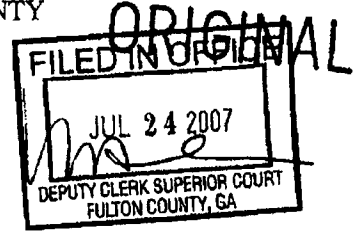


IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



GEORGIA POWER COMPANY; THE)
SOUTHERN COMPANY; and SOUTHERN)
POWER COMPANY,)

Plaintiffs,)

v.)

BART L. GRAHAM, in his official capacity)
as Commissioner of Revenue of the)
State of Georgia,)

Defendant.)

Civil Action File No. 2007CV13783

COMPLAINT

Georgia Power Company, The Southern Company, and Southern Power Company (collectively "Plaintiffs") hereby file this Complaint against Bart L. Graham, in his official capacity as Commissioner of Revenue of the State of Georgia ("the Commissioner"), to recover tax overpayments owed Plaintiffs for their increased use of Georgia's port facilities in accordance with O.C.G.A. § 48-7-40.15 ("the Ports Tax Credit"), and show the Court as follows:

INTRODUCTION

1.

Plaintiffs bring this action pursuant to the refund provisions of O.C.G.A. § 48-2-35 to recover certain tax overpayments which they are owed because Plaintiffs are entitled to the State of Georgia's Ports Tax Credit, O.C.G.A. § 48-7-40.15, for the years at issue. The Ports Tax Credit is available for businesses that locate or expand in Georgia and utilize Georgia's ports. For the tax years at issue in this litigation, 2002, 2003, and 2004, Plaintiff Georgia Power increased its port traffic of products through Georgia's ports by more than 10% above its base year port traffic, as required by the statute to claim the credit. Because Plaintiffs did not claim

the Ports Tax Credit on their original 2002, 2003, and 2004 consolidated income tax returns, they thereafter filed claims for refund with Defendant pursuant to O.C.G.A. § 48-2-35. O.C.G.A. § 48-2-35 provides that a taxpayer who meets certain requirements shall be refunded any and all taxes erroneously or illegally assessed and collected, whether paid voluntarily or involuntarily. Defendant has neither granted nor denied Plaintiffs' claims for refund in the intervening twenty months since they were filed in November 2005. O.C.G.A. § 48-2-35(c)(4) provides that a civil action may be filed by Plaintiffs in this Court if Defendant has not granted or denied a claim for refund within one year of its filing. Because Plaintiffs are entitled to refund of a portion of their 2002, 2003, and 2004 income taxes based on their eligibility for the Ports Tax Credit, and because Defendant has neither granted nor denied Plaintiffs' Refund Claims within one year from the date of filing, Plaintiffs respectfully seek redress from this Court, as provided by law.

PARTIES

2.

Plaintiff Georgia Power Company ("Georgia Power") is a Georgia corporation with its principal place of business at 241 Ralph McGill Boulevard, N.E., Atlanta, Fulton County, Georgia 30308. It is a public utility regulated by the Georgia Public Service Commission and is a subsidiary of The Southern Company. Georgia Power is engaged in the business of generating, transmitting, and distributing electricity to its retail and wholesale customers. Georgia Power is The Southern Company business entity which would be the principal beneficiary of tax credits recovered pursuant to this action.

3.

Plaintiff The Southern Company ("The Southern Company") is a Delaware corporation with its principal place of business at 30 Ivan Allen Jr. Boulevard, N.W., Atlanta, Fulton County,

Georgia 30308. It is a public utility holding company which owns all of the outstanding common stock of Georgia Power; three other regulated public utilities which provide electric service in the states of Alabama, Florida, and Mississippi (Alabama Power Company, Gulf Power Company, and Mississippi Power Company, respectively); and five other subsidiaries (Southern Power Company, Southern Company Services, Inc., Southern Communications Services, Inc. d/b/a SouthernLINC Wireless, Southern Nuclear Operating Company, Inc., and Southern Telecom, Inc.). The Southern Company each year files with the Commissioner a consolidated income tax return on behalf of itself and its subsidiaries subject to Georgia income tax.

4.

