ALABAMA TAX TRIBUNAL

COMPLETE PAYMENT RECOVERY SERVICES, INC., INTERCEPT, INC., AND METAVANTE CORPORATION,	§		
	§	DOCKET NOS.	BIT. 17-583-LP
Taxpayers,			BIT. 17-751-LP
	§		BIT. 17-752-LP
v.			
	§		
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§		

FINAL ORDER

These consolidated appeals involve adjustments made by the Department of Revenue to net operating losses for 2006 through 2011 claimed by Complete Payment Recovery Services, Inc., Intercept, Inc., and Metavante Corporation (each or collectively, the "Taxpayer"). A hearing was conducted on October 1, 2019. Craig Banks represented the Department. Ann Vasileff, Mark Arrigo, Veronica Caputo, and Jamie Yesnowitz represented the Taxpayer.

FACTS

The three Taxpayers are affiliates under the parent corporation Fidelity National Information Systems, Inc. (the "Parent"). Complete Payment Recovery Services, Inc., is a Georgia corporation in the business of collections and fraud management and was purchased by the Parent corporate structure in 2006. Intercept, Inc., is a Georgia corporation offering banking services and was purchased by the Parent corporate structure in 2004. Metavante Corporation is a Wisconsin corporation offering financial technology services and was purchased by the Parent corporate structure in 2009. All operate in Alabama and numerous other states. FIS Management Services LLC ("FISM") was formed in 2004 and provides services to entities within the Parent corporate structure. All employees of each Taxpayer were assigned to FISM after each Taxpayer was

acquired by the Parent corporate structure. FISM managed all individuals that provided services to the Taxpayer and other entities. Each Taxpayer paid FISM for actual services used by the Taxpayer.

The Taxpayer is subject to the allocation and apportionment provisions of the Multistate Tax Compact, *see* §§ 40-21-1, Art. I, *et seq.*, Ala. Code 1975, and is required to apportion its income based on its property factor, payroll factor, and twice its sales factor. The payroll factor is "a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the period." § 40-27-1, Article IV(13), Ala. Code 1975. In the present case, the Taxpayer apportioned its income in Alabama with no payroll factor because the Taxpayer claims that it has no employees in Alabama or elsewhere and the individuals who perform work for the Taxpayer are employees of FISM.

The Department of Revenue reviewed the Taxpayer's returns and adjusted the reported payroll factor to include in both the numerator (for Alabama services) and denominator (for total services) payments made by the Taxpayer to FISM for employee services. As a result, the Taxpayer's Alabama income and overall apportionment to Alabama increased.

ISSUE

The main issue here is whether the expenses paid by the Taxpayer to FISM for employee services should be included in the payroll factor to determine Alabama business-income tax due. Several questions have been presented by the parties in arguing this issue. Each is addressed herein.

ANALYSIS

a. Is the Tax Tribunal required to follow the rulings of its predecessor, the Administrative Law Division of the Department of Revenue?

The Department of Revenue argues that the issue at bar has been decided previously in *Plantation Pipe Line Co. v. State of Alabama*, Docket Corp. 05-948 (Admin. Law Div. O.P.O. 5/23/2006) and *C&D Chemical Products, Inc. v. State of Alabama*, Docket Corp. 00-288 (Admin. Law Div. 2/9/2001), by the Tax Tribunal's predecessor, the Administrative Law Division of the Department of Revenue, and that the Tax Tribunal is bound by those decisions in the present case. In support of its argument, the Department of Revenue relies on the Tax Tribunal's prior decision in *Mar-Jac Poultry AL LLC v. State of Alabama Department of Revenue*, Docket S. 16-253 (A.T.T. 8/10/2016). According to the Department of Revenue, in *Mar-Jac*, the Tax Tribunal, in following a decision of the Administrative Law Division, set the precedent that the Alabama Tax Tribunal must follow Administrative Law Division decisions. Contrary to the Department of Revenue's contention, however, nothing in the *Mar-Jac* decision expressly states that the Tax Tribunal is bound by those decisions. Even assuming that *Mar-Jac* held that the Tax Tribunal must follow decisions of the Administrative Law Division, as demonstrated below, the legislative intent behind the statutes governing the creation and decisions of the Tax Tribunal is a satisfactory reason to reverse what the Department contends that *Mar-Jac* says.

