RENASANT BANK P.O. BOX 709 TUPELO, MS 38802,	§ §	STATE OF ALABAMA ALABAMA TAX TRIBUNAL
Taxpayer,	§	DOCKET NOS. BIT. 14-1053 BIT. 15-462
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER GRANTING DEPARTMENT'S MOTION TO DISMISS

These consolidated appeals involve the Revenue Department's proposed adjustments to the Taxpayer's financial institution excise tax ("FIET") net operating losses ("NOLs") with respect to its 2008 through 2012 tax years.

On October 6, 2014, the Department issued a "Summary of Adjustments to Financial Institution Excise Tax" concerning the Department's audit of the Taxpayer's 2009 through 2012 FIET liabilities. The first page of the Summary showed additional tax due in each year. Under the column for the 2009 tax year was the statement – "OUT OF STATUTE FOR ASSESSMENT."

The last page of the Summary was titled "Schedule of Net Operating Loss Corrections and Utilizations." That Schedule showed that based on adjustments made pursuant to the Department's audit, "[t]here are no net operating losses available to be carried forward to the 12/31/2008 through 12/31/2012 tax periods."

Also on October 6, 2014, the Department entered FIET preliminary assessments against the Taxpayer for 2010, 2011, and 2012 for the tax due as shown on the above Summary.

On November 6, 2014, the Taxpayer appealed to the Tax Tribunal concerning the Department's proposed adjustments to its 2009 through 2012 FIET NOLs. The Tribunal

docketed the appeal as BIT. 14-1053.

On January 20, 2015, the Department entered FIET preliminary assessments against the Taxpayer for 2008 and 2009. The 2008 assessment was based on a "Summary of Adjustments to Financial Institution Excise Tax" prepared by the Department concerning the 2008 tax year. The last page of the Summary, dated January 20, 2015, was entitled "Schedule of Net Operating Loss Corrections and Utilizations." That Schedule stated that "[a]djustments were made to taxpayer's FIT deduction which in turn changed Net Operating Loss utilized in each tax period." The 2009 assessment was for the tax due as shown on the October 6, 2014 audit Summary, which, as indicated, also stated that the 2009 tax year was "OUT OF STATUTE FOR ASSESSMENT."

On February 20, 2015, the Taxpayer appealed to the Tax Tribunal concerning the Department's proposed reduction of its 2008 FIET NOL deduction or carryover. The Tribunal docketed the appeal as BIT. 15-462.

The Taxpayer filed the above appeals pursuant to Code of Ala. 1975, §40-2A-8(b), which was added by Act 2014-146, effective October 1, 2014. That section reads as follows:

> A taxpayer may elect, but is not required, to file a notice of appeal with the Alabama Tax Tribunal regarding a notice of proposed adjustment issued by the department affecting the taxpayer's net operating loss deductions or carryovers for purposes of the taxes imposed by Chapters 16 and 18 of this title. Such notice of appeal shall be filed within the time period prescribed in subsection (a), and the Alabama Tax Tribunal shall have jurisdiction to determine the amount of the taxpayer's net operating loss deductions or carryovers for the tax periods in question.

The Department has petitioned the Tribunal to dismiss the Taxpayer's appeals because, according to the Department, the Tribunal does not have subject matter

jurisdiction, citing Code of Ala. 1975, §40-2A-8(d). That section reads in part that "[t]his section shall not apply to the procedures governing assessments and refunds which are otherwise provided for by (the Uniform Revenue Procedures Act, Code of Ala. 1975, §40-2A-7, et seq.)" The Department argues that the above section prohibits the Taxpayer from separately appealing the NOL adjustments pursuant to §40-2A-8(b) because the adjustments were made pursuant to the audit and assessment procedures in §40-2A-7(b). I agree for the reasons explained below.