Plaintiff Southern Power Company ("Southern Power") is a Delaware corporation with its principal place of business at 30 Ivan Allen Jr. Boulevard, N.W., Atlanta, Fulton County, Georgia 30308. It is engaged in the construction, acquisition, and management of electric generation assets and sells electricity at market-based rates in the wholesale market. Southern Power is The Southern Company business entity which would be entitled to the tax refunds pursuant to this action associated with Ports Tax Credits which could not be applied to Georgia Power.

5.

Defendant Bart L. Graham is Commissioner of Revenue of the State of Georgia and is being sued in his official capacity. Service of process, if not acknowledged, may be made on this Defendant at 1800 Century Boulevard, N.E., Atlanta, DeKalb County, Georgia 30345-3205.

JURISDICTION AND VENUE

6.

This Court has subject matter jurisdiction over Plaintiffs' Complaint and personal jurisdiction over the Defendant. O.C.G.A. § 48-2-35 provides that a taxpayer who meets certain requirements shall be refunded any and all taxes erroneously or illegally assessed and collected, whether paid voluntarily or involuntarily.

7.

Venue is proper in this Court and in Fulton County pursuant to O.C.G.A. § 48-2-35(c)(4)(A).

BACKGROUND ON TAX CREDITS IN GEORGIA

8.

Before 1994, economic incentives for business investment and job creation in Georgia were largely left to individual counties, which often resulted in counties competing against one another for jobs and investment and sometimes hampered the State of Georgia's ability to encourage new businesses to locate in Georgia and existing businesses to expand here.

9.

At the same time, a number of other state governments in the Southeast region were providing substantial economic incentives to businesses and consequently lured some large manufacturing facilities to their states, which otherwise might have located in Georgia.

10.

For example, the State of South Carolina in 1992 enticed car manufacturer Bayerische Motoren Werke ("BMW") with economic incentives to locate a large automotive assembly plant in Greer, South Carolina, instead of Georgia.

11.

Similarly, the following year, in 1993, the State of Alabama enticed another car manufacturer, Mercedes-Benz, with more than \$300 million in economic incentives to locate a large automotive assembly plant in Vance, Alabama, instead of Georgia.

12.

Then-Governor Zell Miller responded in the 1994 legislative session by introducing a bill which would create Georgia's first statewide policy of comprehensive economic incentives for business development in the state.

13.

The legislation, which was adopted by the General Assembly in its 1994 legislative session and signed by Governor Miller following the 1994 session, is entitled the Georgia Business Expansion Support Act of 1994, and is codified at O.C.G.A. § 48-7-40 et seq. See 1994 Ga. Laws 928, § 1. The legislation is generally referred to by the acronym "BEST."

14.

BEST provides tax credits not only for new businesses locating in Georgia, but also for existing businesses, and, when BEST was introduced, Governor Miller and his economic development advisers specifically emphasized that BEST was geared primarily to existing businesses because most new jobs and investment in Georgia are created through expansions by existing businesses rather than new companies relocating to the state.

15.

The tax credits provided by BEST, as originally enacted in 1994, included credits for such activities as creation of jobs, job retraining, manufacturing investment, and childcare. The credit for new jobs created varied depending on the county in which a particular job was created,

with the state divided into three tiers of counties and higher credits provided for jobs created in more distressed counties of the state.

16.

Since 1994, BEST has been amended and occasionally expanded, and it remains the State of Georgia's major tool for encouraging the expansion of business investment and jobs in Georgia.

17.

In addition to competing with neighboring states such as Alabama and South Carolina for large manufacturing plants in the 1990's, port traffic was another area which these and other coastal states considered important for statewide economic growth.

18.

In the 1990's, Georgia's ports competed heavily with ports in such other Southeast locations as Mobile, Alabama; Jacksonville, Florida; and Charleston, South Carolina, for companies to use their port facilities and locate large distribution centers near those ports.

19.

As just one example, Georgia competed intensely with South Carolina for The Home Depot, Inc. ("The Home Depot") to build a distribution facility near the Savannah port and use the Savannah port for much of The Home Depot's imports into the United States. South Carolina sought for The Home Depot to locate the facility near its Charleston, South Carolina port. It was estimated that this facility, if located in Savannah, would comprise approximately 10% of all port traffic at the Savannah port.

