

MICHELIN NORTH AMERICA, INC.  
F/K/A MICHELIN TIRE CORP.  
P.O. BOX 19001  
GREENVILLE, SC 29602-9001,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA  
ALABAMA TAX TRIBUNAL

DOCKET NO. F. 00-154

### **OPINION AND PRELIMINARY ORDER**

This case involves petitions for refund of franchise tax paid by the above Taxpayer for the 1994 through 1999 tax years. Chris Grissom and Will Thistle represented the Taxpayer. Pam Slate represented the Revenue Department.

The Taxpayer concedes that its 1994 refund petition was not timely filed, and consequently, that its appeal concerning that petition is due to be dismissed when a Final Order is entered in the case. The Revenue Department concedes that the Taxpayer's 1997, 1998, and 1999 petitions were timely filed with the Department and timely appealed to the Department's Administrative Law Division ("ALD") (now the Tax Tribunal). This Order addresses whether the Taxpayer's 1995 and 1996 petitions were timely filed and timely appealed. If not, the Tax Tribunal is without jurisdiction to hear the appeals for those years.

Code of Ala. 1975, §40-2A-7(c)(2)a. contains the statute of limitations within which a taxpayer must file a refund petition with the Department, and reads as follows:

Generally. A petition for refund shall be filed with the department or an automatic refund issued pursuant to Section 40-29-71, or a credit allowed, within (i) three years from the date that the return was filed, or (ii) two years from the date of payment of the tax, whichever is later, or, if no return was timely filed, two years from the date of payment of the tax. For purposes of this paragraph, taxes paid through withholding or by

estimated payment shall be deemed paid on the original due date of the return.

Code of Ala. 1975, §40-2A-7(c)(5) provides that if a petition is denied, the taxpayer must appeal the denied petition to the Tax Tribunal or to the appropriate circuit court “within two years from the date the petition is denied.”<sup>1</sup>

### **FACTS**

The Taxpayer’s 1995 franchise tax return was due on March 15, 1995.

The Taxpayer filed an extension request with the Department concerning its 1995 annual return that was dated March 14, 1995, and date stamped as received by the Department on March 20, 1995.<sup>2</sup> The envelope in which the extension request was mailed is not in evidence. The Taxpayer presented into evidence an EFT worksheet and bank records showing that it remitted \$278,000 in franchise tax to the Department on the March 15, 1995 extension due date. The Department received the payment on March 20, 1995.

The Department date stamped the Taxpayer’s annual 1995 franchise tax return as received on September 18, 1995.

The Taxpayer mailed a 1995 refund petition to the Department that was postmarked September 16, 1998, and date stamped as received by the Department on September 24, 1998. The Department failed to either grant or deny the petition, which

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<sup>1</sup> During the years in issue, a denied refund petition could be appealed to the appropriate circuit court or to the Department’s ALD. The Alabama Legislature statutorily replaced the ALD with the Alabama Tax Tribunal, effective October 1, 2014, pursuant to the Taxpayer Fairness Act, Act 2014-146.

<sup>2</sup> During the years in issue, a taxpayer could request a six month extension to file its franchise tax return pursuant to former Department Reg. 810-2-3-.08 (repealed November 30, 2006).

was by statute deemed denied six months from when the petition was filed. Code of Ala. 1975, §40-2A-7(c)(3).

The Taxpayer appealed the deemed denied 1995 refund petition to the ALD, which date stamped the petition as received on February 11, 2000.

The Taxpayer's 1996 franchise tax return was due on March 15, 1996.

The Taxpayer filed an extension request with the Department concerning its annual 1996 franchise tax return that was postmarked March 15, 1996. The Taxpayer also paid \$864,570 with the extension request.

The Taxpayer's annual 1996 franchise tax return was date stamped as received by the Department on September 16, 1996.

The Taxpayer filed a petition for refund of 1996 franchise tax that was postmarked March 9, 1999.<sup>3</sup> The Department failed to either grant or deny the petition, which was by statute deemed denied six months from when the petition was filed. See again, §40-2A-7(c)(3).

The Taxpayer appealed the deemed denied refund to the ALD, which was date stamped as received by the Division on February 11, 2000.

### **ANALYSIS**

As indicated, §40-2A-7(c)(2)a. provides a specific time limitation within which a taxpayer must file a petition for refund with the Department. If the petition is denied, §40-2A-7(c)(5) allows the taxpayer to appeal either to the Tax Tribunal (previously the

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<sup>3</sup> The Taxpayer filed a second 1996 refund petition that was date stamped as received by the Department on February 21, 2003. The Taxpayer concedes that that petition was not timely filed.

ALD) or to the appropriate circuit court within two years from when the petition was denied.

