

TIME WARNER, INC. & SUBSIDIARIES §
1 TIME WARNER CENTER
NEW YORK, NY 10019-6038, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. CORP. 08-800

v.

§

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

**PRELIMINARY ORDER DENYING
DEPARTMENT'S MOTION TO DISMISS
AND TAXPAYER'S MOTION TO STRIKE**

Time Warner, Inc. and various of its subsidiaries, all doing business in Alabama, filed a consolidated 2001 Alabama corporate income tax return. The return reported a loss for Alabama tax purposes of \$14,512,898.

The federal Securities and Exchange Commission ("SEC") and the Department of Justice investigated various of Time Warner's business transactions from 1999 through 2002. The parties settled the investigation in early 2005. The settlement required Time Warner to reduce its advertising revenues in the 2000 through 2003 tax years. That adjustment resulted in larger income tax net operating losses ("NOLs") for eight of Time Warner's subsidiaries in those years. Time Warner was not required, however, to file amended federal returns for 2000 through 2003. Rather, it included the additional NOLs totaling \$179,630,000 in its 2004 federal return's NOL carryforward schedule.

The Department subsequently audited Time Warner's 2001 consolidated Alabama return. The Department adjusted various items, which are not disputed by Time Warner.¹

¹ As indicated, Time Warner had reported negative Alabama taxable income on its 2001 return. The audit adjustments only changed the amount of the negative income. The adjustments did not result in an additional refund due because the Department had already refunded all of the estimated tax paid by Time Warner in 2001, less \$25,000 that was applied to Time Warner's 2002 estimated tax and the \$12,500 consolidated return filing fee.

The Department also changed or adjusted Time Warner's NOLs available to be carried over to other years. A September 5, 2008 letter to Time Warner from Department Hearing Officer Chris Sherlock stated that "[t]he enclosed adjustments reflect changes made to the net operating loss deduction available to be carried forward." The letter also informed Time Warner that if it did not agree with the NOL adjustments, it could file a petition for review and explain why it disagreed. The Department would then "schedule a conference to allow the taxpayer and the Department to present their respective positions" on the NOL issue.

The nature or amount of the NOL carryover adjustments actually made by the Department are not known, and apparently are not disputed. Time Warner nonetheless appealed the NOL adjustments to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-8(a).² Time Warner claims that the Department failed to adjust the available NOL carryover amount to reflect the additional losses of \$179,630,000 resulting from the 2005 settlement with the SEC and the Justice Department.

The Administrative Law Division notified the Department's Legal Division of the appeal by letter dated October 14, 2008. Time Warner has submitted a copy of the letter that was date stamped as received by the Legal Division on that date. The Legal Division e-mailed the Administrative Law Division on November 14, 2008 and requested an extension to file its Answer in the case. The Division failed to forward a copy of the extension request to Time Warner's representative. The request was granted on November 17, 2008.

The Department filed a motion to dismiss on November 24, 2008. The motion in

² Time Warner appealed to the Administrative Law Division on Monday, October 6, 2008

substance contends that the NOL carryover adjustment issue is not ripe for appeal. Specifically, the Department claims that its failure/refusal to adjust Time Warner's available NOL carryover amount to reflect the \$179,630,000 in settlement losses cannot be appealed because it did not result in a denied refund or final assessment of additional tax due.

Time Warner subsequently filed a motion to strike the Department's motion to dismiss. It claims that the Department failed to comply with Code of Ala. 1975, §40-2A-9(c) and Dept. Reg. 810-14-1-.24(2)(a) because the Department failed to timely request an extension to file its Answer, and also failed to submit a copy of the extension request to Time Warner's representative. It also asserts that the Department has to date still not filed an "Answer" in the case. It argues that because the Department failed to comply with the above statute and regulation, the Administrative Law Division should grant it the relief sought, i.e., its NOL carryforward amount should be increased to reflect the settlement losses of \$179,630,000.

Issue (1). Can Time Warner appeal pursuant to Code of Ala. 1975, §40-2A-8(a)?

Section 40-2A-8(a) reads in part that "[a]ny taxpayer aggrieved by any act or proposed act or refusal to act by the department shall be entitled" to appeal to the Administrative Law Division. Section 40-2A-8(c) specifies that "[t]his section shall not apply to the procedures governing assessments and refunds" otherwise provided for in Chapter 2A of Title 40.

The Department contends that Time Warner cannot appeal under §40-2A-8(a) because the Department's failure/refusal to include the settlement losses in Time Warner's

(postmark date), which was within the 30 day appeal period specified in §40-2A-8(a).

NOL adjustment schedule may lead to an appealable denied refund or final assessment in other years. I agree that the Department's failure to recognize the settlement losses may result in a denied refund and/or a disputed final assessment in future years. I disagree, however, that Time Warner is barred from now appealing the Department's failure/refusal to include the settlement losses in its NOL adjustments.

If the Department audits a taxpayer's return and makes various adjustments that increase or decrease the taxpayer's liability for the subject year, the proper procedure is for the taxpayer to appeal any final assessment or denied refund resulting from the adjustments. If the audit adjustments for whatever reason do not result in a denied refund or a final assessment in the subject year, the adjustments are generally moot and will not effect the taxpayer's liability in any other years.

