

**IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE**

GENERAL MOTORS CORPORATION)

Plaintiff/Appellee,)

vs.)

**DUDLEY W. TAYLOR,)
COMMISSIONER OF REVENUE)
FOR THE STATE OF TENNESSEE)**

Defendant/Appellant.)

Davidson Equity No. 87-2841-I
CONSOLIDATED

Appeal No.
01A01-9510-CH-00450

FILED

November 13, 1996

**Cecil W. Crowson
Appellate Court Clerk**

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE IRVIN H. KILCREASE, JR., CHANCELLOR

For the Plaintiff/Appellee: _____

For the Defendant/Appellant:

Charles W. Burson
Joe C. Peel
Nashville, Tennessee

Frank N. Stockdale Carney
Katharine A. Jungkind
Michael R. Marshall
Memphis, Tennessee

AFFIRMED AND REMANDED

HOLLY KIRBY LILLARD, J.

CONCUR:

ALAN E. HIGHERS, J.

DAVID R. FARMER, J.

OPINION

This case is appealed to this Court after being remanded to the trial court by the Tennessee Supreme Court in *General Motors Corp. v. Taylor*, 811 S.W.2d 897 (Tenn. 1991) (hereinafter “*General Motors I*”). Plaintiff/Appellee General Motors Corporation (“General Motors”) filed the lawsuit seeking a refund of corporate excise taxes. In this appeal, the Defendant/Appellant Commissioner of Revenue (“Commissioner”) contends that General Motors does not have standing and has not met the procedural prerequisites to its claim for a refund. The trial court found that General Motors fulfilled the procedural requirements and that General Motors was entitled to the refund it sought. We affirm.

General Motors filed tax returns with the State of Tennessee for the years 1982, 1983, and 1984. Taxes for those years were paid as stated on the returns. They were not paid under protest. In 1986 and 1987, the Commissioner audited General Motors’ tax returns for the years 1982, 1983, and 1984. *General Motors I*, 811 S.W.2d at 898.

General Motors had reported a net operating loss of nearly six million dollars for 1982. After conducting the audit, the Commissioner reduced the net operating loss to zero. The Commissioner determined that General Motors had overpaid its 1982 taxes and had underpaid its 1983 and 1984 taxes. The 1982 overpayment was applied against the additional tax liability assessed for 1983 and 1984. After the overpayment was distributed, there remained an additional tax liability of \$82,522 for 1984, which consisted of \$47,284 in taxes and \$35,238 in interest. The 1987 assessment was calculated as follows:

<u>Year</u>	<u>Liability as shown on GM’s return</u>	<u>Liability per Audit</u>	<u>Increase or (decrease) per Audit</u>
1982	\$ 46,169	\$ 46,117	\$ (52)
1983	\$ 670,191	\$ 586,549	\$(101,642)
1984	\$ 1,274,034	\$1,423,012	\$ 148,978
Combined	\$ 1,990,394	\$2,037,678	\$ 47,284

See id.

In June, 1987, General Motors paid the \$82,522 assessment and simultaneously filed a claim for a refund for tax years 1982, 1983, and 1984. The Commissioner denied the claim for refund in 1987, and General Motors filed this lawsuit. *Id.* In its complaint, General Motors sought a refund of the 1982 \$101,642 overpayment, which was applied to the 1984 underpayment of taxes, as well as the additional tax liability of \$82,522 for 1984. *Id.* at 899. The Commissioner, relying on Tenn.

Code Ann. § 67-1-1807, moved to dismiss the complaint on the grounds that the trial court lacked subject matter jurisdiction because General Motors did not pay the 1982, 1983, and 1984 taxes under protest. Under Tenn. Code Ann. § 67-1-1807, recovery of refunds for taxes paid prior to January 1, 1986, would be governed by the laws as they existed in 1985. The law at that time required that the taxes be paid under protest in order for the taxpayer to later apply for a refund. However, for taxes paid after January 1, 1986, payment of taxes under protest was not a condition precedent to a suit for recovery of the taxes. The trial court granted the Commissioner's motion to dismiss for lack of subject matter jurisdiction, and the case was ultimately appealed to the Tennessee Supreme Court. *Id.* at 898. The Tennessee Supreme Court rendered its decision on June 10, 1991. *Id.* at 897.