Alabama's appellate courts have consistently held that taxpayers must strictly comply with the procedural aspects of the Uniform Revenue Procedures Act at Code of Ala. 1975, §40-2A-7 et seq., and that if a taxpayer fails to timely file a refund petition with the Department pursuant to §40-2A-7(c)(2)a., or fails to timely appeal a denied petition to either the Tax Tribunal (previously the ALD) or to the appropriate circuit court pursuant to §40-2A-7(c)(5), the appeal of the denied refund must be dismissed for lack of subject matter jurisdiction. *Lockheed Martin Corp. v. State, Dep't of Revenue*, 210 So.3d 1123 (Ala. Civ. App. 2016); *Rheem Manufacturing Co. v. Alabama Dept. of Revenue*, 33 So.3d 1 (Ala. Civ. App. 2009); *Patterson v. Gladwin Corp.*, 835 So.2d 137 (Ala. 2002).

Concerning the 1995 tax year, the Taxpayer's extension request was dated March 14, 1995, and date stamped as received by the Department on March 20, 1995. The Taxpayer's EFT worksheet and bank records show that the Taxpayer paid \$278,000 in franchise tax to the Department on March 15, 1995. The Department received and date stamped the Taxpayer's 1995 annual return on September 18, 1995. The Department received the Taxpayer's 1995 petition for refund in an envelope postmarked September 16, 1998. Finally, the Taxpayer appealed the deemed denied petition to the ALD on February 11, 2000.

The threshold question is whether the Taxpayer timely filed its 1995 extension request by the March 15, 1995 deadline. If not, the 1995 return was filed late, in which

case the Taxpayer had two years from when the tax was paid to petition for a refund pursuant to §40-2A-7(c)(2)a.

The envelope in which the 1995 extension request was mailed to the Department is not in evidence. The Taxpayer argues, however, that the extension request was timely filed because the request form was dated March 14, 1995, and the Taxpayer's EFT worksheet and bank records show that the Taxpayer paid \$278,000 to the Department on the March 15, 1995 filing deadline. "That Taxpayer's extension request was dated before the filing deadline and payment was made on the filing deadline constitute substantial circumstantial evidence that Taxpayer timely filed its extension request." Taxpayer's Response to Department of Revenue's Second Amended and Corrected Response to Request for Procedural and Jurisdictional Arguments, at 4.

The Department contends that the "mailbox rule" at Code of Ala. 1975, §40-1-45 controls concerning the receipt of any document required to be filed with the Department by a date certain. It asserts that a document is timely filed only (1) if it is actually received by the Department on or before the due date, or (2) pursuant to §40-1-45, if the envelope in which the document is mailed to the Department is postmarked by the U.S. Postal Service on or before the due date.<sup>4</sup> It argues that circumstantial

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<sup>4</sup> Department Reg. 810-1-5-.01 currently provides that a postage meter imprint is sufficient to show a timely mailing. The parties disagree as to whether that regulation was in effect during the years in issue. The Court in *Lockheed Martin* held that "[d]uring the relevant periods (1998 and 1999), the Department had not promulgated any regulations authorizing acceptance of articles bearing a postage meter imprint," citing a 1995 ALD case, *Ward v. Ala. Dept. of Revenue*, Docket Inc. 95-396 (Admin. Law Div. 11/7/1995). The Taxpayer contends that the Court's statement in *Lockheed Martin*, and presumably the ALD's holding in *Ward*, are incorrect. That issue is, however, is irrelevant and need not be decided for the reasons explained below.

evidence other than a Postal Service postmark cannot be used or accepted to prove that a document was timely mailed, citing *Lockheed Martin Corp.*, supra. I agree.

At issue in *Lockheed Martin* was whether the company had timely filed for an extension to file its 1998 franchise tax return. It was undisputed that the Department did not receive the extension request by the March 16, 1998 due date.<sup>5</sup> The company submitted a document showing that it had written a check to the Department on March 16, 1998 for the 1998 franchise tax due, and also a copy of the extension request dated March 16, 1998. A senior tax manager for the company testified concerning a 1998 company activity list which showed that his office had delivered the extension request to the company's mailroom on March 15, 1998. There was, however, no evidence showing either when the mailroom actually mailed the request, or when the envelope in which the request was mailed was postmarked by the Postal Service.

Lockheed Martin argued that the above facts constituted "other evidence" that was sufficient to prove that the extension request was timely filed by the March 16, 1998 due date. Lockheed cited several ALD opinions in support of its "other evidence" argument.