Current § 40-2A-8(d) was originally enacted as §40-2A-8(c) in 1992 pursuant to Act 92-186. The Department's Administrative Law Division, now the Tax Tribunal, addressed §40-2A-8(c) in *Time Warner, Inc. & Subsidiaries v. State of Alabama*, Corp. 08-800 (Admin. Law Div. 1/2/2009). In that case, the Department audited Time Warner's 2001 Alabama income tax return and adjusted the NOLs available to be carried over to other years. The audit adjustments did not change Time Warner's 2001 Alabama liability, so there was no tax liability or refund due for that year. Time Warner nonetheless appealed the NOL adjustments pursuant to §40-2A-8(a), which then provided that "[a]ny taxpayer aggrieved by any act or proposed act or refusal to act by the department shall be entitled" to appeal to the Administrative Law Division.

The Department moved to dismiss the appeal because the proposed NOL adjustments could have been carried back or forward to other years, and thus may have later resulted in an appealable denied refund or final assessment in those years, citing §40-2A-8(c) (now §40-2A-8(d)). The Division disagreed, holding that the appeal was proper because the 2001 NOL adjustment did not change Time-Warner's 2001 liability, and thus did not involve the procedures governing assessments and refunds at Code of Ala.

1975, §§40-2A-7(b) and (c), respectively.[1] The prohibition in §40-2A-8(c) (now §40-2A-8(d)) thus did not apply. The Preliminary Order Denying the Department's Motion to Dismiss in *Time Warner* reads in pertinent part:

> **Issue (1). Can Time Warner appeal pursuant to Code of Ala. 1975, §40-2A-8(a)?**
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> Section 40-2A-8(a) reads in part that "[a]ny taxpayer aggrieved by any act or proposed act or refusal to act by the department shall be entitled" to appeal to the Administrative Law Division. Section 40-2A-8(c) specifies that "[t]his section shall not apply to the procedures governing assessments and refunds" otherwise provided for in Chapter 2A of Title 40.
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> The Department contends that Time Warner cannot appeal under §40-2A-8(a) because the Department's (NOL adjustments) may lead to an appealable denied refund or final assessment in other years. I agree that the (NOL adjustments) may result in a denied refund and/or a disputed final assessment in future years. I disagree, however, that Time Warner is barred from now appealing the Department's . . . NOL adjustments.
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> If the Department audits a taxpayer's return and makes various adjustments that increase or decrease the taxpayer's liability for the subject year, the proper procedure is for the taxpayer to appeal any final assessment or denied refund resulting from the adjustments. If the audit adjustments for whatever reason do not result in a denied refund or a final assessment in the subject year, the adjustments are generally moot and will not affect the taxpayer's liability in any other years.
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> This case can be distinguished, however, because while the Department's 2001 NOL adjustments (or non-adjustments) did not result in a final assessment or denied refund for that year, they may effect Time Warner's liability in other years.
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> As indicated, §40-2A-8(c) provides that the §40-2A-8(a) appeal procedure does not apply "to the procedures governing assessments and refunds which are otherwise provided for by this chapter. . . ." That prohibition does not apply in this case because, as indicated, the Department's . . . NOL adjustments did not and will not result in an appealable final assessment or denied refund concerning the subject year. Because the §§40-2A-7(b) and

[1] The Department also had not changed Time Warner's liability for any other years based on the 2001 NOL adjustments. Those adjustments thus did not involve the procedures governing assessments for any other tax years.

> (c) procedures concerning appeals of final assessments and denied refunds, respectively, do not apply, the §40-2A-8(c) prohibition also does not apply. The Department's failure to include the settlement losses in Time Warner's NOL carryover adjustments thus constituted "an act or proposed act or refusal to act," which is appealable to the Administrative Law Division pursuant to §40-2A-8(a).
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> Also, if Time Warner had not appealed the audit adjustments, i.e., the Department's failure to include the settlement losses in the NOL carryover adjustments, the Department could possibly argue that the adjustments are binding and cannot be disputed in subsequent years. I suspect that possibility caused Time Warner to file the instant appeal. And as a practical matter and for judicial economy, it is reasonable to resolve the issue up front in a single case, instead of having the unresolved issue pending for years, and then having to decide the issue in possibly a number of cases involving various final assessments and/or denied refunds.

