PLANTATION OAKS OF ALABAMA, INC. 5215 County Road 10 Tuskegee, AL 36083-4811,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 04-728
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Plantation Oaks of Alabama, Inc. ("Taxpayer") for State lodgings tax for November 1999 through April 2003. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on October 18, 2004. Jim Sizemore represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

ISSUES

This case involves two issues:

(1) The threshold issue is whether the Department was authorized to assess the Taxpayer a second time for the same tax for the same period; and

(2) If the Department was authorized to assess the Taxpayer, the issue then is whether the Taxpayer is liable for lodgings tax on rooms rented to its private club members because it also rented rooms to the public at-large.

FACTS

The Taxpayer operates two hunting lodges and a hunting club in Macon County, Alabama. Before November 1999, the Taxpayer only rented rooms to club members hunting on the property. The Department concedes that the Taxpayer was not liable for lodgings tax when it only provided rooms to its private club members.

The Taxpayer began providing rooms to non-members in November 1999. The Taxpayer thereafter erroneously collected and remitted sales tax, not lodgings tax, on those rentals to non-members. It did not, however, collect and remit any tax on the proceeds from the rooms it continued to provide to its club members.

The Department audited the Taxpayer and determined that because the Taxpayer provided public accommodations beginning in November 1999, it was thereafter liable for lodgings tax on all of its room rentals, including rentals to club members. It allowed the Taxpayer a credit against the lodgings tax for the sales tax it had erroneously collect on the rentals to non-members. It then assessed the Taxpayer on the rental gross proceeds ($45 per night per club member) paid by the club members.

The Department entered a lodgings tax final assessment against the Taxpayer for November 1999 through April 2003 on October 17, 2003. The Taxpayer timely appealed to the Administrative Law Division. The Administrative Law Division notified the Department's Legal Division of the appeal on November 20, 2003, and directed it to file an Answer within 30 days, as required by Code of Ala. 1975, §40-2A-9(c). The Department failed to either file an Answer within 30 days or request in writing an extension to file the Answer, as required by Dept. Reg. 810-14-1-.24(2)(a).[1]

The Administrative Law Division notified the Legal Division on January 7, 2004 that

[1] Section 40-2A-9(c) provides that the Administrative Law Judge may allow the Legal Division an extension of up to 60 days to file its Answer. The Legal Division is thus in practical effect allowed 90 days to file an Answer in a case. Reg. 810-14-1-.24(2)(a) also requires that the extension must be requested in writing before the original 30 day Answer period expires.

the Answer in the case was overdue.[2] The Department subsequently filed its Answer on February 26, 2004. The Administrative Law Division also received a motion from the Taxpayer on February 26, 2004 requesting that the final assessment be dismissed because the Department had failed to file its Answer within 90 days, as required by §40-2A-9(c) and Dept. Reg. 810-14-1-.24.

The Administrative Law Division granted the Taxpayer's motion and entered a Final Order dismissing the final assessment on March 23, 2004. The Final Order reads as follows:

> The issue of whether a taxpayer should be granted relief if the Department fails to timely file its Answer within 90 days was addressed in *Sungard Business Systems, Inc. v. State of Alabama*, U. 94-310 (Admin. Law Div. 1/10/1995), as follows:
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> > Code of Ala. 1975, §40-2A-9(c) was enacted as part of the Taxpayers' Bill of Rights and Uniform Revenue Procedures Act, effective October 1992. Section 40-2A-9(c) requires the Department to file an answer with the Administrative Law Division within 30 days after being notified of a taxpayer's appeal. The Department may be allowed an additional 60 days at the discretion of the Administrative Law Judge. The section reads in pertinent part as follows:
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> > > The administrative law division shall notify the legal division of the department that an appeal has been filed, and the legal division shall be required to file a written answer with the administrative law division within 30 days from receipt of such notice. The answer shall state the facts and issues in dispute and the department's position relating thereto, however, the administrative law judge shall have discretion to require additional information from either the taxpayer or the department or to allow the legal

[2] The Administrative Law Division, as a courtesy, routinely notifies the Legal Division concerning overdue Answers. It is not required to do so by statute or otherwise.

> division additional time, not to exceed 60 days, within which to file an answer.

Code of Ala. 1975, §40-2A-9(b) provides in relevant part as follows:

> The administrative law judge shall be responsible for administration of the administrative law division and shall have authority to schedule and conduct hearings and decide all appeals properly filed with the administrative law division. The administrative law judge shall have discretion to dismiss any appeal for failure or refusal to comply with any department regulation or statute concerning appeals to the administrative law division, or the failure or refusal to comply with any preliminary order issued by the administrative law judge.

The Department does not dispute that it failed to file its answer in this case within 90 days as required by §40-2A-9(c). Rather, the Department argues that even though its answer was late, §40-2A-9(b) does not give the Administrative Law Judge authority or jurisdiction to dismiss the final assessment in issue. I disagree.