In *General Motors I*, the Supreme Court held that the \$101,642 overpayment of the 1982 taxes, applied to the 1984 underpayment of taxes, could not be recovered because this amount was not paid under protest and was not paid "on or after January 1, 1986," as required under Tenn. Code Ann. § 67-1-1807(b). However, as to the additional liability of \$82,522 assessed in the 1987 audit and paid in 1987, the Court found that subject matter jurisdiction existed. *Id.* at 899. Accordingly, General Motors was entitled to pursue its claim for a refund of the amounts paid in 1987:

Should General Motors prevail on the substantive issues raised in its claim for a refund of 1982, 1983, and 1984 taxes, its recovery of such taxes will be limited to \$47,284, plus interest thereon in the amount of \$35,238 paid by General Motors on June 29, 1987, plus additional interest thereon accruing subsequent to such payment pursuant to T.C.A. § 67-1-1803(b).

Id. at 900. The Supreme Court remanded the cause to the chancery court for a hearing on the substantive issues. *Id.*

The Supreme Court issued another decision affecting the issues in this case. *Southern Ry. Co. v. Taylor*, 812 S.W.2d 577 (Tenn. 1991), discussed the interpretation of Tenn. Code Ann. § 67-4-805 and Tenn. Comp. R. & Regs. 1320-6-1-.21. The facts in *Southern Railway* involved the calculation of net operating loss in the same manner that the Commissioner calculated General Motors' 1982 and 1983 net operating loss in the 1987 audit, including application of the same statutes and regulations. Tenn. Code Ann. § 67-4-805 allowed a deduction from a taxpayer company's net income equal to 100% of dividends received from a subsidiary corporation of which the taxpayer company owned 80% or more of the outstanding stock. *Id.* at 578. However, Tenn.

Comp. R. & Regs. 1320-6-1-.21(a) provided that there be added to a company's net operating loss for excise tax purposes all nonbusiness earnings, including dividends otherwise excluded from net earnings under Tenn. Code Ann. § 67-4-805. *Id.* at 579.

Southern Railway had claimed on its 1984 tax return a net operating loss carryover based on its losses in 1981, 1982, and 1983. In calculating the net operating loss for each of these years, Southern Railway did not add to its "net earnings" for the three years in question the dividends it received from corporations of which Southern Railway owned 80% or more of the outstanding shares. *Id.* at 578. In a 1986 audit, the Commissioner reduced Southern Railway's net operating loss by adding to its net earnings the value of these dividends, pursuant to Tenn. Comp. R. & Regs. 1320-6-1-.21. *See id.* at 578-79. The Supreme Court held that the Commissioner could not reduce Southern Railway's net operating loss carryover by adding to its net earnings dividends received from subsidiaries of which Southern Railway owned 80% or more of the outstanding shares because this would be inconsistent with the statutory deduction set forth in Tenn. Code Ann. § 67-4-805(b)(2)(C). *Id.* at 579-80. Consequently, the Court declared void Tenn. Comp. R. & Regs. 1320-6-1-.21(a). Therefore, the deduction for dividends from 80% subsidiaries, a permissible deduction in computing "net earnings," would also be an allowable deduction in computing "net operating loss" under Tenn. Code Ann. § 67-4-805(b)(2)(C). *Id.* at 580.

Accordingly, in *Southern Railway*, the Court found that the manner of calculating net operating loss used by the Commissioner was impermissible since it was inconsistent with express statutory deductions and that, as a result, Southern Railway was entitled to a refund. *Id.* This method of calculating net operating loss was also used by the Commissioner in its 1987 audit of General Motors, on which General Motors sought a refund.

