QMS, INCORPORATED One Magnum Pass Mobile, AL 36618,	'	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	'	DOCKET NO. F. 97-260
v.	'	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	'	

FINAL ORDER

The Revenue Department denied refunds of 1993 through 1996 franchise tax requested by QMS, Incorporated (ATaxpayer@). The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, '40-2A-7(c)(5)a. The appeal was docketed as F. 97-260. The Department also assessed corporate income tax against the Taxpayer for the fiscal years ending September 1990 and September 1991. The Taxpayer appealed pursuant to Code of Ala. 1975, '40-2A-7(b)(5)a. That appeal was docketed as INC. 98-165. The cases were consolidated for purposes of a hearing on June 19, 1998. This Final Order addresses only the franchise tax appeal, Docket F. 97-260. The corporate income tax appeal, Docket INC. 98-165, will be decided separately, in due course.

The Department concedes that the Taxpayer is owed franchise tax refunds of $56,217 for 1993, $18,109 for 1995, and $6,587 for 1996, plus additional interest. The Department argues, however, that a refund cannot be issued for 1994. The facts concerning 1994 are as follows:

The Taxpayer failed to include certain bank notes as capital on its 1994 Alabama

franchise tax return. The Department included the notes in the Taxpayer=s capital base

as long-term debt pursuant to Code of Ala. 1975, '40-14-41(b)(3). The Taxpayer appealed.

The Administrative Law Division ruled that the notes were long-term debt, and thus constituted capital for franchise tax purposes. A Final Order was entered affirming the final assessment in issue and entering judgment against the Taxpayer for 1994 franchise tax in the amount of $94,026.76, plus interest. QMS, Inc. v. State of Alabama, Docket F. 96-170 (Admin. Law Div. 9/17/96). The Taxpayer failed to appeal.

The Taxpayer used the manufacturing factors to apportion capital to Alabama on its original 1994 franchise tax return. The Taxpayer filed an amended 1994 return on August 23, 1996, and apportioned capital using the selling factors. [1] The amended return claimed a refund for the year. The Taxpayer also filed amended returns and claimed refunds for 1993, 1995, and 1996. The Department denied the refunds. This appeal followed.

As indicated, the Department concedes that the Taxpayer should be issued refunds for 1993, 1995, and 1996. The Department also concedes that the Taxpayer overpaid its 1994 franchise tax. The Department argues, however, that a refund cannot be issued

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[1]The Administrative Law Division ruled in an appeal of a denied 1992 franchise tax refund that the Taxpayer had correctly used the selling apportionment factors in the subject year. QMS, Inc. v. State of Alabama, Docket F. 95-487 (Admin. Law Div. Final Order On Application For Rehearing 8/16/96). That ruling apparently prompted the Taxpayer to file amended returns and change to the selling classification in subsequent years. As indicated, the Taxpayer filed the 1994 amended return on August 23, 1996, one week after Docket F. 95-487 was decided.

because the 1994 year is closed as a result of the Final Order in F. 96-170 concerning the 1994 final assessment. I agree.

A final order issued by the Administrative Law Division is conclusive, unless changed on appeal, and has the same force and effect as a final order issued by a circuit judge in Alabama. Code of Ala. 1975, '40-2A-9(e). When a final assessment is appealed, the Administrative Law Division is required to determine the taxpayer=s correct liability for the period in question. Code of Ala. 1975, '40-2A-7(b)(5)d.1. All issues relative to the taxpayer=s liability are open for review. After a final order and judgment are entered, and there is no appeal, the taxpayer=s liability for the tax period is fixed and cannot be reopened. Consequently, because the Taxpayer failed to appeal the Final Order concerning the 1994 final assessment, its franchise liability for 1994 is fixed.[2]

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[2]The above principle would also prohibit the Department from assessing additional tax against a taxpayer under similar circumstances, even if additional tax was clearly owed. The Department is authorized to enter a final assessment against a taxpayer even if a final assessment was previously entered for the same tax and tax period. Code of Ala. 1975, 40-2A-7(b)(2)j. That statute presupposes, however, that the statute of limitations for assessing tax for the period has not expired, and that the taxpayer=s liability for the period is not otherwise fixed. As indicated, if a final assessment is appealed to the Administrative Law Division, a subsequent final order entering judgment against the taxpayer finally fixes the taxpayer=s liability for the year. The Department

The doctrine of *res judicata* also bars the Taxpayer=s refund claim. *Res judicata* prohibits the relitigation of all issues that were or could have been raised in prior litigation. Ex parte Alabama State Bar, 625 So.2d 423 (Ala. 1993).

For *res judicata* to apply, four elements are necessary: (1) There must be a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of parties, and (4) with the same cause of action presented in both

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could not reassess the taxpayer for additional tax due.

suits. Wesch v. Folsom, 6 F.3rd 1465 (11th Cir. 1993). Those four elements are present in this case.

First, the Final Order issued in the appeal of the 1994 final assessment was a judgment on the merits of the Taxpayer=s 1994 franchise tax liability. It is irrelevant that the Taxpayer failed to raise the selling versus manufacturer issue in the prior case. As indicated, *res judicata* applies to all issues that were or could have been litigated.

The Taxpayer also cannot argue that it was unaware of the selling versus manufacturer issue while the prior litigation was pending. The Taxpayer filed its amended 1994 return and changed its classification to seller on August 23, 1996. The appeal concerning the 1994 final assessment was not decided until September 17, 1996. The Taxpayer thus knew while the appeal of the 1994 final assessment was pending that even if it lost the long-term debt issue, which it did, the amount of the 1994 final assessment was still excessive. If the Taxpayer had raised the selling reclassification issue at that time, it=s liability for the year would have been reduced accordingly. Having failed to do so, the Taxpayer=s 1994 franchise liability is now fixed.

The second *res judicata* element is also present. The Administrative Law Division had jurisdiction to render a judgment concerning the 1994 final assessment. Code of Ala. 1975, '40-2A-7, et seq.

Third, the parties in this appeal and the prior appeal of the final assessment are the same.

Fourth, the same cause of action, the determination of the Taxpayer=s 1994

franchise tax liability, was involved in both cases.

The Department, if it has not already done so, is directed to issue the Taxpayer franchise tax refunds for 1993, 1995, and 1996, as indicated above. The Department=s denial of the 1994 refund is affirmed.

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

Entered March 25, 1999.

BILL THOMPSON
Chief Administrative Law Judge

BT:ks

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