The Court held that "[w]e do not believe those (ALD) opinions by the Department's administrative law judge stand for the proposition asserted by Lockheed, which would appear to be inconsistent with the plain and unambiguous language of

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<sup>5</sup> The statutory due date was March 15, 1998. Because that date was a Sunday, Lockheed had until the next business date, Monday, March 16, 1998, to file the request. See, Code of Ala. 1975, §40-1-44.

§40-1-44. . . .”<sup>6</sup> *Lockheed Martin*, 210 So.3d at 1129.

The Court did not, however, definitively decide the “other evidence” issue “because the ‘other evidence’ upon which Lockheed relies does not establish that the 1998 franchise tax return was timely filed.” *Lockheed Martin*, 210 So.3d at 1131. Specifically, the Court held that while there was evidence that the extension request reached the company’s mailroom on March 16, 1998, there was “no evidence indicating that the extension request was actually deposited in the United States mail on that date.” *Lockheed Martin*, 210 So.3d at 1130.

Likewise, there is no evidence that the Taxpayer’s 1995 extension request was actually mailed on the March 15, 1995 due date. The fact that the request was dated March 14, 1995, and that the Taxpayer remitted the tax due on the March 15, 1995 due date (the Department received the payment on March 20, 1995), does not prove that the extension request was actually mailed on or before the due date. Consequently, even if the “other evidence” offered by the Taxpayer could be used to prove a timely mailing, it did not do so in this case.<sup>7</sup>

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<sup>6</sup> I agree that the ALD cases cited, *Schoen v. Dept. of Revenue*, Docket Inc. 11-211 (March 23, 2011); *Zhang v. Dept. of Revenue*, Docket Inc. 10-1044 (1/14/2011); *Dept. of Revenue v. Eli Witt*, Docket Misc. 91-125 (August 6, 1991), did not support Lockheed Martin’s position. I can also find no case decided by the ALD in which the Division specifically held that a taxpayer could prove the timely filing of a document other than by either actual receipt of the document by the Department on or before the due date, or by a postmark on the envelope in which the document was mailed via the U. S. Postal Service on or before the due date.

<sup>7</sup> And while the Court in *Lockheed Martin* technically did not decide if other evidence could be used to prove timely mailing, its statement that such a position “would appear to be inconsistent with the plain and unambiguous language of §40-1-44” is a strong indication that other evidence cannot be used to prove timely mailing. When the

Because the extension request was not timely filed, the 1995 return was due on the original due date, March 15, 1995. The annual return filed in September 1995 was thus not timely filed, regardless of whether it was filed on or before September 15, 1995, or after that date.

Because the return was not timely filed, the Taxpayer had two years from when the tax in issue was paid to petition for a refund. Section 40-2A-7(c)(2)a. The parties agree that the 1995 tax was paid in March 1995.<sup>8</sup> They further agree that the Taxpayer's 1995 refund petition was filed in September 1998, clearly outside of the two year statute.<sup>9</sup> The Tribunal is thus without jurisdiction to hear the Taxpayer's appeal of

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language in a statute is plain and unambiguous, such language must be strictly followed. *Ex parte Kimberly-Clark Corp.*, 503 So.2d 304 (Ala. 1987).

<sup>8</sup> The Department contends that the tax paid by the Taxpayer with the extension request in March 1995 was an "estimated payment," which, pursuant to §40-2A-7(c)(2)a., was "deemed paid on the original due date of the return." The Taxpayer disputes that the payment was an "estimated payment" within the context of §40-2A-7(c)(2)a. That dispute is irrelevant because, as discussed, the parties agree that the tax was paid in March 1995, and that the Taxpayer petitioned for a 1995 refund in September 1998, clearly more than two years from when the tax was paid. I note, however, that the ALD held in at least three cases that the term "estimated payment" applies only to the quarterly estimated income tax payments required by Code of Ala. 1975, §§40-18-82 and 40-18-83. "'Estimated payment' is a term of art relating to the declaration of quarterly estimated (income) tax payments provided for in Code of Ala. 1975, §§40-18-82 and 40-18-83." *Brayman v. State of Alabama*, Docket Inc. 95-411 (Admin. Law Div. 1/9/1996) at 2. See also *Stephens v. State of Alabama*, Docket Inc. 96-127 (Admin. Law Div. 4/12/1996) and *Slaughter v. State of Alabama*, Docket Inc. 09-579 (Admin. Law Div. OPO 2/6/13). The payment of tax with an extension request thus is not an "estimated payment" pursuant to §40-2A-7(c)(2)a.