In 1991, the Tennessee legislature amended Tenn. Code Ann. § 67-4-805(b)(2)(C)(ii) to add the following:

(ii) There shall be added to the net loss as determined for excise tax purposes, all nonbusiness earnings, all interest, dividends excluded from net earnings pursuant to this section and any other income excluded from net earnings pursuant to this section.

Tenn. Code Ann. § 67-4-805(b)(2)(C)(ii) (1994 & Supp. 1996); 1991 Tenn. Pub. Acts 503, § 7.

Therefore, the amended statute "undid" the ruling in *Southern Railway* by providing that dividends

received from 80% subsidiaries could be added back to the net operating loss, consistent with the calculation used by the Commissioner in its 1987 audit of General Motors. However, the legislature opened a small window for those seeking refunds for excise taxes paid prior to the effective date of the amendment. The amendment required that those seeking such refunds file a refund claim within thirty days of the effective date of the amendment, June 28, 1991. *See* 1991 Tenn. Pub. Acts 503, § 8.

General Motors paid the \$82,522 excise tax assessment prior to the effective date of the 1991 Act. General Motors paid these taxes in 1987 based on 1984 earnings, which had been assessed in the 1987 audit. General Motors asserted that it would not have had to pay the \$82,522 assessment had the Commissioner not calculated the 1982 and 1983 net operating loss in the same manner that the Supreme Court declared void in *Southern Railway*. Therefore, General Motors filed a refund claim with the Commissioner on July 25, 1991, within thirty days of the effective date of the 1991 amendment. The Commissioner denied General Motors' refund claim. Following the denial of the refund claim, General Motors filed a lawsuit in the Davidson County Chancery Court. That suit was consolidated with the instant proceeding, which was on remand from the Tennessee Supreme Court.

Subsequently, there was a bench trial of the consolidated action. In its Opinion, the trial court concluded that, in light of *Southern Railway*, the Commissioner could not enforce Tenn. Comp. R. & Regs. 1320-6-1-.21(a) so as to require dividends excluded from net earnings to be added back into the calculation of net operating losses. At trial, the Commissioner had also asserted that General Motors was precluded from seeking a refund by operation of the statute of limitations. However, the trial court determined that 1991 Tenn. Pub. Acts 503 waived any statute of limitations for refunds so long as the refund claim was filed within thirty days of the effective date of Chapter 503. Since General Motors filed its refund claim within this window of time, the trial court held that General Motors was entitled to a refund of the \$82,522 additional liability assessed in the 1987 audit, plus interest and attorney's fees. From this ruling, the Commissioner appeals.

In this appeal, the Commissioner asks this Court to consider whether a taxpayer can seek recovery of 1983 excise tax overpayments paid without protest in 1983 and 1984 by claiming a "credit carryover" of those payments against a tax liability assessed after January 1, 1986, the

effective date of Tenn. Code Ann. § 67-1-1802. The Commissioner also contends that the trial court erred in holding that 1991 Tenn. Pub. Acts 503, § 8, authorized a taxpayer to claim credit carryovers for tax years which were barred by the limitations period in Tenn. Code Ann. § 67-1-1802.

The Commissioner argues that General Motors cannot pursue the refund of the \$82,522 assessment because Tenn. Code Ann. § 67-1-1802 does not permit a refund of tax payments paid prior to January 1, 1986, if not paid under protest. Indeed, the Tennessee Supreme Court held in *General Motors I* that General Motors could not seek recovery of a \$101,642 overpayment from 1983 because such amount was not paid under protest. However, the refund General Motors seeks in the amount of \$82,522 arises from the assessment it paid in 1987. While this liability relates to General Motors' 1984 taxes, the refund sought is only for the \$82,522 assessed in 1987 and not for payments made in prior years. General Motors was not required to pay under protest the 1987 assessment in order to later seek a refund. The Tennessee Supreme Court held that General Motors is entitled to bring suit to recover the 1987 assessment. *General Motors I*, 811 S.W.2d at 900.