This same issue was decided in a prior Administrative Law Division case, *State v. Bishop-Parker Furniture Company*, Docket No. S. 93-252, decided March 31, 1994. In that case, the Department failed to file its answer within the required 90 days. As in this case, the Department conceded that the answer had not been timely filed, but nonetheless argued that §40-2A-9(b) did not give the Administrative Law Judge authority to dismiss the final assessments in issue. The Department's argument was rejected, as follows:

> The cardinal rule of statutory construction is that a statute must be construed to fulfill the intent of the Legislature. *Gulf Coast Media, Inc. v. The Mobile Press Register, Inc.*, 470 So.2d 1211. The purpose and object of the statute must be considered, and the plain language of the statute should not be followed when the practical consequences will lead to unjust results and is contrary to the purpose of the statute. *Smith v.*

Alabama Medicaid Agency, 461 So.2d 817; *Birmingham News Co. v. Patterson*, 202 F.Supp 881. The plain-meaning rule of statutory construction should not be followed where the result is inconsistent with the intent of the statute. *Bailey v. USX Corp.*, 850 F.2d 1506.

The clear intent of the Taxpayers' Bill of Rights and Uniform Revenue Procedures Act, of which §§40-2A-9(b) and (c) are a part, is to provide "equitable and uniform procedures for the operation of the department and for all taxpayers when dealing with the department." See Code of Ala. 1975, §40-2A-2(1). Certainly the Legislature did not intend nor would it be equitable to penalize a taxpayer for failing to comply with a statute or regulation concerning administrative appeals, but not hold the Department to the same standard.

The Legislature required the Department to answer within 30 days to protect taxpayers from undue delay by the Department. However, if a taxpayer cannot be granted relief when the Department fails to answer within the required 30 days, or at least within the additional 60 days allowed by §40-2A-9(c), then in practical effect the time limits imposed by that section would be meaningless. The Department could ignore the time requirements without penalty.

In light of the above, §40-2A-9(b) must be construed to allow the administrative law judge authority to grant relief to either party where the opposing party fails to comply with a statute, regulation or preliminary order concerning an appeal before the Administrative Law Division, either by dismissing the taxpayer's appeal if the taxpayer fails to comply, or by granting the relief sought by a taxpayer if the Department fails to comply. That legislative intent is recognized in Department Reg. 810-14-1-.24(3), which specifies that if either party fails to comply ". . . the Administrative Law Judge shall have discretion to dismiss the appeal, grant all or part

> of the relief sought by the taxpayer, or take any other action appropriate under the circumstances."
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> The above logic is equally applicable in this case. If a taxpayer cannot be granted relief under §40-2A-9(b), then in practical effect the time limits imposed by §40-2A-9(c) would be meaningless. The Department could ignore the statutory time requirements without penalty. Clearly, that was not the intent of the Legislature. As noted in *Bishop-Parker*, numerous taxpayer appeals have been dismissed on motion by the Department because the taxpayer failed to timely file a notice of appeal. The intent of the Legislature and fairness requires that the Department must be held to the same standard.
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> *Sungard*, at 1-4.
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> In addition to the *Sungard* and *Bishop-Parker* cases discussed above, the Administrative Law Division has also granted a taxpayer relief in four other cases because the Department's Answer was not filed within the required 90 days. *Sellars v. State of Alabama*, Inc. 02-859 (Admin. Law Div. 2/21/03); *J.P.'s Finishing Products v. State of Alabama*, S. 98-338 (Admin. Law Div. 8/1/00); *Muncaster v. State of* Alabama, S. 98-273 (Admin. Law Div. 6/16/00); *Varcak v. State of Alabama*, Inc. 97-420 (Admin. Law Div. 8/18/98). None of the six cases were appealed to circuit court. If the Department believes that the Administrative Law Division has misconstrued §40-2A-9(c), it should appeal to circuit court. If a circuit or appellate court determines that the Administrative Law Division is not required to grant a taxpayer relief if the Department fails to file an Answer within 90 days, the Administrative Law Division will proceed accordingly. In the meantime, all Answers must be filed within the 90 day deadline.

Plantation Oaks of Alabama, Inc. v. State of Alabama, S. 03-1041 (Admin. Law Div. 3/23/2004).

Although the March 23, 2004 Final Order invited the Department to appeal to circuit court if it disagreed with the Order, the Department failed to appeal. Instead, on August 17, 2004, the Department entered a second lodgings tax final assessment against the Taxpayer for the same tax for the same period. The Taxpayer again timely appealed to the

Administrative Law Division.

ANALYSIS

Issue (1). The validity of the second final assessment.

