SHOWELL FARMS, INC., as successor to Showell Growers, Inc. Post Office Box 158 Showell, Maryland, 21862,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
SHOWELL FARMS, INC., as successor to Showell Farms of Florida, Inc. Post Office Box 158 Showell, Maryland, 21862,	§	DOCKET NO. F. 94-387 F. 94-406
Taxpayers,	§	
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department entered final assessments of franchise tax for the years 1989 through 1992 against Showell Farms, Inc., as successor to Showell Farms of Florida, Inc., and against Showell Farms, Inc., as successor to Showell Growers, Inc., for the years 1988 through 1992. Showell Farms, Inc. is hereafter referred to as either "Showell Farms" or "Taxpayer". Showell Growers, Inc. is hereafter referred to as "Showell Growers", and Showell Farms of Florida, Inc. is hereafter referred to as "Showell Florida". As discussed below, Showell Growers and Showell Florida were both wholly-owned subsidiaries of Showell Farms prior to their merger into Showell Farms in May 1992.

The Taxpayer appealed both assessments to the Administrative Law Division. The cases were consolidated and heard together on March 7, 1995. G. David Johnston represented the Taxpayers. Assistant Counsel Beth Acker appeared for the Department.

This case involves two issues:

(1) The final assessments are based on capital employed in Alabama by Showell Growers and Showell Florida during the subject years. The first issue is whether the final assessments should be dismissed because they were entered against Showell Farms, as successor to Showell Florida and Showell Growers, and not directly against Showell Florida and Showell Growers;

(2) If the final assessments in issue are upheld, what is the validity or effect of a third final assessment entered by the Department directly against Showell Farms on January 30, 1995 for the tax years 1992 and 1993.

The facts are as follows:

Both Showell Florida and Showell Growers operated in Alabama from 1988 until 1992. Showell Florida was qualified to do business in Alabama in 1988, but was not qualified for any subsequent years. Showell Growers was never qualified to do business in Alabama. Both corporations failed to file Alabama franchise tax returns or pay Alabama franchise tax for the years in issue.

In May 1992, Showell Growers and Showell Florida merged into their parent corporation, Showell Farms. Showell Farms had not done business in Alabama prior to the May 1992 merger, and thus was not liable for Alabama franchise tax prior to that time.

On April 13, 1994, the Department entered preliminary assessments of franchise tax against Showell Florida for the years 1989 through 1992, and against Showell Growers for the years 1988

through 1992. After the preliminary assessments were entered, the Department learned that both corporations had previously merged into Showell Farms in 1992. Consequently, the Department entered the two final assessments in issue on September 7, 1994 against Showell Farms, as successor to the two merged corporations. Showell Farms appealed to the Administrative Law Division.

On January 30, 1995, the Department also entered another final assessment against Showell Farms for franchise tax for the years 1992 and 1993. That final assessment was based on capital employed by Showell Farms in Alabama on the merger date in May 1992.

The Taxpayer first argues that the final assessments in issue should be dismissed because they were incorrectly entered against Showell Farms, as successor to Showell Growers and Showell Florida, and not directly against Showell Growers and Showell Florida. I disagree.

The Department timely entered preliminary assessments against Showell Florida and Showell Growers on April 13, 1994.[1] Entry of a preliminary assessment stays the statute of limitations for assessing tax in Alabama. Code of Ala. 1975, §40-2A-7(b)(2).

After the Department learned that the two subsidiary corporations had merged with Showell Farms in May 1992, the

[1]Code of Ala. 1975, §40-2A-7(b)(2)a. allows the Department to enter a preliminary assessment at any time if a taxpayer fails to file a return as required by law. Both Showell Florida and Showell Growers failed to file Alabama franchise tax returns for the years in question.

Department made the assessments final in the name of Showell Farms, as successor to the two merged corporations.

The legal consequences of a merger of two corporations in Alabama is that the surviving corporation assumes all the rights of the merged corporation, and also all the liabilities and obligations of the merged corporation. Code of Ala. 1975, §10-2A-145(5) was in effect at the time of the May 1992 merger. That section provided as follows:

> "(5) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by such merger or consolidation."