Time Warner at 3 – 5.

While *Time Warner* was pending on the merits, another case involving NOLs and the interplay between §§40-2A-8(a) and (c) (now §40-2A-8(d)) was appealed to the Administrative Law Division. In *Wachovia Mortgage Corp. v. State of Alabama*, Docket BIT. 10-959, the Department adjusted the taxpayer's 2006 NOL available to be carried forward to future years. As in *Time Warner*, the taxpayer appealed the proposed adjustment pursuant to §40-2A-8(a). And again as in *Time Warner*, the Department moved to dismiss the appeal, arguing "that the taxpayer cannot appeal a proposed act, i.e., the Department's proposed adjustments to the taxpayer's NOL available for carryover, that may in the future result in an appealable final assessment or denied refund." Preliminary Order on Department's Motion to Dismiss at 1.

The Division addressed the issue, as follows:

> The taxpayer in *Time Warner* appealed the proposed NOL adjustments to the Administrative Law Division out of an abundance of caution because it was unsure if the Department would later argue, after a final assessment

> was subsequently entered or a refund was denied based on the disputed NOL adjustments, that the taxpayer could not challenge or appeal the final assessment or denied refund because it had not previously appealed the proposed adjustments. I speculate that the appeal in this case was filed for the same precautionary reason.
>
> As stated, the Department argues in this case that the Taxpayer can only appeal after the NOL adjustments are applied in a subsequent year and result in a disputed final assessment or denied refund. The Department thus concedes that the Taxpayer can later challenge the NOL adjustments by an appeal to the Administrative Law Division, which should allay the Taxpayer's concern that the Department may later argue that the Taxpayer cannot appeal any subsequent final assessment or denied refund resulting from the NOL adjustments. It would be estopped from doing so. (footnote omitted)
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> Given that the Department agrees that the Taxpayer can later appeal any final assessment or denied refund based on the NOL adjustments, the Taxpayer should notify the Administrative Law Division by February 11, 2011 if it wishes to pursue this appeal. Dismissing the appeal would not prejudice or harm the Taxpayer's right to later contest the NOL adjustments by an appeal of any final assessment or denied refund. It would also avoid any unnecessary and costly appeal to circuit court and beyond on the jurisdictional issue of whether the Taxpayer has the right to appeal the proposed NOL adjustments pursuant to §40-2A-8(a).
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> If the Taxpayer wishes to pursue this appeal, it should explain why by the above date. The Administrative Law Division will then address the Department's Motion to Dismiss and revisit its holding in *Time Warner* concerning the jurisdictional issue and the scope of §40-2A-8(a).

Preliminary Order on Department's Motion to Dismiss at 2, 3.

The parties subsequently settled both *Time Warner* and *Wachovia Mortgage* on the merits. Consequently, the jurisdictional issue of whether an NOL adjustment could be appealed pursuant to §40-2A-8(a) was never addressed by a circuit or appellate court.

As discussed, current subparagraph (b) was added to §40-2A-8 by Act 2014-146, effective October 1, 2014. As illustrated by the *Time Warner* and *Wachovia Mortgage* cases, before the current version of §40-2A-8(b) was enacted, there was a perceived uncertainty as to whether a taxpayer could or was required to appeal a proposed NOL

adjustment to the Administrative Law Division pursuant to §40-2A-8(a). "Prior to the passage last year of (Act. 2014-146), it was arguably unclear whether a taxpayer was *required* to appeal a proposed adjustment to its NOLs under former Section 40-2A-8(a)." Taxpayer's Response to Motion to Dismiss at 4. The Taxpayer argues, and I agree, that the Legislature enacted the current version of §40-2A-8(b) to insure that taxpayers have the option to appeal a proposed NOL adjustment, "to remove any ambiguity that existed regarding the application of former Section 40-2A-8(a) to NOL adjustments." Taxpayer's Response to Motion to Dismiss at 6.

