QMS, INC. Post Office Box 81250 Mobile, Alabama 36689-1250,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. F. 95-487
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

QMS, Inc. ("Taxpayer") petitioned the Revenue Department for a refund of 1992 franchise tax. The Department partially denied the refund, and the Taxpayer appealed to the Administrative Law Division. A hearing was conducted on April 3, 1996. Gregory Jones, Arnie Nelson, Jane McPherson, and Ted Langley appeared for the Taxpayer. Assistant Counsel Dan Schmaeling represented the Department.

This case involves two issues:

(1) First, what apportionment formula should the Taxpayer be required to use to apportion its capital to Alabama for the subject year. That issue turns on whether the Taxpayer was primarily engaged everywhere in (1) manufacturing, or (2) selling, or (3) a combination of manufacturing and selling; and

(2) Did the Taxpayer timely apply for a refund of the overpaid tax as required by Code of Ala. 1975, §40-2A-7(c)(2).

The Taxpayer is engaged in the computer software/hardware business and maintains a printer assembly plant, administrative and sales offices, research and development facilities, and a warehouse in Mobile, Alabama. The Taxpayer manufactures some hardware at its Mobile facility, but primarily purchases already manufactured items

(circuit boards, printer engines, etc.) from outside sources. The Taxpayer then sells the integrated products through its 22 sales offices throughout the United States.

On or before March 15, 1992, the Taxpayer filed for an extension to file its 1992 Alabama franchise tax return. The Taxpayer paid $260,110.00 with the extension request. The extension was granted, and the Taxpayer was allowed until September 15, 1992 to file its 1992 return.

On September 15, 1992, the Taxpayer filed its 1992 return and paid additional tax due as reported of $17,830.00. The Taxpayer apportioned capital to Alabama on the return as a corporation primarily engaged in manufacturing. Schedule D on the Alabama 1992 franchise tax return requires a foreign corporation primarily engaged in manufacturing to use factors 1 (cost of manufacturing), 6 (payroll), and 7 (property) from Schedule C.

On September 15, 1995, the Taxpayer filed an amended 1992 franchise return and apportioned capital to Alabama as a corporation primarily engaged in selling. The selling category on the 1992 return required the use of factors 2 (sales), 6 (payroll), and 7 (property) from Schedule C.

The Department reviewed the amended return, treated the Taxpayer as being primarily engaged in both selling and manufacturing, and consequently reapportioned the Taxpayer's capital using the average of factors 1 (cost of manufacturing) and 2 (sales), plus factors 6 (payroll) and 7 (property). As discussed

below, the combined selling and manufacturing formula was not included as a category on Schedule D of the 1992 franchise return. The Department nonetheless used the formula because, according to the Department, it most accurately reflected the Taxpayer's capital employed in Alabama. The hybrid formula used by the Department reduced the refund to $52,020.00. However, the Department only refunded to the Taxpayer the $17,830.00 that was paid with the return in September 1992. The Department denied the balance of the refund because, according to the Department, it was not timely claimed within three years from when the return was filed as required by Code of Ala. 1975, §40-2A-7(c)(2). Specifically, the Department claims that the extension filed by the Taxpayer in March 1992 was a "return" within the scope of §40-2A-7(c)(2). Consequently, the Department argues that the three year statute began running when the extension was filed and the $260,110.00 was paid in March 1992, and thus expired concerning the $260,110.00 before the amended return was filed in September 1995.

Issue 1 - How should the Taxpayer be required to apportion capital to Alabama in 1992?

Schedule D on the Alabama franchise tax return includes various broad business categories, i.e. sales, manufacturing, services, etc. Each category specifies an apportionment formula using various factors from Schedule C. A foreign corporation is required to select the Schedule D category that best fits its primary business everywhere. The corporation then apportions its capital to Alabama using the specified formula.