The Taxpayer argues that the final assessment in issue should be dismissed because (1) the Department is not authorized to assess a taxpayer twice for the same tax for the same period, and (2) the Department is barred from reassessing the Taxpayer based on the doctrine of collateral estoppel. I agree.

The Alabama Taxpayers' Bill of Rights ("TBOR") and Uniform Revenue Procedures Act ("URPA") was enacted in 1992 and governs the procedures for assessing tax in Alabama. Code of Ala. 1975, §40-2A-1, et seq. "The TBOR prescribes uniform procedures that must be followed in assessing and collecting taxes." *GMAC v. City of Red Bay*, 204 Ala. Lexis 167 at 5.

Before 1992, the Department could not enter a second final assessment against a taxpayer for any period for which a prior final assessment had been entered. The Department was prevented from reassessing a taxpayer for a period already assessed based on case law holding that a final assessment unappealed from was as conclusive as a circuit court judgment and finally fixed the taxpayer's liability for the period. See, *Lambert v. State, Dept. of Revenue*, 414 So.2d 983 (Ala. Civ. App. 1982); *Hamm v. Harrigan*, 178 So.2d 529 (1965). Some taxpayers took advantage of the above "loophole" to effectively avoid audit and assessment for a tax period by not paying the tax due as reported on their return for the period. That forced the Department to enter a final assessment for the tax due. The taxpayer would wait for the 30 day appeal period to run, and then pay the tax due. Because an unappealed from final assessment had been entered for the period, the

taxpayer's liability was finally fixed, and the Department could not thereafter audit and assess the taxpayer for additional tax due for the period. The taxpayer thus paid a small amount of penalty and interest in return for the assurance that the period was forever closed.

The loophole was effectively closed by URPA in 1992. The drafters of URPA were aware of the loophole, and thus included a provision in the Act that for the first time allowed the Department to reassess a taxpayer for additional tax due for a period for which a final assessment had already been entered.[3] Section 40-2A-7(b)(2)j. reads in pertinent part – "Additional tax may be assessed by the Department within any applicable period allowed above, even though a preliminary or final assessment has been previously entered by the Department against the same taxpayer for the same or a portion of the same tax period."

By its specific language, §40-2A-7(b)(2)j. authorizes the Department to assess a taxpayer for any additional tax not previously assessed by the Department. Consequently, if the Department enters a final assessment against a taxpayer and later determines that the taxpayer owes additional tax for the same period, §40-2A-7(b)(2)j. authorizes the Department to enter a second final assessment for the period for the additional tax due, assuming, of course, that the statute of limitations for assessing the tax has not expired. It does not, however, authorize the Department to assess the same tax twice, as the Department has done in this case. That was not the intent of the Legislature, nor is it

[3] I served as chairman of an ad hoc committee of Department employees, CPAs, and tax attorneys that drafted the TBOR and URPA in the early 1990's. The Alabama Legislature unanimously enacted the committee's work product as Act 92-186 in 1992 with only minor changes.

allowed by the language of the statute.[4]

The Department is also barred or estopped from reassessing the Taxpayer because the same tax was dismissed by the Final Order entered in the prior *Plantation Oaks* appeal. That Final Order was as conclusive as a circuit court judgment, and cannot be collaterally attacked. "The final order (entered by the Administrative Law Judge) shall provide such relief as is appropriate under the circumstances. Any final order, unless altered or amended on appeal, shall have the same force and effect as a final order by a circuit judge sitting in Alabama." Code of Ala. 1975, §40-2A-9(e).

The Court of Civil Appeals held in *Lambert* that a final assessment unappealed from is as conclusive as a circuit court judgment and cannot be collaterally attacked. *Lambert,* 414 So.2d at 986, citing *Radue v. Bradshaw*, 268 So.2d 760 (1962). It necessarily follows that an unappealed Final Order issued by the Department's Administrative Law Judge, which also is as conclusive as a circuit court judgment, also cannot be collaterally attacked. The Department elected not to appeal the Final Order in the prior *Plantation Oaks* appeal. It cannot now collaterally attack that Final Order by entering another final assessment for the same tax that was dismissed by the Final Order.

[4] If, however, the Department voids a final assessment before the 30 day appeal period expires, it may thereafter re-enter the assessment for all or part of the same tax. In that case, the initial final assessment would not be an unappealed from final assessment, and thus would not become as conclusive as a circuit court judgment.

Finally, as discussed above, at 5, 6, allowing the Department to reassess a taxpayer for the same tax for the same period would also render meaningless the statutory requirement that the Department must file its Answer within 90 days. The Department could circumvent the statutory time requirement by simply reassessing the taxpayer for the same tax, as it has attempted to do in this case.

A discussion of the second issue is pretermitted by the above holding. The final assessment in issue is voided.

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

Entered January 6, 2005.

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BILL THOMPSON
Chief Administrative Law Judge