KNAUF FIBER GLASS GMBH, INC. 1 KNAUF DRIVE SHELBYVILLE, IN 46176-1420,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. CORP. 05-970
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

PRELIMINARY ORDER

This appeal involves a final assessment of corporate income tax entered against the above Taxpayer for 1998 through 2000. On February 7, 2006, the Taxpayer moved to dismiss the 1998 tax year from the final assessment because it was not timely assessed. The Administrative Law Division entered a Preliminary Order on February 8, 2006 stating that the issue raised in the motion would be decided after the March 29, 2006 hearing scheduled in the case.

The parties have jointly requested for the issue to be decided before the March 29 hearing because if 1998 is not in dispute, the parties will not be required to prepare for and address several substantive issues relating to that year. This Preliminary Order addresses the issue.

The Taxpayer timely filed its 1998 Alabama return on September 13, 1999. The Taxpayer and the Department executed a waiver on September 9, 2002 extending until March 31, 2003 the three year statute of limitations for assessing the tax due for the year.

On March 24, 2003, the Taxpayer signed a second waiver which indicated that the statute would be further extended until September 15, 2003. The Department failed to sign the second waiver.

The Department entered a preliminary assessment against the Taxpayer for the 1998 through 2000 tax years on September 15, 2003. The Department subsequently entered the final assessment in issue concerning those years on July 29, 2005. The Taxpayer timely appealed.

The issue is whether the second waiver document signed by the Taxpayer, but not by the Department, effectively extended the statute of limitations until September 15, 2003. If not, the 1998 tax year was not assessed within three years, as required by Code of Ala. 1975, §40-2A-7(b)(2), and thus must be deleted from the final assessment.[1]

Code of Ala. 1975, §40-2A-7(b)(2)i. reads as follows:

> The department and the taxpayer may, prior to the expiration of the period for entering a preliminary assessment or the filing of a petition for refund, agree in writing to extend the time provided for entering the assessment or filing the petition in this chapter. The tax may be assessed, or the petition for refund may be filed, at any time prior to the expiration of the period agreed upon. The period agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

The Department contends that the Taxpayer's signature on the second waiver form is sufficient to extend the statute, and that it was not necessary for a Department representative to also sign the document.

The Taxpayer argues that the second waiver form is invalid because it was not signed by a Department representative, and thus the parties did not "agree in writing" to extend the statute, as required by §40-2A-7(b)(2)i. I agree.

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[1] The Taxpayer contends in its motion that the 6 year 25 percent omission statute of limitations at §40-2A-7(b)(2)b. does not apply to the 1998 tax year. The Department apparently agrees because it did not raise or address the 25 percent statute in its response to the motion.

Section 40-2A-7(b)(2)i. specifies that the "department and the taxpayer may . . . agree in writing to extend" the statute. The statute further makes references to "the period agreed upon." To agree in writing, both parties must sign a waiver document evidencing a written agreement to extend the statute. Consequently, to be a valid waiver, the Department must sign the waiver.

I understand the Department's position that a waiver extending the time within which the Department may assess tax only benefits the Department, and thus only the taxpayer's signature showing the taxpayer's consent to the extension should be required. As a practical matter, the waiver statute could have been written so that only the taxpayer has to consent in writing for the statute to be extended. But the statute as written requires that both the Department and the taxpayer must agree in writing. The Department is correct that a statute that limits the Department's ability to assess tax should be liberally construed for the Department. But the plain language of §40-2A-7(b))2)i. is unambiguous, and must be followed. *IMED Corp. v. Systems Engineering Associates Corp.*, 602 So.2d 344 (Ala. 1992).

Although not directly on point, the holding in *Brafman v. United States*, 384 F.2d 863 (5th Cir. 1967), is somewhat analogous. The Court held in *Brafman* that the assessment against the taxpayer was not valid because it was not signed by the appropriate IRS officer, as required by an IRS regulation. Likewise, the waiver in issue also is not valid because it was not agreed to in writing, i.e., signed, by a Department representative, as required by §40-2A-7(b)(2)i.

The Court also stated in *Brafman* that although technical in nature, the procedures specified by law must be followed.

> We recognize that in sustaining Mrs. Brafman's contention regarding lack of proper assessment within the limitations period we are disposing of this case on what could be termed a "technical defense." As the district court said in *United States v. Lehigh*, W.D. Ark. 1961, 201 F.Supp. 224, 234, this is both true and immaterial:
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> > Any procedural defense is in a sense "technical." The procedures set forth in the Internal Revenue Code were prescribed for the protection of both Government and taxpayer. Neglect to comply with those procedures may entail consequences which the neglecting party must be prepared to face, whether such party be the taxpayer or the Government.
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> Certainly the courts have not hesitated to enforce strictly the Code requirement that a taxpayer's returns must be signed to be effective. Thus, unsigned returns, even with remittances, have been viewed as nullities from the standpoint of imposition of penalties and of commencement of the running of the statute of limitations. It has availed the taxpayer little that his failure to sign was inadvertent. (footnotes omitted)

Brafman, 384 F.2d at 868.

Finally, in *State of Alabama v. Fletcher Oil Company, Inc.*, Misc. 92-143 (Admin. Law Div. 9/15/92), a waiver that was not completely dated and two other waivers that were unilaterally altered by the Department were found to be invalid. In so holding, the Administrative Law Division stated – "The Department should generally be held strictly accountable for the proper preparation and execution of all waivers." *Fletcher Oil* at 8, 9.

The purported waiver extending the statute of limitations until September 15, 2003 is not valid because it was not signed by a Department representative. Consequently, the 1998 tax year was not timely assessed and is due to be deleted from the final assessment in issue. That portion of the final assessment will be voided when a Final Order is entered

in this case. The case will be heard as scheduled on March 29, 2006.

This Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered March 6, 2006.

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BILL THOMPSON
Chief Administrative Law Judge