The Alabama Tax Tribunal was created by the Taxpayer Fairness Act in 2014, which is codified in Chapter 2B of Title 40. That Chapter's section on "Legislative Findings" reads as follows:

> To increase public confidence in the fairness of the state tax system, the state shall provide an *independent* agency to be known as the Alabama Tax Tribunal to hear appeals of tax and other matters administered by the Department of Revenue and certain self-administered counties and municipalities that choose to participate with the Alabama Tax Tribunal to hear appeals of taxes levied by or on behalf of self-administered counties or municipalities. Any judge of the Alabama Tax Tribunal shall have the requisite knowledge and experience to hear and resolve disputes between taxpayers and the Department of Revenue or taxpayers and any self-administered

> county or municipality that has elected to participate with the Alabama Tax Tribunal. Such hearing shall take place only after the taxpayer has had a full opportunity to settle any matter with the Department of Revenue or with a self-administered county or municipality. There shall be no requirement of the payment of the amounts in issue or the posting of a bond. This *independent* Alabama Tax Tribunal shall exist within the executive branch of the government.

§ 40-2B-1, Ala. Code 1975 (emphasis added). Additionally, § 40-2B-2(a), Ala. Code 1975, states the purpose of establishing the Alabama Tax Tribunal:

> [t]o increase public confidence in the fairness of the state tax system, the state shall provide an *independent* agency with tax expertise to resolve disputes between the Department of Revenue and taxpayers, prior to requiring the payment of the amounts in issue or the posting of a bond, but after the taxpayer has had a full opportunity to attempt settlement with the Department of Revenue based, among other things, on the hazards of litigation. By establishing an *independent* Alabama Tax Tribunal within the executive branch of government, this chapter provides taxpayers with a means of resolving controversies that insures both the appearance and the reality of due process and fundamental fairness. … It is the intent of the Legislature that this chapter foster the settlement or other resolution of tax disputes to the extent possible and, in cases in which litigation is necessary, to provide the people of Alabama with a fair and *independent* dispute resolution forum with the Department of Revenue. The chapter shall be interpreted and construed to further this intent.

(Emphasis added). These statutes make clear that the Legislature intended the Alabama Tax Tribunal to be <u>independent</u> from the Alabama Department of Revenue.

Importantly, with regard to the decisions issued by the Tax Tribunal, § 40-2B-2(*l*)(7), Ala. Code 1975, states:

> The *Alabama Tax Tribunal's* interpretation of a taxing statute subject to contest in one case shall be followed by the Alabama Tax Tribunal in subsequent cases involving the same statute, and its application of a statute to the facts of one case shall be followed by the *Alabama Tax Tribunal* in subsequent cases involving similar facts, unless the *Alabama Tax Tribunal's* interpretation or application conflicts with that of an appellate court or the Alabama

> Tax Tribunal provides satisfactory reasons for reversing prior precedent.

(Emphasis added.) Nothing in the statute quoted above requires the Tax Tribunal to follow Administrative Law Division decisions. In fact, it expressly requires that the Tax Tribunal follow its decisions alone. In Alabama, it is well settled that, "[i]n interpreting a statute, it is the court's duty to ascertain and give effect to the legislative intent as expressed in the words of the statute." *Kimberly-Clark Corporation v. Eagerton*, 445 So. 2d 566 (Ala. Civ. App. 1983); *Winstead v. State*, 375 So. 2d 1207 (Ala. Civ. App.), cert. denied, 375 So. 2d 1209 (Ala. 1979). "We will not read into [a statute] language the legislature could easily have included had it chosen to do so, but did not." *T.G. v. Houston County Dept. of Human Resources*, 39 So. 3d 1146, 1149 (Ala. Civ. App. 2009) (citing *Ex parte Emerald Mtn. Expy. Bridge*, 856 So. 2d 834, 840 (Ala. 2003); *Noonan v. East-West Beltline, Inc.*, 487 So. 2d 237, 239 (Ala. 1986) ("It is not proper for a court to read into the statute something which the legislature did not include although it could have easily done so.")). While the Tax Tribunal may certainly find the decisions of the Administrative Law Division persuasive, the intent of the Legislature is clear. The Tax Tribunal is independent from the Department of Revenue and the Administrative Law Division. Because the Legislature did not reference the Administrative Law Division in § 40-2B-2(*l*)(7), Ala. Code 1975, or expressly state that the Tax Tribunal was bound by the Administrative Law Division's prior decisions, that statute will not now be read to impose a such duty on this Tribunal. As such, the Tax Tribunal is not required to follow the rulings of the Administrative Law Division.

