STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. INC. 86-267
AMEREX CORPORATION P.O. Box 81 Trussville, AL 35173,	§	
Taxpayer.	§	

ORDER

Amerex Corporation, (hereinafter referred to as "Taxpayer") filed a petition for refund of corporate income tax relating to fiscal years 1983, 1984 and 1985, and the short year 1984. The Department denied the refunds and the Taxpayer appealed to the Administrative Law Division. A hearing was conducted on November 10, 1987. The Taxpayer was represented by the Hon. Brian T. Williams. Assistant counsel Mark Griffin appeared for the Department. Based on the evidence submitted by the parties, the Administrative Law Judge entered a recommended order on February 12, 1988. After a review of the Administrative Law Division record in the case and the recommended order, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

The facts are undisputed.

The Taxpayer is an Alabama corporation. During the subject years, the Taxpayer did business in California and paid to California the tax levied by the California Revenue and Tax Code, §23151. That tax is part of the Bank and Corporation Franchise Tax

and constitutes a privilege or franchise tax measured by net income from business done in California in the preceding year. It is separate from the California Corporate Income Tax, codified at California Revenue and Tax Code, §23501.

The Taxpayer originally claimed the California tax as a deduction on its Alabama returns. Amended returns were subsequently filed on which the California tax was claimed as a credit under Code of Ala. 1975, §40-18-21. The Department disallowed the resulting refund claims and the Taxpayer appealed to the Administrative Law Division.

The determinative issue is whether the subject California tax constitutes an "income tax" within the purview of §40-18-21. The California Constitution allows an income tax at Article 13, §26, Constitution of the State of California.

CONCLUSIONS OF LAW

Code of Ala. 1975, §40-18-21 provides a credit for "the amount of income tax actually paid" to another state on account of business transacted or property held in such state.

Two Alabama cases are directly on point, State v. Algernon Blair, Inc., 228 So.2d 803, and Burton Mfg. Co., Inc. v. State, 469 So.2d 620. A prior case, State v. Robinson Land & Lumber Co., 77 So.2d 641, aff'd, 77 So.2d 648, involved the credit section but did not address the issue of what constituted an "income tax" within the scope of the statute.

Algernon Blair involved a Tennessee excise tax measured by net earnings for the prior year from business done within the state. The Tennessee Constitution specifically prohibited the imposition of an income tax. Further, the Tennessee Supreme Court characterized the tax as an excise tax on the privilege of doing business in the state, and not an income tax. Roane Hosiery, Inc. v. King, 381 S.W.2d 265; Woods Lumber Co. v. MacFarland, 355 S.W.2d 448. Based on the above, the Alabama Supreme Court determined that the Tennessee tax, although measured by net income, was not an income tax and thus that the credit section did not apply.

However, in Burton, a Florida tax measured by net income was construed by the Alabama Court of Civil Appeals as an income tax under both Alabama and Florida law. Several factors were considered. First, the Florida Constitution had been amended immediately prior to passage of the subject tax so as to allow for imposition of a corporation income tax. Second, the statute itself referred to the tax as an income tax. Also, the Florida Supreme Court had characterized the tax as an income tax in Department of Revenue v. Leadership Housing, Inc., 343 So.2d 611. Finally, the Court considered the definition of "income tax" set out in the Multistate Tax Compact, Code of ala. 1975, §40-27-1 et seq. That section provides that an income tax "means a tax imposed on or measured by net income".

Judge Holmes dissented, arguing that Florida law should

control and that the intent provision of the Florida statute clearly stated that the intent of the Florida Legislature was that the tax should be construed as an excise or privilege tax.

The Taxpayer argues that Burton is dispositive. That is, any tax measured by net income should be construed as an income tax for purposes of §40-18-21.

However, Burton does not hold that any tax measured by net income is conclusively an income tax. Rather, the majority considered a number of factors, all indicating that the subject tax was an income tax under Florida law. The Multistate Tax Compact definition of "income tax" was considered only as an "extrinsic aid" due to the ambiguous nature of the Florida statute.[1] Ultimately, the law of the foreign state must control. State v. Robinson Land and Lumber Co., supra; Burton Mfg. Co., Inc. v. State, supra, dissenting opinion.