20.

Ultimately, The Home Depot decided to use the Savannah port and locate its port distribution facility near that port because of economic incentives, including those provided by BEST, which Georgia officials promised to The Home Depot.

21.

Through BEST, the State of Georgia attempted to increase port traffic from companies through the Ports Tax Credit, O.C.G.A. § 48-7-40.15, which was enacted in 1998 and is based on 1997 base year traffic.

22.

The Ports Tax Credit is available for businesses that locate or expand in Georgia and utilize Georgia's ports. This tax credit offers tax credits to businesses that increase their port traffic by 10% in one year from the base level, as measured in tons, twenty-foot equivalent units ("TEU's"), or containers.

23.

The Ports Tax Credit applies to both exports and imports which pass through Georgia's ports.

NATURE OF THE CLAIM

24.

For each of the tax years 2002, 2003, and 2004, The Southern Company filed its Georgia corporate income tax returns on a consolidated basis with its subsidiaries subject to Georgia income tax, including Georgia Power and Southern Power.

25.

Effective for taxable years beginning on and after January 1, 1994, BEST, as codified at O.C.G.A. §§ 48-7-40.2, 40.3 and 40.4, provides for income tax credits for taxpayers who make

substantial investments in Georgia by expanding their existing manufacturing facilities or by building new manufacturing facilities. The amount of the credit is based upon a specified percentage of the cost basis of the taxpayer's qualified investment property placed in service in Georgia during the taxable year ("Manufacturer's Investment Tax Credits").

26.

The applicable Manufacturer's Investment Tax Credit is either 5%, 3%, or 1% of the cost basis of the taxpayer's qualified investment property placed in service during the taxable year, depending upon the Georgia county in which such new property is located.

27.

The amount of the Manufacturer's Investment Tax Credit is increased to either 8%, 5%, or 3% if the taxpayer's qualified investment property consists of new pollution control equipment or a new pollution control facility.

28.

Defendant's regulations promulgated pursuant to O.C.G.A. §§ 48-7-40.2, -40.3, and -40.4 (the "Regulations") provide detailed filing and approval requirements for taxpayers seeking to qualify for the Manufacturer's Investment Tax Credits.

29.

For each of the years 2002, 2003, and 2004, pursuant to Regulation section 560-7-8-.37(c), Georgia Power applied to Defendant for approval of Manufacturer's Investment Tax Credits for Georgia Power's new or expanded manufacturing facilities placed in service in such years in Georgia ("Qualified Projects").

30.

During each of the years 2002, 2003, and 2004, Georgia Power submitted to the Defendant detailed information regarding the nature of each of the Qualified Projects within thirty days of completion in accordance with Regulation subsection 560-7-8-.37(3) and (8),

including information showing Georgia Power's cost basis in all of its qualified investment property purchased or acquired during each taxable year for use in its new or expanded Georgia manufacturing facilities.

31.

Pursuant to Regulation section 560-7-8-.37(3)(c)7, Defendant reviewed Georgia Power's submissions and issued certificates of approval for the Qualified Projects, which entitled the Plaintiffs to Manufacturer's Investment Tax Credits for the years 2002, 2003, and 2004, respectively.

32.

Effective for taxable years beginning on or after January 1, 1998, the Ports Tax Credit, as codified at O.C.G.A. § 48-7-40.15, makes available an alternative, enhanced Manufacturer's Investment Tax Credit under circumstances in which the taxpayer has otherwise qualified for the basic credit and, in addition to investing in new or expanded Georgia manufacturing facilities, has also increased its use of Georgia ports by a specified amount.

33.

The practical impact of the Ports Tax Credit is to increase a taxpayer's Manufacturer's Investment Tax Credit from the county-tiered rate schedule to a flat rate of 5% of the cost basis of the taxpayer's new qualified investment property placed in service during the year in question, regardless of the Georgia county where the property is located. The rate of the credit is increased to a flat 8% of the cost of the taxpayer's qualified investment property placed in service in the case of recycling and pollution control equipment.

