

MITTERNIGHT BOILER WORKS, INC. §
P.O. Box 489
Satsuma, AL 36572-0489, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. CORP. 03-1085

v.

§

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

FINAL ORDER

This case involves a disputed final assessment of 2001 corporate income tax entered against the above Taxpayer. A hearing was conducted on March 9, 2005. Robert Clute and Greg Watts represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department. A Preliminary Order was subsequently entered on March 24, 2005. That Order adequately states the facts and issue, as follows:

The Taxpayer is located in Satsuma, Alabama and manufactures tanks and pressure vessels for the chemical industry. The Taxpayer established an employee stock option plan ("ESOP") in 1990. Over 30 percent of the Taxpayer's stock was eventually owned by the Taxpayer's employees through the ESOP.

The ESOP employees sued the Taxpayer's owners in 2001 concerning the management of the company. The Taxpayer was struggling financially at the time, which was worsened when the Taxpayer's bank suspended its line of credit as a result of the lawsuit.

The parties subsequently settled the lawsuit in mid-2001 by the owners assuming the company's debts in return for some real property. In deciding whether to settle, the Taxpayer's CPA advised the ESOP employees that the Taxpayer would not owe Alabama tax in 2001 because a large net operating loss ("NOL") carryover was available to offset the company's 2001 income. The employees settled the lawsuit based on that assurance. The settlement was closed in November 2001.

In December 2001, the Alabama Legislature enacted Act 2001-1088 as a way to immediately increase the State's revenue. The Act amended Code of Ala. 9175, §40-18-35.1 to provide that all NOLs available to corporations for the 2001 tax year shall be disallowed. The Act thus

prohibited the Taxpayer from claiming the available NOL on its 2001 Alabama return. Consequently, without being able to claim the NOL, the Taxpayer owed \$111,095 on its 2001 Alabama return. It timely filed the return, but due to its financial condition was unable to pay the tax due.

The Taxpayer's representatives argued at the March 9 hearing that the retroactive disallowance of the NOL was unconstitutional. They also conceded, however, that the Administrative Law Division was not empowered to declare a statute unconstitutional.

The representatives also argued that it would be unfair to not allow the Taxpayer to claim the NOL in 2001 because the ESOP employees that now own the business had relied on their CPA's advice, which was correct when given, that because of the available NOL, the company would owe no Alabama taxes in 2001. They explained that the Taxpayer is still struggling economically, and that the extension of the Taxpayer's line of credit depends on whether the Taxpayer must pay the 2001 tax in issue. The Taxpayer's bank is due to extend the line of credit on or before April 27, 2005. If the line of credit is not extended, the Taxpayer will most likely go out of business. In that case, the Taxpayer's fifty-plus employees will lose their jobs, and the State of Alabama will in all likelihood be unable to collect the tax in issue. The State will also lose any future tax revenue from the Taxpayer.

The Administrative Law Division is without equitable authority to grant the Taxpayer relief. However, the Department's Taxpayer Advocate has extraordinary equitable authority pursuant to Code of Ala. 1975, §40-2A-4. Consequently, a copy of this Preliminary Order and a copy of the transcript of the March 9 hearing is being forwarded to the Taxpayer Advocate's Office for review. The Taxpayer Advocate should review the case and notify the Administrative Law Division as soon as possible whether the issuance of a Taxpayer Assistance Order is appropriate under the circumstances. (footnote omitted.) An appropriate Order will then be entered.

The Taxpayer Advocate has responded that his office is unable to grant the Taxpayer any relief other than a payment plan. A copy of the Taxpayer Advocate's response is attached to and made a part of this Final Order.

Code of Ala. 1975, §40-18-35.1, as amended by Act 2001-1088, prohibited the Taxpayer from claiming its available NOL carryforward on its 2001 return. I sympathize with the Taxpayer's plight, but extraordinary equitable relief cannot be granted by either the

Administrative Law Division or the Department's Taxpayer Advocate. The tax in issue must be affirmed, plus interest as required by Code of Ala. 1975, §40-1-44. Under the circumstances, the penalty assessed by the Department is waived for reasonable cause pursuant to Code of Ala. 1975, §40-2A-11(h).

The final assessment, less the penalty, is affirmed. Judgment is entered against the Taxpayer for tax and interest of \$121,136.17. Additional interest is also due from the date of entry of the final assessment, November 6, 2003. The Taxpayer may contact the Department's Corporate Tax Division at 334-242-1200 concerning payment arrangements.

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

Entered April 15, 2005.

BILL THOMPSON
Chief Administrative Law Judge