<sup>9</sup> The envelope in which the refund petition was mailed to the Department apparently bore a postage meter stamp dated September 15, 1998. But whether the regulation allowing the recognition of a postage meter stamp, Reg. 810-1-5-.01(4), was in effect in 1998 is irrelevant because the petition filed in September 1998 was outside of the two year statute, whether it was filed before or after the 15<sup>th</sup> of that month.



the denied 1995 petition. The Taxpayer's appeal of that petition will be dismissed when a Final Order is entered in the case.

The Department does not dispute that the Taxpayer timely requested an extension to file its 1996 annual return by the March 15, 1996 due date. It contends, however, that the Taxpayer failed to timely file the return by the extended September 15, 1996 due date because the Department did not actually receive the return by the due date, and there is no evidence that the envelope in which the return was mailed was postmarked by that date.

The Taxpayer argues that the Department stipulated that the appeal of the 1996 return was timely, see Joint Stipulation dated July 16, 2015. It further asserts that the Department has twice conceded that the 1996 return was timely, see Department Amended and Corrected Response dated December 30, 2003, at 5, and Department Reply Brief dated January 16, 2014, at 8. Finally, the Taxpayer submitted into evidence a Postal Service Form 3877 that was postmarked by the Postal Service on September 13, 1996, and signed by a postal worker. The Form indicates that the Taxpayer had delivered to the Postal Service a document on that date addressed to "Alabama Department of Revenue, EFT Unit, P.O. Box 327950, Montgomery, Alabama, 36132-7950."

The Department did stipulate that the Taxpayer's appeal of the denied 1996 refund petition "[a]ppears timely. . . ." It also previously conceded that the 1996 appeal was timely, presumably based on the Form 3877 that was postmarked September 13, 1996.

For return year 1996, taxpayer timely filed its extension request on March 15, 1996. Taxpayer has submitted evidence that it timely filed its annual return as well. Although the postmark on the annual return is unclear as to whether it displays September 19<sup>th</sup> or September 13<sup>th</sup>, a Department stamp shows that the Department received the annual return on September 16, indicating that the post-mark on the annual return must display September 13.

Department of Revenue's Second Amended and Corrected Response, at 4.

The Department asserts that it has changed its position regarding the timeliness of the filing of the 1996 return based on the holding in *Lockheed Martin*. It also argues that while it stipulated that the 1996 appeal "appeared timely," it never stipulated that it was in fact timely. It claims that in any case, subject matter jurisdiction cannot be stipulated or agreed to by the parties. I agree.

"Lack of subject matter jurisdiction may not be waived by the parties. . . ." *Ex parte Smith*, 438 So.2d 755 (Ala. 1983). Likewise, the parties in an appeal of a denied refund cannot stipulate that a circuit court or the Tribunal has jurisdiction to hear the appeal. Rather, if the facts show that the taxpayer failed to timely appeal the denied refund, the appeal must be dismissed. The burden is also on the taxpayer to prove the existence of subject matter jurisdiction. "The burden of establishing the existence of subject matter jurisdiction falls on the party invoking that jurisdiction," i.e., the Taxpayer in this case. *Boys & Girls Clubs of S. Alabama, Inc. v. Fairhope Point-Clear Rotary Youth Programs, Inc.*, 114 So.3d 817, 820 (Ala. 2012).

As was the "other evidence" of timely mailing concerning the 1995 appeal, the Form 3877 showing a postmark date of September 13, 1996 is also insufficient to prove that the Taxpayer timely filed its annual 1996 return. Only a timely postmark on the

envelope in which the return was mailed is sufficient pursuant to §40-1-44. And as stated by the Court in *Lockheed Martin*, the Taxpayer's other evidence argument "would appear to be inconsistent with the plain and unambiguous language of §40-1-45." *Lockheed Martin*, 210 So.3d at 1129. There is also no evidence that the document delivered by the Taxpayer to the Postal Service for mailing on September 13, 1996 was the Taxpayer's annual return.

Because the 1996 return was not received by the Department by the due date, and because there is no postmarked envelope showing a timely mailing, I must conclude that the return was not timely filed. The Taxpayer thus had two years from when the tax was paid to petition for a refund. Consequently, because the 1996 refund petition was filed on March 9, 1999, clearly more than two years from when the tax was paid in March 1996, the Tribunal is also without jurisdiction to hear the appeal of the denied 1996 refund. The appeal of that petition will also be dismissed when a Final Order is entered in the case.

The Tribunal will set the case for a hearing in due course concerning the denied 1997, 1998, and 1999 petitions.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days, pursuant to Ala. Code § 40-2B-2(m).

Entered September 15, 2017.

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BILL THOMPSON  
Pro Tempore Tax Tribunal Judge

bt:dr

cc: Pamela B. Slate, Esq.  
James E. Beck, Esq.  
Bruce P. Ely, Esq.  
Christopher R. Grissom, Esq.