

WACHOVIA MORTGAGE CORP.
201 S. COLLEGE STREET D1100-132
CHARLOTTE, NC 28244,

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§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. BIT. 10-959

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE

§

**PRELIMINARY ORDER ON DEPARTMENT'S
MOTION TO DISMISS**

On September 8, 2010, the Department notified the above Taxpayer of various adjustments to the amount of the Taxpayer's net operating loss ("NOL") available to be carried forward from the 2006 tax year. The Taxpayer appealed the proposed adjustments to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-8(a).

The Department has filed an Answer and Motion to Dismiss, a copy of which is enclosed with the Taxpayer's copy of this Order. The Department argues that the appeal should be dismissed because the Administrative Law Division does not have jurisdiction to hear the appeal. Specifically, the Department contends 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.

The Administrative Law Division previously addressed this issue in *Time Warner, Inc. v. State of Alabama*, Docket No. Corp. 08-800 (Admin. Law Div. Preliminary Order Denying Department's Motion to Dismiss and Taxpayer's Motion to Strike 1/2/2009). The Division held in that case that the taxpayer could appeal to the Division pursuant to §40-2A-8(a) from the Department's proposed adjustments to the taxpayer's available NOL

carryover amount. That appeal is currently being held in abeyance by the Division.

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.¹

¹ The Department asserts in its Answer and Motion to Dismiss at 6, that “. . .[W]e all know that (estoppel) does not apply against the State in the assessment of taxes.” That is correct in the context of a Department employee giving a taxpayer incorrect information concerning whether a tax is owed or not. See, *Community Action Agency of Huntsville, Madison County, Inc. v. State*, 406 So.2d 870 (Ala. 1981); *Blass v. State of Alabama*, Docket No. 09-1069 (Admin. Law Div. 3/3/2010); *Russell v. State of Alabama*, Docket No. Inc. 08-688 (Admin. Law Div. 1/12/2009); *Jones-Miles v. State of Alabama*, Docket No. Inc. 05-627 (Admin. Law Div. 6/28/2005). The government can be estopped, however, if a government official or employee misinforms a taxpayer concerning the taxpayer's procedural appeal rights. *Ex parte Four Seasons*, 450 So.2d 110 (Ala. 1984); *Home Depot v. State of Alabama*, Docket No. S. 06-1079 (Admin. Law Div. P.O. 5/2/2007). The Department in this case concedes that the Taxpayer can appeal when a final assessment is
(continued)

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).

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).

The Department states in its Answer and Motion to Dismiss at 2, that simultaneous with this appeal, the Taxpayer requested the Department's Hearing Officer to review the substantive issue in dispute. It further stated that the Administrative Law Division and the Hearing Officer cannot both have jurisdiction over the issue, but that the request has been withdrawn. It also indicates, at 7, 8, that the Department requested certain information from the Taxpayer, and that the Taxpayer failed to provide all of the information. It further states that if the Taxpayer would provide the information, the information would be

entered or a refund is denied as a result of the NOL adjustments. Based on *Ex parte Four Seasons*, the Department would then be estopped from later arguing that the Taxpayer could not appeal from any such final assessment or denied refund.

reviewed and any necessary changes would be made.

To begin, even if an issue is properly appealed to the Administrative Law Division, that does not prevent the Department from reviewing any additional information provided by a taxpayer. Consequently, regardless of whether this appeal is dismissed on jurisdictional grounds or not, the Taxpayer should provide the Department Hearing Officer with all requested and other relevant information relating to the substantive issue. The Hearing Officer should make all appropriate adjustments to the NOL carryover amount and notify the Taxpayer of her findings. The above may not resolve the substantive issue, but it will further clarify the issue and prevent a subsequent examination of the information if and when the issue is before the Administrative Law Division. An appropriate Order will be entered after the Taxpayer responds.

Entered January 21, 2011.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: David Avery, III, Esq.
James E. Long, Jr., Esq. (w/enc.)
Melody Moncrief
Chris Sherlock