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September 16, 2010

OPINION

TO: Paul Bogdanski, CPA
Tellabs Operations, Inc.
William Boyd, CRE
Judy O'Daniel

FROM: Jonathan V. Gerth, Esq.
Hearings Officer

RE: Tellabs Operations, Inc

## BACKGROUND

Tellabs Operations, Inc (Taxpayer) is a global provider of communications equipment and service conducting business within jurisdictions in Alabama. The taxpayer made payments of sales taxes to the jurisdiction of Bessemer, Alabama during the months of January 2004 through June 2004 which resulted in an overpaid balance of sales tax for that jurisdiction. In 2005, the taxpayer sold communications equipment and services to a purchaser in Bessemer and invoiced the purchaser for the sales price of the equipment plus applicable Alabama and Bessemer sales taxes. At the time of the equipment sales to the purchaser in Bessemer, the taxpayer possessed sales tax credits created by the previous overpayments in 2004. Those pre-existing Bessemer tax credits were applied against the taxpayer's sales tax liability associated with the 2005

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equipment sales and were used in the months of June, July, and August of 2005 according to the taxpayer's initial appeal. The Bessemer sales tax returns, which were filed with Revenue Discovery Systems (RDS), for those months did not specify any jurisdiction on the form and reflected no liabilities for those months. The taxpayer completed the returns by filling in the term "None" under all categories within the form. Following the filing of these returns, the taxpayer received a resale certificate from its Bessemer purchaser indicating that the purchaser was exempt from paying sales tax on the purchase of the equipment.

After receiving the resale certificate, the taxpayer then attempted to carry forward the existing credits remaining for the Bessemer jurisdictions by filing sales tax returns with RDS. The sales tax returns again did not include any tax liabilities, did not specify any jurisdiction, and did not reflect a negative balance indicating the credit carry forward. The returns were completed by filling the spaces provided with the term "None" under all categories of the form.

In March 2006, the taxpayer reorganized its operations and all subsequent Alabama sales by the company were made through an affiliate company, Tellabs North America, Inc. Due to the subsequent reorganization, the taxpayer was unable to utilize the Bessemer tax credits due to insufficient future tax liabilities. Concluding that it would never be able to use the credits, the taxpayer filed a petition for refund through RDS on September 18, 2007 in the amount of $235,790. The petitions for refund were considered and were denied by RDS on behalf of Bessemer because they were not timely claimed pursuant to §40-2A-7(c)(2)a of the Code of Alabama 1975. The taxpayer timely filed an appeal of the denial refund in accordance with §40-2A-7(c)(5)a and this hearing ensued.

## ANALYSIS

It is well settled that the right to a reclaim of monies voluntarily paid to the state or counties thereof, as taxes, is a matter of legislative grace, and like exemptions and deductions, must be strictly construed for the government.

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*Patterson v. Gladwin Corp.*, 835 So.2d 137, 145 (Ala., 2002) The United States Supreme Court held in *Badaracco v. C.I.R.*, 104 S.Ct 756 (1984) that statutes of limitation are similar in that they too should be construed in favor of the government and against a taxpayer. Furthermore, courts are not authorized to rewrite a statute because they might deem its effects susceptible to improvement. This is especially so when courts construe a statute of limitations which must receive strict construction in favor of the government. *Id.* at 764.

Tax refunds in Alabama are governed by *Code of Ala.* 1975, §40-2A-7(c)(1). That statute provides that any taxpayer may file a petition for any overpayment of tax or other amount erroneously paid . . . 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. *Code of Ala.* 1975, §40-2A-7(c)(2)a. The language of the statute is clear as to when a petition for refund must be filed. When the language of a statute is plain and unambiguous it must be strictly followed and the clearly expressed intent of the legislature must be given effect. *Alabama Dept. of Human Resources ex rel. Yancey v. Yancey,* 2010 WL 2885947, 2 (Ala.Civ.App.) (Ala.Civ.App.,2010).

In this case, the taxpayer filed the tax returns and paid the sales taxes on the same dates. The specific dates on which the taxpayer's credits were generated due to the filing of returns accompanied by overpayment are 1/19/2004, 2/20/2004, 3/15/2004, 4/15/2004, 5/10/2004, and 6/17/2004. Applying the statute of limitations set forth in §40-2A-7(c)(2)a, the relevant date that would trigger the expiration of the period in which a petition for refund could be filed for any of the credits would be three years after the final return was filed, or 6/17/2007. The taxpayer filed the petitions for refund of Bessemer sales taxes on 9/18/2007, outside of the allowable period set forth in the statute. Consequently, the refund requested by the taxpayer is barred by the statute of limitations in §40-2A-7(c)(2)a.