The Commissioner asserts on appeal that the Chancellor committed reversible error in holding that 1991 Tenn. Pub. Acts 503 waived the limitations period for refund claims under Tenn. Code Ann. § 67-1-1802 and thereby authorized refund claims for periods prior to January 1, 1986. Section 8 of Chapter 503 provides as follows:

SECTION 8. Notwithstanding the provisions of Tennessee Code Annotated, Section 67-1-1802, no excise tax paid prior to the effective date of this act which is attributed to the addition to the net loss of nonbusiness earnings, interest, dividends excluded from net earnings pursuant to Section 67-4-805 and any other income excluded from net earnings pursuant to Section 67-4-805 shall be refunded unless a properly documented refund claim is filed [sic] within thirty (30) days after the effective date of this act.

1991 Tenn. Pub. Acts 503, § 8. After considering the Commissioner's argument, the trial court ruled as follows:

The defendant also asserts that the statute of limitations bars the recovery of this refund. Chapter 503 waived any statute of limitations for refunds so long as the refund claims, based on the holding in Southern Railway, were filed within thirty days of the effective date of Chapter 503.

Mem. Op. at 3. The Act clearly anticipates claims for refund based on the *Southern Railway* ruling and provides a window of time for such claims to be filed. The Act states that the window of time for claims is provided "[n]otwithstanding the provisions of Tennessee Code Annotated, Section 67-

1-1802.” 1991 Tenn. Pub. Acts 503, § 8. The interpretation of the trial court is consistent with the language of the Act. It is undisputed that General Motors filed a claim for refund on the payment at issue within the thirty-day window of time. Therefore, the decision of the trial court on this issue is affirmed.

Finally, the trial court held that General Motors was entitled to a refund of the \$82,522 additional tax liability assessed in the audit conducted in 1986 and 1987 of General Motors’ franchise/excise tax returns for 1982, 1983, and 1984. In the audit, the Commissioner refused to permit General Motors to apply the 1982 net operating loss of nearly six million dollars to reduce General Motors’ taxable income. Applying Tenn. Comp. R. & Regs. 1320-6-1-.21(2)(a), the Commissioner added back to General Motors’ net operating income dividends from 80% or more owned subsidiaries and nonbusiness income. This reduction eliminated General Motors’ net operating loss and increased General Motors’ tax liability for 1984. General Motors paid the \$82,522 assessment in June, 1987, and pursuant to the Wilder Act, Tenn. Code Ann. § 67-1-1801 *et seq.*, General Motors timely filed its claim for a refund. In *General Motors I*, the Tennessee Supreme Court held that General Motors was not required to make this payment under protest in order to preserve its rights to a refund. It stated that, if General Motors could prevail on the substantive issues, it could recover as a refund the 1987 assessment.

As discussed above, in *Southern Railway v. Taylor*, 812 S.W.2d 577, 579 (Tenn. 1991), the Tennessee Supreme Court held that the Commissioner could not apply Tenn. Comp. R. & Regs. 1320-6-1-.21(2)(a) to reduce Southern Railway’s net operating loss carryover by adding back dividends from 80% or more owned subsidiaries. To do so would be in contravention of Tenn. Code Ann. § 67-4-805(b)(2)(C). The Court held that the administrative rule was inconsistent with the statute and was therefore void. *Id.* at 580.

Southern Railway governs the substantive issue in this cause. The 1987 assessment is not a “credit carryover”; rather, it is an additional audit payment levied and paid in 1987, after the January 1, 1986, effective date of the Wilder Act. Applying *Southern Railway* to the facts in this case, we find that General Motors is entitled to a refund of the \$82,522 assessment paid in 1987, plus interest and attorney’s fees. Therefore, the trial court is affirmed on this issue.

The decision of the trial court is affirmed. The cause is remanded to the trial court for determination of the amount of interest and attorney’s fees. Costs are assessed against the Appellant,

for which execution may issue if necessary.

HOLLY KIRBY LILLARD, J.

CONCUR:

ALAN E. HIGHERS, J.

DAVID R. FARMER, J.