In prior cases before the Administrative Law Division, foreign corporations have argued that they should be allowed to use an alternative apportionment formula or method not included on Schedule D because it more accurately reflects capital employed in Alabama. However, the Administrative Law Division has consistently held that the formulas set out on Schedule D are prima facie reasonable and must be followed. See generally, Intergraph Corp. v. State of Alabama, Admin. Law Docket F. 91-171, decided November 6, 1995; State v. Bethlehem Steel Corp., Admin. Law Docket F. 92-151, decided January 13, 1994.

The Department is also bound by the same rule, at least for the years prior to the effective date of Act 95-568.[1]

[1]Act 95-568 provides that a foreign corporation must apportion capital to Alabama pursuant to Department regulations as specified on the franchise return, except that if such formulas do not fairly represent the corporation's actual capital employed in Alabama, then either the taxpayer or the Department may require use of any

Consequently, the Department cannot require the Taxpayer to use a different apportionment formula in 1992 other than those specified on Schedule D.

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other formula or method that equitably apportions capital to Alabama. See, Code of Ala. 1975, §40-14-41(c), as amended by the above Act. However, the above provision is effective only for tax years after the effective date of Act 95-568, July 31, 1995.

Schedule D on the 1992 return did not include a combined "selling and manufacturing" formula.[2] Consequently, either the "manufacturing" or "selling" formula on the return must be used. As between manufacturing and selling, the Department concedes that the Taxpayer was primarily engaged in selling during 1992. The Department attorney stated that "There is no question that their sales everywhere were more than what their manufacturing was everywhere." (Transcript, at pages 33-34). The Taxpayer thus properly filed its amended return using the "selling" factors on Schedules C of the 1992 return.

Issue 2 - The statute of limitations issue.

Code of Ala. 1975, §40-2A-7(c)(2)a. provides that a refund must be requested "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."

A foreign corporation's Alabama franchise tax return is due on March 15 of the subject year. Code of Ala. 1975, §40-14-47. A corporation may, however, be granted an extension to file of up to six months. See, Department Reg. 810-2-3-.08.

The Taxpayer in this case filed an extension request on March

[2]Schedule D on the 1991 return included a combined "manufacturing and selling" formula which required use of the average of factors 1 and 2 plus factors 6 and 7. However, that formula was not included on the 1992 return. The "manufacturing" formula on the 1993 Schedule D used the same formula as the combined "manufacturing and selling" formula on the 1991 return. But again, there was no combined "manufacturing and selling" formula on the 1993 return.

15, 1992. The extension was granted giving the Taxpayer until September 15, 1992 to timely file its return.

The Department argues that the extension request was a "return" within the meaning of §40-2A-7(c)(2)a., in which case the three year statute started running concerning the $260,110.00 when the extension request was filed and the amount paid in March 1992. I disagree.

"Return" is defined at Code of Ala. 1975, §40-2A-2(16) as follows:

> RETURN. Any report, document, or other statement required to be filed with the Department for the purpose of paying, reporting, or determining the proper amount of value or tax due.

An extension request is neither "required to be filed", nor is it filed for the "purpose of paying, reporting, or determining the proper amount of value or tax due." Rather, an extension request is simply a request for additional time within which to timely file a return. The term "return" as used in §40-2A-7(c)(2)a. refers to the actual return on which a taxpayer's liability is calculated and/or reported.

The Taxpayer's 1992 franchise tax return was timely filed on September 15, 1992. That document is the "return" referred to in subparagraph (c)(2)a. The Department concedes that the Taxpayer filed its amended return and requested a refund within three years from that date. Consequently, the Taxpayer timely requested a refund of the tax reported on its September 15, 1992 original return, which included that amount pre-paid with the extension request in March 1992.

In summary, the Taxpayer was primarily engaged everywhere in selling in 1992, and thus properly apportioned its capital employed in Alabama using the selling formula on Schedule D of the 1992 Alabama return. The Taxpayer also timely requested a refund of the tax reported on its original return filed on September 15, 1992. The Department does not otherwise dispute the amount of the refund. The Department is accordingly directed to issue a refund to the Taxpayer of $110,181.00, plus applicable interest.

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

Entered May 24, 1996.

BILL THOMPSON
Chief Administrative Law Judge