In my opinion, even before current §40-2A-8(b) was enacted, there was no uncertainty that a taxpayer could appeal an NOL adjustment concerning a given tax year pursuant to §40-2A-8(a). As discussed in *Time Warner*, however, that right to appeal is limited by current §40-2A-8(d), which in substance provides that if the Department makes an NOL audit adjustment pursuant to the procedures that govern assessments and refunds at §§40-2A-7(b) and (c), respectively, then the right to appeal the NOL adjustment pursuant to §40-2A-8 does not apply.

Alabama's uniform assessment procedures are found in §40-2A-7(b). The initial assessment procedure is for the Department to "calculate the correct tax . . . based on the most accurate and complete information" available to the Department. Section 40-2A-7(b)(1)a. Consequently, an audit (or other) adjustment by the Department, including an NOL adjustment, that changes a taxpayer's liability for the period in issue is a part of the process or procedures governing assessments, and thus cannot be appealed pursuant to §40-2A-8. Rather, the assessment review and appeal procedures in §40-2A-7(b) must be followed. As stated in *Time Warner* – "If the Department audits a taxpayer's return and

makes various adjustments that increase or decrease the taxpayer's liability for the subject year, the proper procedure is for the taxpayer to appeal from any final assessment or denied refund resulting from the adjustments."

In short, the Legislature enacted §40-2A-8(c) (now §40-2A-8(d)) to prevent a taxpayer from taking an interlocutory appeal from a Department audit (or other) adjustment that is made pursuant to the Department's assessment/refund procedures, and that can later be addressed pursuant to the uniform assessment/refund review and appeal procedures at §§40-2A-7(b) and (c), respectively.

The above is not altered by the fact that the Legislature enacted current §40-2A-8(b) to clarify that a taxpayer may, but is not required, to appeal an NOL adjustment to the Tax Tribunal. The Legislature also retained §40-2A-8(c) (now §40-2A-8(d)) as a part of the statute. Current §§40-2A-8(b) and (d) must be read in para materia. Consequently, a taxpayer may appeal an NOL adjustment to the Tribunal, but only if, as in *Time Warner*, the adjustment is not part of an on-going audit process governed by the assessment and refund procedures in §§40-2A-7(b) and (c), respectively.

The NOL adjustments in issue were made pursuant to an on-going Department audit. As discussed, the adjustments are a step in the procedures governing the assessment of tax. The Taxpayer thus must challenge the adjustments pursuant to the procedures governing assessments at §40-2A-7(b). The Department has entered preliminary assessments against the Taxpayer for the subject years pursuant to §40-2A-7(b)(1)a. The Taxpayer has properly petitioned for a review of those preliminary assessments pursuant to Code of Ala. 1975, §40-2A-7(b)(4)a. That statutory process should proceed in due course.

The Taxpayer argues that an NOL adjustment can be disputed in two separate, parallel forums. "The plain language of subsection (d) confirms that the Tribunal can have jurisdiction over NOL adjustments under Section 40-2A-8(b), while the ADOR's hearing officer can have jurisdiction over a preliminary assessment (based in whole or in part on the NOL adjustments) for the same period." Taxpayer's Response to Motion to Dismiss at 5. I disagree. As explained below, the clear purpose of current §40-2A-8(d) can only be to prevent taxpayers from appealing an NOL audit adjustment in two simultaneous forums.[2]

As originally enacted in 1992 pursuant to Act 92-186, §40-2A-8(a) allowed a taxpayer to appeal to the Administrative Law Division from "any act or proposed act or refusal to act by the department. . . ." An audit adjustment by the Department was clearly an "act" by the Department within the broad language of the above section. To prevent taxpayers from appealing a tentative audit adjustment pursuant to §40-2A-8(a), the Legislature narrowed the scope of §40-2A-8(a) by including §40-2A-8(c); thereby removing from the scope of §40-2A-8(a) any audit or other adjustments made pursuant to the

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[2] As seen in *Time Warner*, if an NOL adjustment does not change the taxpayer's liability for the subject year, the assessment and refund procedures at §§40-2A-7(b) and (c), respectively, do not come into play, in which case §40-2A-8(d) does not apply and an appeal of the NOL adjustment pursuant to current §40-2A-8(b) is appropriate.