The taxpayer claims that they are entitled to the refund relying on the decision in *Stephens v. State of Alabama*, Inc. 96-127(Admin Law Div. 5/9/1996). In *Stephens*, the Alabama Administrative Law Division (ALJ) held that a

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$5,000.00 credit carried over from 1991 to 1992 was paid when the 1992 Alabama income tax return was filed on October 12, 1995. Since at least 1988, the taxpayers in *Stephens* had overpaid their Alabama income tax in each year and carried over a portion of the overpayment as a credit to be applied to the next year's liability. The State Department of Revenue (Department) argued that the credit claimed in each year was a continuous roll-over of the same overpayments initially made in 1988 through 1990 and that the refund claimed in 1995 should be barred by the statute of limitations. The ALJ's decision held that the credit amount carried over to each subsequent year was "paid" when the taxpayer's filed the subsequent year's return. His rationale was that the credit was applied as a tax paid towards their liability in that year and, therefore, lost its identity as a credit from a prior year at that time. In other words, the amount paid by credit in 1992 was not the same tax initially overpaid in 1988 through 1990 because portions had been repeatedly applied to current liabilities and new withholdings had been merged. *Id.* at 3.

This case is distinguishable from *Stephens*. Despite that *Stephens* pertained to income tax withholding and special statutes on that issue, the tax in dispute under *Stephens* was "paid" by a credit carried over from a prior year when they filed returns. *Matthews v. State of Alabama*, Inc. 96-139 (Admin. Law Div. 4/25/1996). The taxpayer here paid the taxes in dispute with payments that were made in consecutive months from 1/2004 through 6/2004. The taxpayer claimed in their initial appeal they attempted to apply current liabilities to those credits in June, July, and August of 2005 by filing returns on which they claimed no liabilities, specified no jurisdictions, and indicated no existing credit. The taxpayer provided copies of the sales tax return submitted to RDS for the period of 6/2004 through 3/2006 all of which contained no information. When RDS receives a tax return which does not specify any applicable jurisdiction, shows no liabilities, and contains no payments, the return is classified as an erroneously filed return. The return is not posted to a specified jurisdiction when the taxpayer provides no indication of their intent. Thus, the taxpayer's filing and payment history does not reflect any returns having ever been filed for the jurisdiction of Bessemer. This differs from the facts in *Stephens* in both that the taxpayer was neither filing returns that carried forward a credit nor paying current liabilities with those credits per the return. This also indicates

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that the credit was not losing its identity by being apportioned between current liabilities, new remittances, and credit carry forwards. In other words, taxes were not being "paid" when the returns were filed because no return was being filed for the jurisdiction where the credit existed. Even if the taxpayers did claim credits in June, July, and August of 2005, more than two years would have passed prior to the petition being filed. Finally, despite the taxpayer's efforts in filing the erroneous returns, they never indicated on any return that a credit was being carried forward which would have, at very least, kept Bessemer on notice that the credit was outstanding.

The filing situation in this case resembles the situation in *Caster Knott Dry Goods v. State of Alabama*, W. 03-518 (Admin Law Div. 2/25/2004). In *Castor*, the business filed monthly returns and paid Alabama withholding tax of $170,059.15 in 1998 under the name "Caster Knott Dry Goods." Dillard's, Inc. acquired the business in August of 1998. In order to reconcile the books, Dillard's subsequently remitted another $170,059.15 in 2000 under the name "The Higbee Company." Dillard's later discovered that the withholding tax had been paid twice. Although Caster had paid the tax and was carrying the credit, they failed to claim the credit on the returns as they were filing under a different name. Therefore, when Castor finally attempted to claim the refund more than three years after the returns were filed, and more than two years after the tax was paid, the refunds were denied because they were not timely requested. Had Castor actually filed the W-2's under their name, then the taxes would have been paid at the time the returns were filed, and the refund petitions would have been timely. However, due to the erroneous filing of the returns, Castor was unable to claim the credits because no returns had been posted to their account.

The taxpayer here was filing erroneous returns that were unable to be posted to any account because they did not specify any jurisdictions, liabilities, or credits to apply. Had the taxpayer been filing returns which specified the intended jurisdiction and carried forward a credit balance, they may have successfully tolled the statute of limitations. By failing to do so, the taxpayers have petitioned for a refund of taxes more than three years after the returns were filed, and more than two years after the taxes were paid. Therefore, the refunds

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were correctly denied as barred by the statute of limitations under §40-2A-7(c)(2)a.

The taxpayer's situation here is sympathetic. The 11th Circuit has ruled, however, that "general principles of equity may not override statutory requirements for timely filing of tax refunds claims." *Vintilla v. U.S.*, 931 F.2d 1444, 1446 (11th Cir. 1991) The Supreme Court recently explained the reasoning behind strict adherence to the limitations period in tax refund suits stating "[A]lthough we should not construe a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would extend the waiver beyond that which" is intended. *Id.* (quoting *Block v. North Dakota*, 461 U.S. 273, 287 (1983))

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

Entered September 16, 2010.