This case can be distinguished, however, because while the Department's 2001 NOL adjustments (or non-adjustments) did not result in a final assessment or denied refund for that year, they may effect Time Warner's liability in other years.

As indicated, §40-2A-8(c) provides that the §40-2A-8(a) appeal procedure does not apply "to the procedures governing assessments and refunds which are otherwise provided for by this chapter. . . ." That prohibition does not apply in this case because, as indicated, the Department's failure/refusal to include the settlement losses in the NOL adjustment did not and will not result in an appealable final assessment or denied refund concerning the subject year. Because the §§40-2A-7(b) and (c) procedures concerning appeals of final assessments and denied refunds, respectively, do not apply, the §40-2A-8(c) prohibition also does not apply. The Department's failure to include the settlement losses in Time Warner's NOL carryover adjustments thus constituted "an act or proposed act or refusal to

act," which is appealable to the Administrative Law Division pursuant to §40-2A-8(a).

Also, if Time Warner had not appealed the audit adjustments, i.e., the Department's failure to include the settlement losses in the NOL carryover adjustments, the Department could possibly argue that the adjustments are binding and cannot be disputed in subsequent years. I suspect that possibility caused Time Warner to file the instant appeal.

And as a practical matter and for judicial economy, it is reasonable to resolve the issue up front in a single case, instead of having the unresolved issue pending for years, and then having to decide the issue in possibly a number of cases involving various final assessments and/or denied refunds. Finally, while the Department is not obligated to assist a taxpayer in tax planning, it should fairly, efficiently, and timely address any pending issues that may impact a taxpayer's liability in a future year, i.e., the amount of any available NOL carryover or other tax attribute amount.³

The Department's motion to dismiss is denied.

Issue (2). Should Time Warner be granted relief because the Department failed to comply with §40-2A-9(c) and Reg. 810-14-1-.24(2)(a)?

The Department is required to file an Answer to an appeal filed with the Administrative Law Division within 30 days from receiving notice of the appeal. Section 40-2A-9(c). The Division may, however, grant the Department an additional 60 days within

³ The Department's Hearing Officer correctly offered in his September 5, 2008 letter to address any issues Time Warner may have with the NOL adjustments. As discussed below, the Hearing Officer will be allowed to address the issue.

which to file the Answer, see again, §40-2A-9(c). Department Reg. 810-14-1-.24(2)(a) also provides that “[a]ny request for additional time (to file an Answer) must be made in writing to the Administrative Law Division within the time allowed for filing an answer, with a copy to the taxpayer or the taxpayer’s representative.”

The Department failed to comply with §40-2A-9(c) and Reg. 810-14-1-.24(2)(a) in this case because it failed (1) to file its Answer within 30 days; (2) to request an extension to file within 30 days; and (3) to send a copy of the extension request to Time Warner or Time Warner’s representative. The Administrative Law Division has held, however, that failure by one party to technically comply with the procedures in §40-2A-9(c) does not mandate or require the Administrative Law Division to grant relief to the other party. As stated by the Administrative Law Division in *Compass Marketing, Inc. v. State of Alabama*, S. 07-987 (Admin. Law Div. Prel. Order 3/11/2008):

The Administrative Law Division may dismiss an appeal or grant relief to either party if the opposing party fails to comply with a statute or regulation concerning appeals to the Administrative Law Division. See, Code of Ala. 1975, §40-2A-9(b) and Reg. 810-14-1.24(3). The decision to do so, however, is discretionary with the Division. “The Administrative Law Judge shall have discretion to dismiss the appeal, grant all of or part of the relief sought by the taxpayer, or take any other action appropriate under the circumstances.” Reg. 810-14-1-.24(3).

Compass Marketing at 2.

In this case, the Department responded to Time Warner’s notice of appeal within 90 days, albeit with a motion to dismiss and not a styled “Answer.” But under the circumstances, the motion will be treated as a timely filed Answer for purposes of §40-2A-9(c). Time Warner’s motion for relief is denied.

The Department should file amended pleadings by January 23, 2009 addressing the issue of why Time Warner's NOL carryover schedule should not be adjusted to include the additional settlement losses. The matter will then be submitted to the Individual and Corporate Tax Hearing Officer so that he may conduct a conference, as envisioned in the Hearing Officer's September 5, 2008 letter to Time Warner. The Administrative Law Division will hold the case in abeyance pending the conference, and thereafter take appropriate action as dictated by the results of the conference.⁴

Entered January 2, 2009.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: David E. Avery, III, Esq.
Bruce P. Ely, Esq.
William T. Thistle, Esq.
Melody Moncrief

⁴ Even if Time Warner's appeal to the Administrative Law Division was improper, which is not the case, Time Warner's appeal letter should in any case be treated as a timely request for a conference before the Hearing Officer. It is hoped that the issue can be resolved at the conference, but as indicated, the Administrative Law Division has jurisdiction and will take appropriate action as necessary after the conference and resulting decision.