

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

FINAL ORDER  
ON APPLICATION FOR REHEARING

A Final Order was entered in this case on May 24, 1996. The Department timely applied for a rehearing on May 30, 1996.

This case involves two issues:

(1) Should the Taxpayer be required to apportion capital to Alabama for 1992 as a corporation primarily engaged in manufacturing, processing, or fabricating, as argued by the Department, or a corporation primarily engaged in selling, as argued by the Taxpayer; and

(2) Should an extension to file a return be treated as a "return" for statute of limitations purposes within the scope of Code of Ala. 1975, §40-2A-7(c)(2)a.

Issue 1 - The proper apportionment formula.

The Final Order held that the Taxpayer was primarily engaged in selling in 1992. That finding was based on the Department's concession that "There is no question that their sales everywhere were more than what their manufacturing was everywhere." See, Final Order, at page 4.

The Department argues on rehearing that the Taxpayer should

not be treated as a corporation primarily engaged in selling.

The Department's rationale is as follows:

The Final Order places great weight on the fact that this Taxpayer's sales everywhere were more than their manufacturing everywhere. This has the effect of throwing out the manufacturing classification for every manufacturing company due to the fact that all companies that manufacture a product sell that product at a markup. All manufacturing companies are going to have a "sales everywhere" number that is larger than its "manufacturing everywhere" number simply because they sell what they manufacture at a price above the cost of manufacturing.

The Department has a valid point. But in 1992, the only guideline for deciding a foreign corporation's correct apportionment formula was the corporation's primary activity everywhere. Consequently, because the Taxpayer's sales were greater than its manufacturing in 1992, the Taxpayer must be classified as a "sales" corporation for that year.

The Department subsequently promulgated Reg. 810-2-3-.13 after 1992. That regulation provides that - "A taxpayer shall be deemed to be employing capital primarily in Manufacturing, Processing or Fabricating if 50 percent or more of the items sold by the taxpayer are Manufactured, Processed or Fabricated by the taxpayer." The above regulation is reasonable, and solves the problem pointed out by the Department. But as stated, Reg. 810-2-3-.13 was promulgated after 1992, and thus is not applicable in this case.

The Taxpayer argues that even if Reg. 810-2-3-.13 was applicable, it still did not manufacture more than 50 percent of

the items that it sold. However, the category in question includes "manufacturing, processing or fabricating." The Taxpayer clearly manufactured less than 50 percent of the items sold, but it also purchased components from outside sources and assembled those components into a finished product.

"Fabricating" is defined as "to construct by combining or assembling." The American Heritage Dictionary, 2nd College Edition. Consequently, the cost of any components purchased by the Taxpayer from outside sources and assembled into a finished product for sale should also be included in the "manufacturing, processing or fabricating" category. It is then a question of fact whether the Taxpayer manufactures or fabricates more than 50 percent of the items that it sells in any given year.

Issue 2 - The statute of limitations question.

The Department reiterates its position that an application for extension to file a return should be treated as a return for statute of limitations purposes at Code of Ala. 1975, §40-2A-7(c)(2)a. The Department's argument is again rejected for the reasons stated in the Final Order. An extension to file is not a return within the context of the above section.

The above considered, the Final Order previously entered in this case is affirmed. This Final Order on Application for Rehearing may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §§40-2A-9(f) and (g).

Entered August 16, 1996.

BILL THOMPSON  
Chief Administrative Law Judge