

GENESYS CONFERENCING
OF GEORGIA, INC.
9139 S. Ridgeline Blvd.
Highland Ranch, CO 80129,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. CORP. 03-616

FINAL ORDER

The Revenue Department assessed corporate income tax against Genesys Conferencing of Georgia, Inc. (“Taxpayer”) for the short year January 1, 2001 through August 1, 2001. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on January 8, 2004. Matt Lazzeri and John Gupta represented the Taxpayer. Assistant Counsel David Avery represented the Department.

Code of Ala. 1975, §40-18-35.1(7) prohibits a corporation from claiming a net operating loss (“NOL”) in any tax year that began in calendar year 2001. There is an exception, however, for any “corporation dissolved and completely liquidated within calendar year 2001” The issue in this case is whether a statutory merger should be recognized or treated as a dissolution and complete liquidation within the context of §40-18-35.1(7).

The Taxpayer merged into its parent corporation, Genesys Conferencing of Massachusetts, Inc., on July 31, 2001. The Taxpayer subsequently claimed an NOL on its Alabama corporate income tax return for the short year January 1, 2001 through August 1, 2001. The Department disallowed the NOL pursuant to §40-18-35.1(7), and entered the

final assessment in issue. The Taxpayer appealed.

The Department argues that the exception in §40-18-35.1(7) does not apply in this case because a statutory merger is distinct from and cannot be recognized as a dissolution and complete liquidation.

The Taxpayer concedes that a merger is legally distinct from a dissolution and complete liquidation. It argues, however, that a merger and a liquidation are identical for income tax purposes, and consequently, that a merger should be recognized as a liquidation in the context of §40-18-35.1(7).

The Taxpayer, on the other hand, asserts that a subsidiary that merges into its parent is a “corporation dissolved and completely liquidated” within the meaning of Alabama Code §40-18-35.1(7). Its primary contention is that, under Alabama income tax law, a parent-subsidary statutory merger must be treated in the same manner as a liquidation of the subsidiary into the parent. This treatment is required because, by virtue of Alabama Code §40-18-8(h), Alabama adopts I.R.C. §332 and its accompanying regulations. These provisions require that a parent-subsidary statutory merger be treated in the same manner as a liquidation. The Taxpayer believes that this interpretation is consistent with the application of substance over form, since there is no tax, business, or economic distinction between the two transactions other than in the legal means by which they are accomplished.

Taxpayer’s Brief at 2.

Code of Ala. 1975, §40-18-8 addresses the recognition of gains and losses from the sale or exchange of property for Alabama income tax purposes. Section 40-18-8(h) provides as follows – “No gain or loss shall be recognized on the receipt by a corporation of property on the complete liquidation of a subsidiary corporation when the requirements of 26 U.S.C. §332, relating to complete liquidation of subsidiaries, are satisfied.”

The Taxpayer contends that the statutory merger of a subsidiary into its parent is treated as a complete liquidation pursuant to §332, citing various Treasury regulations and

an IRS private letter ruling. Taxpayer's Brief at 3. The Taxpayer thus argues that because Alabama has adopted §332, the principles relating to that section, i.e. a merger is recognized as a liquidation, should also apply to §40-18-35.1(7). I disagree.

First, §40-18-8(h) adopts §332 only to the extent that a surviving parent corporation is not required to recognize a gain or loss on the receipt of property from a liquidated subsidiary. The scope of §332 is thus limited, and cannot be extended to other provisions in the Alabama Revenue Code.

Second, and importantly, the language used in §40-18-35.1(7) limits the exception to only a corporation "dissolved and completely liquidated" in 2001. A cardinal rule of statutory construction is that a statute must be construed as written. "The fundamental role of the courts in construing statutory provisions is to ascertain the legislative intent from the language used in the enactment. Where a statutory pronouncement is clear and unambiguous, this court must abide by the statute as written. *Parker v. Hilliard*, 567 So.2d 1343 (Ala. 1990). Courts are to interpret statutes, not amend or repeal them under the guise of judicial interpretations. *Id.*" *Heater v. Tri-State Motor Transit Co.*, 644 So.2d 25, 26 (Ala.Civ.App. 1994). See also, *IMED Corp. v. Systems Engineering Assoc. Corp.*, 602 So.2d 344 (Ala. 1992); *Kimberly-Clark Corp. v. Eagerton*, 445 So.2d 566 (Ala.Civ.App. 1983).

If the Legislature had intended for the exception in §40-18-35.1(7) to also apply to a corporation that merged with another corporation in 2001, it could have so stated. It did not. Applying the plain language of the statute, only a corporation that was dissolved and completely liquidated in 2001 can claim an NOL in that year. The Department thus correctly disallowed the NOL claimed by the Taxpayer on its 2001 Alabama return.

The final assessment is affirmed. Judgment is entered against the Taxpayer for corporate tax and interest of \$52,120.84. Additional interest is also due from the date of entry of the final assessment, August 5, 2003.

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

Entered April 2, 2004.