Section 40-2A-8(d) would also bar an appeal under §40-2A-8(b) if the Department had applied the NOL adjustments concerning one tax year to change the taxpayer's liabilities in another or other tax years. For example, if the Department reduced a taxpayer's 2010 NOL, and the adjustment also reduced the NOL carryover claimed by the taxpayer on a 2013 return, which resulted in additional 2013 tax due, the taxpayer could not separately appeal the 2010 NOL adjustment pursuant to §40-2A-8(b) because it was part of the assessment procedures concerning 2013. The taxpayer in *Time Warner* was allowed to appeal pursuant to then §40-2A-8(a) because the 2001 NOL adjustment did not result in or cause an assessment for that year, and the Department had not applied the 2001 NOL adjustment to change Time Warner's liability in any other tax year.

assessment and refund procedures at §§40-2A-7(b) and (c), respectively. For example, if the Department audited a taxpayer for income tax and disallowed a deduction that increased the taxpayer's liability for the tax year, the Legislature, by enacting §40-2A-8(c), expressed its intent that the taxpayer could not appeal that Department "act" pursuant to §40-2A-8(a). Rather, the taxpayer must dispute the disallowed deduction pursuant to the preliminary assessment review and final assessment appeal procedures in §40-2A-7(b).

When the Legislature enacted current §40-2A-8(b) pursuant to Act 2014-146, it also greatly narrowed the scope of §40-2A-8(a). As amended, that section now only allows appeals from "any act or proposed act or refusal to act *concerning the denial or revocation of a license, permit, or certificate of title* by the department. . . ." Because §40-2A-8(a) now only allows appeals of license, permit, or title disputes, an audit or other Department adjustment to a taxpayer's liability is no longer an "act" appealable under §40-2A-8(a).

If a Department act involving the procedures governing assessments and refunds can no longer be appealed pursuant to current §40-2A-8(a), the question arises as to why the Legislature kept the phrase – "this section shall not apply to the procedures governing assessments and refunds which are otherwise provided for by this chapter. . . ." – in the statute as part of current §40-2A-8(d). It did so for a reason because it cannot be presumed that the Legislature enacted a meaningless statute with no scope of operation. *Druid City Hospital Board v. Epperson*, 378 So.2d 696 (Ala. 1979).

Because an audit adjustment cannot be appealed pursuant to current §40-2A-8(a), the only adjustment that can now be appealed pursuant to §40-2A-8 is an NOL adjustment pursuant to subparagraph (b). Consequently, the only reason the Legislature could have kept the above phrase as part of §40-2A-8(d) is to limit the scope of §40-2A-8(b).

Otherwise, the phrase would have no scope of operation. In summary, the Legislature added current §40-2A-8(b) to clarify that a taxpayer may appeal an NOL adjustment to the Tax Tribunal, but it retained the limiting language in §40-2A-8(d) to insure that an NOL adjustment made pursuant to the procedures governing assessments and refunds could not be independently and separately appealed to the Tribunal.

As agreed by the Taxpayer, the Legislature did not change the law when it enacted the current version of §40-2A-8(b). Rather, it only clarified and affirmed the holding in *Time Warner* that a taxpayer may appeal an NOL adjustment pursuant to §40-2A-8, but only if the adjustment was not made pursuant to the Department's audit/assessment/refund procedures at §§40-2A-7(b) or (c). In that case, the prohibition in current §40-2A-8(d) applies, and an appeal pursuant to "[t]his section," i.e., §40-2A-8, is prohibited.