34.

To qualify for the Ports Tax Credit, the taxpayer must use Georgia's ports at a rate 10% over the taxpayer's base year port traffic, defined by law as the amount of product annually transported by way of waterborne ship or vehicle through a Georgia port facility during the

period from January 1, 1997, through December 31, 1997. In the event the taxpayer's usage of Georgia's ports during that period was not at least seventy-five tons, five containers, or ten TEU's, the taxpayer is deemed to have had base year port traffic in such amounts.

35.

The Southern Company filed its original consolidated Georgia income tax returns for the years 2002 and 2003 without reflecting any enhanced Ports Tax Credit for Georgia Power's new or expanded manufacturing facilities placed in service in Georgia during each of such years.

36.

During the year 2005, Plaintiffs became aware that Georgia Power had increased its use of the Georgia ports over its usage during the year 1997 by importing certain parts and equipment to be installed at its generating plants.

37.

In August of 2005, Plaintiffs contacted the Georgia Department of Revenue to determine whether the traffic of such items through Georgia's ports would entitle Georgia Power to the enhanced Ports Tax Credit over and above the Manufacturer's Investment Tax Credit to which Georgia Power was already entitled during the years 2002, 2003, and 2004.

38.

Based on its discussions with the Department of Revenue, Plaintiffs concluded that the Ports Tax Credit was available for each of the years 2002, 2003, and 2004. In each of these years, Georgia Power increased its port traffic of products, namely air heater baskets and transformers, through Georgia's ports during each previous twelve-month period by more than 10% above Georgia Power's base year port traffic.

39.

As a result of such increase in Georgia Power's base year port traffic of products through Georgia's ports, Plaintiffs were entitled to the enhanced Port Tax Credit in lieu of the Manufacturer's Investment Tax Credit for the years 2002, 2003, and 2004.

40.

The amount of Plaintiffs' Ports Tax Credit that they could utilize on their 2002, 2003, and 2004 Georgia income tax returns is limited to 50% of Georgia Power's and Southern Power's separate company income tax liability attributable to income generated in Georgia each year, less the amount of any income tax credit to which either was entitled under O.C.G.A. § 48-7-40 for the creation of new jobs in Georgia. Any remaining Ports Tax Credit, however, may be carried forward for the ensuing ten taxable years following the tax year in which the qualified investment property giving rise to the Ports Tax Credit was placed in service in Georgia.

41.

The Southern Company utilized the Ports Tax Credit on its originally filed 2004 Georgia consolidated income tax return, which it filed on behalf of itself and its subsidiaries subject to Georgia income tax, including Georgia Power and Southern Power.

42.

Because Plaintiffs had not originally elected to use the enhanced Port Tax Credit during the years 2002 and 2003, and because Plaintiffs became entitled to an additional amount of Port Tax Credit for the year 2004, Plaintiffs determined that they overpaid Georgia income tax liabilities for those years.

43.

Because of such overpayments, on or about November 4, 2005, Plaintiffs filed with the Defendant claims for refund pursuant to O.C.G.A. § 48-2-35 for the tax years 2002, 2003, and 2004 (the "Refund Claims").

44.

As of this date of the filing of this action, Defendant has neither granted nor denied Plaintiff's Refund Claims.

45.

Because more than one year has passed since the filing of the Refund Claims, this action is ripe for decision and appropriately before this Court pursuant to O.C.G.A. § 48-2-35(c)(4).

CLAIM FOR RELIEF

Count One: Refund Claim for 2002

46.

The foregoing allegations are incorporated by reference into this Count.

47.

Plaintiffs overpaid income taxes to the State of Georgia for the 2002 tax year because they were eligible for the Ports Tax Credit, O.C.G.A. § 48-7-40.15.

48.

Plaintiffs have filed a Refund Claim for the 2002 tax year with Defendant in accordance with the requirements of O.C.G.A. § 48-2-35.

49.

O.C.G.A. § 48-2-35 provides that a taxpayer who meets certain requirements shall be refunded any and all taxes erroneously or illegally assessed and collected, whether paid voluntarily or involuntarily.