Section 10-2A-145 was repealed by the Alabama Business Corporation Act, Code of Ala. 1975, §10-2B-1.01 et seq., effective January 1, 1995, and replaced by §10-2B-11.06 of that Act. Sections 10-2B-11.06(3) and (4) provide substantially the same as repealed §10-2A-145, as follows:

> "(3) The surviving corporation shall be responsible and liable for all the liabilities and obligations of each corporation party to the merger; and neither the rights of creditors nor any liens upon the property of any corporation party to the merger shall be impaired by the merger;
>
> (4) Any claim existing or action or proceeding pending by or against any corporation party to the merger may be prosecuted, or continued, as if the merger had not taken

> place, or the surviving corporation may be substituted in the action or proceeding for the corporation whose existence ceased;"

Based on the above, Showell Farms assumed all existing liabilities and obligations of Showell Growers and Showell Florida at the time of the merger in May 1992, including the accrued franchise tax liability of the two corporations. The Department thus properly assessed Showell Farms for the franchise tax liability of both Showell Growers and Showell Florida for the subject years.

In addition, entry of the preliminary and final assessments in different names also did not violate the Taxpayer's due process rights, or the notice procedures set out in the Uniform Revenue Procedures Act, Code of Ala. 1975, §40-2A-7 et seq.

The preliminary assessments against Showell Growers and Showell Florida were addressed and mailed to the same post office box in Showell, Maryland. The Taxpayer, Showell Farms, subsequently filed a petition for review with the Revenue Department concerning the preliminary assessments. The Department learned at that time about the 1992 merger. The Department subsequently entered final assessments against the successor corporation, Showell Farms. The final assessments were mailed to the same post office box in Showell, Maryland. The Taxpayer was obviously provided due process and an opportunity to contest the final assessments by filing this appeal with the Administrative Law

Division.

The Taxpayer argues in the alternative that if the two assessments in issue are affirmed, the Department should not be allowed to tax Showell Farms again for 1992 tax based on the same capital previously taxed by the two assessments in issue. This argument relates to the subsequent franchise tax final assessment entered by the Department on January 30, 1995 against Showell Farms for the years 1992 and 1993. I agree with the Department that the January 30, 1995 final assessment against Showell Farms is not in issue because it was not appealed by the Taxpayer. However, for the sake of judicial economy, I will address the issue for the benefit of the parties.

The Taxpayer does not dispute the amount of the two assessments entered against Showell Farms, as successor to the two merged corporations. Those final assessments are based on the capital employed by Showell Growers and Showell Florida in Alabama during the subject years, including 1992. As indicated above, those final assessments are due to be affirmed.

However, I also agree that Showell Farms should not be taxed again for additional 1992 franchise tax based on the same capital already taxed by the Department.

The Alabama franchise tax is levied on the privilege of a foreign corporation doing business in Alabama. The tax is measured by capital employed in Alabama. If a corporation is doing business

in Alabama but has no capital employed in Alabama, it is not liable for Alabama franchise tax, except the $25 minimum levied by Code of Ala. 1975, §40-14-41(a).

A foreign corporation that starts business in Alabama during a tax year is liable for franchise tax on its capital employed on the date it begins business in Alabama. International Paper Co. v. Curry, 9 So.2d 8 (1942). The only capital employed by Showell Farms in Alabama when it began business in Alabama in May 1992 was the capital acquired from the two merged subsidiaries. As indicated above, the capital acquired by Showell Farms was properly assessed by the two final assessments in issue. Consequently, no additional tax is due on that same capital, unless the Department can establish that Showell Farms employed additional capital in Alabama in May 1992 other than the capital received from the two subsidiary corporations.

As stated, the above analysis concerning the January 30, 1995 final assessment is not binding because that final assessment is not in issue in this case. The final assessment entered against Showell Farms on January 30, 1995 cannot now be appealed by the Taxpayer because more than 30 days have passed since it was entered. Code of Ala. 1975, §40-2A-7(b)(5). However, the Taxpayer can pay the tax in full and then petition for a refund as provided at Code of Ala. 1975, §40-2A-7(c). If the Department denies the refund, the Taxpayer can then appeal the denial in accordance with

Code of Ala. 1975, §40-2A-7(c)(5).

The above considered, the final assessments in issue against Showell Farms, Inc., as successor to Showell Growers, Inc., and Showell Farms, Inc., as successor to Showell Farms of Florida, Inc., are affirmed. Judgment is accordingly entered against Showell Farms in the amounts of $92,267.96 and $122,193.34, respectively.

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

Entered May 25, 1995.

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BILL THOMPSON
Chief Administrative Law Judge