b. **Does the regulation's limiting of the payroll factor to payments made directly to employees enlarge the provisions of the statute?**

As stated above, the Department of Revenue contends that its adjustments in the present case are valid in light of the Administrative Law Division's previous rulings on the issue at hand in *C&D Chemical* and *Plantation Pipe Line*. Again, while the Tax Tribunal is not bound by the Administrative Law Division's rulings in those decisions, the Tribunal may still find them to be persuasive.

In *C&D Chemical*, *supra*, C&D and Occidental Electrochemical Corporation ("OEC"), entered into a partnership agreement providing each with a 50% indirect ownership interest in a partnership (the "Partnership"). C&D created C&D Chemical Products, Inc. ("C&D Chemical"), for the sole purpose of holding its investment in the Partnership. Both C&D and OEC entered into service agreements with the Partnership pursuant to which OEC provided employees to operate the Partnership's Alabama-based manufacturing facility and C&D provided New Jersey-based employees to perform administrative functions for the Partnership. The Partnership paid C&D and OEC a pro rata monthly administrative fee based upon allocated annual costs.

For the purposes of its Alabama income tax returns, C&D Chemical included in its apportionment factors its pro rata share of the property, payroll, and sales factors of the Partnership, which included amounts paid to C&D and OEC's employees for services provided to the Partnership. The Department of Revenue adjusted C&D Chemical's apportionment formula by requiring elimination of the payroll factor and argued that C&D Chemical should not be allowed a payroll factor because the Partnership did not have any employees. The Administrative Law Division disagreed and held that the amounts paid by the Partnership for the services provided by C&D and OEC employees constituted "compensation paid" and, thus, should have been included in the payroll factor.

In *Plantation Pipe Line*, the Plantation Pipe Line Company ("Plantation") was owned by an affiliate of Exxon Mobile Pipeline Company ("Exxon"), Kinder Morgan Operating L.P. "D" ("KMLP-D"), and Kinder Morgan Operating L.P. "A" ("KMLP-A"). Plantation Services, LLC ("PS LLC"), an entity owned by Exxon and KMLP-A, subcontracted KMLP-D to provide Plantation's operational and administrative functions. Those functions were performed by employees that were transferred by Plantation to KMLP-D. The prior employees of Plantation continued to provide the identical operational and administrative services for Plantation under KMLP-D as they had provided as direct employees of Plantation prior to the transfer.

Under the agreement with KMLP-D, Plantation paid KMLP-D for the services performed by the transferred employees, and for purposes of its Alabama corporate income tax return, reported this amount in its payroll factor. The Department of Revenue eliminated the payroll factor from Plantation's apportionment formula. Relying on *C&D Chemical*, the Administrative Law Division determined that the compensation paid to the employees transferred by Plantation to KMLP-D should have been included in Plantation's payroll factor.

In rendering its decisions in both *C&D Chemical* and *Plantation Pipe Line*, the Administrative Law Division examined Alabama's payroll-factor regulation, Regulation 810-27-1-4-.13(a)(3), which stated, in pertinent part, that "[p]ayments made to an independent contractor or any person not properly classifiable as an employee are excluded" from the payroll factor and that "[o]nly amounts paid directly to employees are included in the payroll factor." Ala. Admin. Code r. 810-27-4-.13(a)(3) (Repealed in 2016). [1] The Administrative Law Division determined

[1]That regulation was repealed in 2016 and replaced by Ala. Admin. Code r. 810-27-1-.13. Ala. Admin. Cod r. 810-27-1-4-.13 (Repealed in 2016) was in effect during the tax years at issue, 2006 through 2011, despite the Administrative Law Division's rejecting the regulation in part in 2001 and 2006, in *C&D Chemical* and *Plantation Pipe Line*, respectively.

that the regulation's limiting of the payroll factor to direct employees enlarged § 40-27-1, Art. IV, Ala. Code 1975, and, thus, was invalid. The Administrative Law Division further determined that indirect employees could be included in the payroll factor.

