax liability in the subject year in both Alabama and Mississippi. The taxpayer claimed a credit on its Alabama return for the tax it actually paid to Mississippi in the year. The Department audited the return, applied the same

[1] The Department concedes in Exhibit C that "[w]e recognize that prior case law raises concerns with our Rule and its percentage limitation." That prior case law is *State v. Robinson Land & Lumber Co. of Alabama, Inc.*, 77 So.2d 641 (Ala. 1955), which is discussed below.

percentage limitation now contained in Reg. 810-3-21-.03(2), and reduced the taxpayer's Alabama liability accordingly.

The Department cited a California case, *Miller v. McColgan*, 110 P.2d 419, in support of its position in *Robinson Land*. California law also allowed a credit for income tax paid to another state. But unlike Alabama's credit statute at the time, which was substantively identical to current §40-18-21, the California credit statute included the percentage limitation language the Department was attempting to apply in the case, and which the Department is attempting to apply in this case via Reg. 810-3-21-.03(2). Specifically, the California statute read in part – ". . ., but such credit shall not exceed such proportion of the tax payable under this act as the income subject to tax in such other State or country bears to the taxpayer's entire income upon which the tax is imposed by this act." Section 25, California Personal Income Tax Act 1935, Statutes 1935, p. 1117.

The Alabama Supreme Court rejected the California case as guiding authority because then, as now, the Alabama credit statute, unlike the California credit statute, did not contain the percentage limitation language.

> Subsection (b) of Section 390, supra, is the safeguard which prevents loss of income tax revenue by the State of Alabama on business transacted within Alabama by reason of credit under subdivision (a) of Section 390, supra, for payments actually paid to another state at a rate higher than our own on business transacted within such other state. For example, assume that an Alabama corporation has taxable income derived within Alabama of $ 10,000 and also taxable income of $ 10,000 on account of business transacted in another state in which the income tax rate is 6%; in the absence of subsection (b), supra, payment of $ 600 income tax to the other state would deprive Alabama of any income tax revenue on the $ 10,000 income of the corporation derived within the State of Alabama. This is the reason for subsection (b), Section 390, Title 51, Code of Alabama 1940. For emphasis, subsection (b), supra, is here quoted alone:

> (b) In case the amount of tax actually paid by a resident of Alabama to another state or territory is in excess of the amount that would be due on the same income computed on the income tax rate in Alabama, then only such amount as would be due in this state on such taxable income shall be allowed as a credit.

Reduced to words, the formula which the State Department of Revenue has used as an interpretation and application of subsection (b), Section 390, supra, is:

> But such credit shall not exceed such proportion of the tax payable under this act as the gross income of the taxpayer derived in such other state or territory bears to his entire gross income derived from all sources both within and without Alabama.

The effect of the application of the State Department of Revenue's formula is to accomplish the very thing which Section 390, supra, was designed to avoid, namely, the imposition of two state income taxes upon one income. Section 390 of the income tax statute contains no such limitation.

It is not within the power of the State Department of Revenue to add or take from the statute by administrative construction. 42 Am.Jur. p. 400, § 80. Only the legislative branch of our state government is vested by the Constitution with lawmaking power.

Robinson Land, 77 So.2d at 647.

The Tribunal is bound by the Supreme Court's decision in *Robinson Land*. If *Robinson Land* was incorrectly decided, or if the statute as written may lead to unconstitutional results, it is for the Alabama Supreme Court to decide. It is also the legislature's duty to change the wording of the statute, not a court. As recently stated by the Tribunal in *Ameris Bank f/k/a Southland Bank v. State of Alabama*, Docket BIT. 16-255 (T.T. 2/9/17):

> It is the role of the Alabama Legislature to amend a statute, not the courts. As held by the Alabama Supreme Court in *Parker v. Hilliard*, 567 So.2d 1343 (Ala. 1990):

> In the area of statutory construction, the duty of a court is to ascertain the legislative intent from the language used in the enactment. When the statutory pronouncement is clear and not susceptible to a different interpretation, it is the paramount judicial duty of a court to abide by the clear pronouncement. See *Ex parte Rodgers*, 554 So.2d 1120 (Ala. 1989), and *East Montgomery Water, Sewer & Fire Protection Authority v. Water Works and Sanitary Sewer Bd. Of the City of Montgomery*, 474 So.2d 1088 (Ala. 1985). Courts are supposed to interpret statutes, not to amend or repeal them under the guise of judicial interpretation.

Parker, 567 So.2d at 1346.

Ameris Bank at 12.

The September 29, 2016 Final Order is affirmed.

This Final Order on Rehearing may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2B-2(m).

Entered February 23, 2017.

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BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr
cc: Ralph M. Clements, III, Esq.
Mark A. Pawlowski, CPA
Jeannine P. Birmingham, CPA
Bruce P. Ely, Esq.
William T. Thistle, II, Esq.