The California Constitution provides for a corporation income tax. However, the statute in question clearly states that the tax is "for the privilege of exercising its corporate franchises within this state". Further, the tax is levied as part of the "Bank and Corporation Franchise Tax", and the California courts have

[1]The Department argues that the Multistate Tax Compact has never been properly enacted, and thus should not be considered. Conversely, if the Compact is operative, then Code of Ala. 1975, §40-18-22 provides that any domestic corporation subject to the Compact shall not be allowed the credit provided by §40-18-21. However, it is not necessary to address those issues in this case. The Compact definition of "income tax" was not cited as definitive law, and could still be considered as an extrinsic aid even if the Compact has not been properly enacted.

repeatedly characterized the tax as a franchise tax. Pacific Co. v. Johnson, 52 S.Ct. 424, 285 U.S. 480; Bank of Alameda County v. McColgan, 159 P.2d 31; West Pub. Co. v. McColgan, 166 P.2d 861, aff'd 66 S.Ct. 1378, 328 U.S. 823; Rosemary Properties, Inc. v. McColgan, 177 P.2d 757; Willamette Industries v. Franchise Tax Bd., 154 Cal. Rptr. 183, 91 C.A.3d 528; see also other cases and authorities in annotations following §23151.

The present case is on point with Algernon Blair, except that the California Constitution does not prohibit an income tax. Burton did not overrule Algernon Blair, but simply distinguished it based on different facts. The California tax in issue is not an income tax under California law, and thus should not be allowed as a credit against Alabama tax under §40-18-21.

The above conclusion is supported by the Georgia Court of Appeal's opinion in Chilivis v. International Business Machines Corp., 235 S.E.2d 616. In that case, the Georgia Tax Commission construed various excise, franchise and privilege taxes measured by net income to be income taxes. The Court disagreed, as follows:

> The commission contends that "income tax" in the statute in issue means any tax, the amount of which is determined by income. The appellee claims that an "income tax" is a tax directly on income, and doesn't include franchise, excise or privilege taxes. We hold that the appellee's construction of the statute is proper . . .
>
> The term "income tax" has for many years been used as a term of art. It refers to taxes on income and does not include taxes on subjects other than income, although measured by income. (cites omitted)

Also, cases interpreting the federal foreign tax credit statute, 26 U.S.C. §901, have distinguished between a direct tax on income and a privilege or excise tax measured by net income. In Allstate Ins. Co. v. U.S., 419 F.2d 409, the court quoted Keasbey and Mattison Co. v. Rothensies, 133 F.2d 894, 897, cert. denied, 320 U.S. 739, 64 S.Ct. 39, as follows:

> . . . The Supreme Court, without advancing any precise definition of the term "income tax", has unmistakenly determined that taxes imposed on subjects other than income, e.g., franchises, privileges, etc., are not income taxes, although measured on the basis of income. Strattor's Independence, Ltd. v. Howbert, 231 U.S. 399, 34 S.Ct. 136, 58 L.Ed. 285; McCoach v. Minehill & S.H.R. Co., 228 U.S. 295, 33 S.Ct. 419, 57 L.Ed. 842; Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389; Ann. Cas. 1912B, 1312; Spreckels Sugar Refining Co. v. McClain, 192 U.S. 397, 24 S.Ct. 376, 48 L.Ed. 496; see: Doyle v. Mitchell Bros. Co., 247 U.S. 179, 183, 38 S.Ct. 467, 62 L.Ed. 1054; United States v. Whitridge, 231 U.S. 144, 147, 34 S.Ct. 24, 58 L.Ed. 159. These criteria are determinative of the nature of the tax in question.

An income tax deduction or credit is granted as a matter of legislative grace, and must be strictly construed against the taxpayer and for the Department. Harsha v. U.S., 590 F.2d 884; State v. Chesebrough-Ponds, Inc., 441 So.2d 598.

Section 40-18-21 clearly provides that a credit should be allowed only for income taxes paid to other states, and Alabama's appellate courts have refused to usurp the authority of the Legislature by expanding the section to include all other taxes measured by net income. The plain wording of the statute must be followed. Montgomery Bridge and Engineering, Inc. v. State, 440

So.2d 1114.

Finally, in an excellent brief, the Taxpayer argues that the United States Supreme Court no longer looks to the technical form of a tax, but rather to its practical effect. All of the cases cited by the Taxpayer involve the Commerce Clause, see Complete Auto Transit Co., Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076. Certainly, the constitutionality of a tax must be decided looking to substance over form.

However, the credit section in issue does not violate any constitutional tenet. It is applied equally to all domestic corporations. The Legislature has broad authority in matters of taxation, State v. Spann, 118 So.2d 740, and can certainly choose to limit the scope of the credit to only income taxes paid to other states. In view of the fact that the California tax in issue is not an income tax, the petition for refund should be and is hereby, DENIED.

This order constitutes the final order in this action for purposes of review under Code of Ala. 1975, §41-22-20.

Done this 3rd day of March, 1988.