The Tax Tribunal does not find the Administrative Law Division's conclusions in *C&D Chemical* and *Plantation Pipe Line* persuasive in the present case. In both decisions, the Administrative Law Division relied on the definition of "compensation" found in the American Heritage Dictionary rather than the definition found in the statute in rejecting the regulation's limiting of the payroll factor to direct employees. *See Plantation Pipe Line*, *supra*, at 5 (quoting *C&D Chemical*, *supra*, at 7-9 (" '[a] regulation must comply with the statute to which it relates, [sic] and cannot enlarge or add to the language of the statute. *Ex parte Uniroyal Tire Co.*, 2000 WL 1074041 (Ala. 2000). … That definition also does not require that compensation must be something paid to an employee.' ")).

The statutory and regulatory definitions of "compensation" must be examined and applied in the present case. Section 40-27-1, Art. IV, 1.(c)., Ala. Code 1975, defines "compensation" as "wages, salaries, commissions and any other form of remuneration paid *to employees* for personal services." (Emphasis added.) The payroll-factor regulation's definition of "compensation," restates the statutory definition verbatim. *See* Ala. Admin. Code r. 810-27-1-4.13(a)(3) (Repealed in 2016).

The regulation goes on to say that "[p]ayments made to an independent contractor or any other person not properly classified as an employee are excluded. Only amounts paid directly to employees are included in the payroll factor." *Id*. The term "employee" is defined in the regulation as follows:

> (A) any officer of a corporation, or (B) any individual who, under the usual common-law rules applicable in determining the

> employer-employee relationship, has the status of an employee. Generally, a person will be considered to be an employee if he is included by the taxpayer as an employee for purposes of payroll taxes imposed by the Federal Insurance Contributions Act; except that, since certain individuals are included within the term "employees" in the Federal Insurance Contributions Act who would not be employees under the usual common-law rules, it may be established that a person who is included as an employee for purposes of the Federal Insurance Contributions Act is not an employee for purposes of this regulation.

Ala. Admin. Code r. § 810-27-1-4-.13(a)(4) (Repealed in 2016).

Because that definition states that compensation is paid "to employees," a regulation clarifying that payments must be made directly to employees in order to be considered "compensation" is consistent with the statute and, thus, does not enlarge it. As such, the Administrative Law Division's rejection of the regulation is not adopted here.

c. Were the individuals who performed services for the Taxpayer considered employees under the Department of Revenue's payroll-factor regulation?

The pertinent section of the regulation states "[p]ayments made to an independent contractor or any other person not properly classifiable as an employee are excluded. Only amounts paid directly to employees are included in the payroll factor." Ala. Admin. Code r. 810-27-1-4.13(a)(3) (Repealed in 2016). According to testimony and evidence submitted at the hearing, the services provided to the Taxpayer for compensation were performed by individuals who were not direct employees. Upon acquisition of the Taxpayer into the Parent group, changes were made regarding the once-employees of the Taxpayer. Titles were changed, officers were moved to a different state, and all hiring, firing, bonuses, raises, benefits, and employment agreements were controlled by FISM. The expectations of and assignments for the individuals were set by FISM. FISM issued paychecks to the individuals. The individuals were no longer employed by the Taxpayer. They were employees of FISM, and the Taxpayer did not pay the

individuals directly. Therefore, for the tax years at issue, the Taxpayer did not have employees to include in the payroll factor of its Alabama apportionment formula. The other arguments presented by the Taxpayer need not be addressed.

Judgment is entered for the Taxpayer. The adjustments made by the Department are voided. This Final Order may be appealed to circuit court within 30 days, pursuant to § 40-2B-2(m), Ala. Code 1975.

Entered June 12, 2020

/s/ *Leslie H. Pitman*
LESLIE H. PITMAN
Associate Tax Tribunal Judge

lhp:cv
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