50.

O.C.G.A. § 48-2-35 also provides that a civil action may be filed by Plaintiffs in this Court if Defendant has not granted or denied a refund claim within one year of its filing.

51.

Defendant has not granted or denied Plaintiffs' Refund Claim for the 2002 tax year, which was filed on or about November 4, 2005.

52.

Because Plaintiffs are entitled to refund of a portion of their 2002 income taxes based on their eligibility for the Ports Tax Credit, and because Defendant has neither granted nor denied Plaintiffs' Refund Claim within one year from the date of its filing, Plaintiffs respectfully request that the Court grant Plaintiff's Refund Claim for the 2002 tax year.

Count Two: Refund Claim for 2003

53.

The foregoing allegations are incorporated by reference into this Count.

54.

Plaintiffs overpaid income taxes to the State of Georgia for the 2003 tax year because they were eligible for the Ports Tax Credit, O.C.G.A. § 48-7-40.15.

55.

Plaintiffs have filed a Refund Claim for the 2003 tax year with Defendant in accordance with the requirements of O.C.G.A. § 48-2-35.

56.

O.C.G.A. § 48-2-35 provides that a taxpayer who meets certain requirements shall be refunded any and all taxes erroneously or illegally assessed and collected, whether paid voluntarily or involuntarily.

57.

O.C.G.A. § 48-2-35 also provides that a civil action may be filed by Plaintiffs in this Court if Defendant has not granted or denied a refund claim within one year of its filing.

58.

Defendant has not granted or denied Plaintiffs' Refund Claim for the 2003 tax year, which was filed on or about November 4, 2005.

59.

Because Plaintiffs are entitled to refund of a portion of their 2003 income taxes based on their eligibility for the Ports Tax Credit, and because Defendant has neither granted nor denied Plaintiffs' Refund Claim within one year from the date of its filing, Plaintiffs respectfully request that the Court grant Plaintiff's Refund Claim for the 2003 tax year.

Count Three: Refund Claim for 2004

60.

The foregoing allegations are incorporated by reference into this Count.

61.

Plaintiffs overpaid income taxes to the State of Georgia for the 2004 tax year because they were eligible for the Ports Tax Credit, O.C.G.A. § 48-7-40.15.

62.

Plaintiffs have filed a Refund Claim for the 2004 tax year with Defendant in accordance with the requirements of O.C.G.A. § 48-2-35.

63.

O.C.G.A. § 48-2-35 provides that a taxpayer who meets certain requirements shall be refunded any and all taxes erroneously or illegally assessed and collected, whether paid voluntarily or involuntarily.

64.

O.C.G.A. § 48-2-35 also provides that a civil action may be filed by Plaintiffs in this Court if Defendant has not granted or denied a refund claim within one year of its filing.

65.

Defendant has not granted or denied Plaintiffs' Refund Claim for the 2004 tax year, which was filed on or about November 4, 2005.

66.

Because Plaintiffs are entitled to refund of a portion of their 2004 income taxes based on their eligibility for the Ports Tax Credit, and because Defendant has neither granted nor denied Plaintiffs' Refund Claim within one year from the date of its filing, Plaintiffs respectfully request that the Court grant Plaintiff's Refund Claim for the 2004 tax year.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray as follows:

- (a) That summons and process be issued as provided by law;
- (b) That the Court determine that Plaintiffs are entitled to the Ports Tax Credit on their 2002, 2003, and 2004 Georgia consolidated income tax returns;
- (c) That the Court determine that, because Plaintiffs are entitled to the Ports Tax Credit for 2002, 2003, and 2004, they are entitled to income tax refunds for those respective tax years, plus interest thereon as provided by law;

- (d) That the Court determine that Plaintiffs are entitled to carry forward the unused Ports Tax Credit from the 2004 tax year to the 2005 tax year;
- (e) That the Court award Plaintiffs all costs and expenses of litigation in bringing this action; and
- (f) That the Court grant such other and additional legal and equitable relief as the Court deems just and proper.

This ~~24~~ day of July, 2007.

Respectfully submitted,

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