The 2009 preliminary assessment entered against the Taxpayer on January 20, 2015 was based on the audit adjustments made pursuant to the Department's October 6, 2014 audit Summary. That Summary included the NOL adjustments that the Taxpayer appealed on November 6, 2014. The Taxpayer argues that because it appealed the 2009 NOL adjustments before the Department entered the 2009 preliminary assessment, the subsequent entry of the 2009 preliminary assessment "should not divest this Tribunal of subject matter jurisdiction over the (2009) NOL adjustments." Taxpayer's Brief at 6. I disagree.

It is irrelevant that the Taxpayer appealed the 2009 NOL adjustment before the Department entered the 2009 preliminary assessment. Rather, the relevant fact is that the Department made the NOL adjustment pursuant to its audit/assessment procedures that changed the Taxpayer's liability for the year in issue. As discussed, the prohibition in §40-

2A-8(c) (now §40-2A-8(d)) did not apply in *Time Warner* because the NOL adjustment in the case did not change the taxpayer's liability for the year in issue, or for any other year. An appeal pursuant to §40-2A-8(a) was thus appropriate. The NOL adjustments in issue have resulted in additional tax due, at least purportedly, for the years in issue. The Taxpayer thus must dispute the adjustments pursuant to the assessment review/appeal procedures in §40-2A-7(b).

Finally, the Taxpayer contends that the Department violated the Alabama Taxpayers' Bill of Rights because it never notified the Taxpayer that its 2008 tax year was being audited before the Department entered the 2008 preliminary assessment on January 20, 2015. It also asserts that the 2008 and 2009 preliminary assessments "were entered long after the (admitted) expiration of the statute of limitations under Ala. Code §40-2A-7(b)(2), and are thus void as a matter of law." Taxpayer's Brief at 6.

Code of Ala. 1975, §40-2A-4(a)(2) provides that "[a]t or before the commencement of an examination of the books and records of a taxpayer, the department shall provide," the taxpayer with a copy of Publication A notifying the taxpayer of certain rights. If the Department in fact reviewed the Taxpayer's books and records in computing the 2008 tax due, its failure to provide the Taxpayer with a Publication A technically violated the above section.

Code of Ala. 1975, §40-2A-4(a)(3) also provides that at or before the issuance of a preliminary assessment, the Department must give the taxpayer a written description of the basis for the tax and any penalty assessed. As discussed, a Summary of Adjustments concerning 2009 through 2012 was printed on October 6, 2014, the same day that the Department entered the 2010, 2011, and 2012 preliminary assessments against the

Taxpayer. The Summary explained the basis for the preliminary assessments. It is assumed that the Department provided the Taxpayer with a copy of the Summary. Likewise, the Department also issued a Summary of Adjustments concerning 2008. Oddly, the first page of the 2008 Summary shows that it was printed on "1/21/15," whereas the remaining pages were printed on "1/20/15," the same day that the 2008 preliminary assessment was entered.

In any case, even if the Department technically failed to comply with either §§40-2A-4(a)(2) or (3), the Department is still authorized to assess the tax due, but is required to waive any penalties, see Code of Ala. 1975, §40-2A-4(c). None of the preliminary assessments in issue include penalties.

Concerning the Taxpayer's claim that the 2008 and 2009 preliminary assessments were not timely entered, that issue will be decided if the assessments are made final and are appealed to the Tax Tribunal or to circuit court. I note, however, that it is most unusual that the Department entered the 2009 preliminary assessment after it had earlier determined that that year was out of statute for assessment.

The Taxpayer's appeals of the 2008 through 2012 NOL adjustments are dismissed.

This Final Order Granting Department's Motion to Dismiss may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2B-2(m).

Entered June 4, 2015.

BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr
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