

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

vs.

§

DOCKET NO. INC. 91-223

JAMES H. AND ANNA S. GLISSON
P. O. Box 9194
Mobile, AL 36691-0194,

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§

Taxpayers.

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FINAL ORDER

The Taxpayers, James H. and Anna S. Glisson, filed petitions for refund of income tax for the years 1984 and 1986. The Department denied the entire 1984 refund and partially denied the 1986 refund. The Taxpayers appealed to the Administrative Law Division and a hearing was conducted on March 2, 1993. James Glisson (Taxpayer) appeared at the hearing along with CPA Tony Zick. Assistant counsel Gwen Garner represented the Department.

The 1984 Refund.

The Taxpayers incurred a 1987 net operating loss (NOL) and attempted to carry the loss back for a refund to 1984. An amended return claiming the refund was filed between January 1, 1991 and October, 1991. The exact date was not disclosed at the hearing.

The issue is whether the refund was timely claimed.

The Department argues that during the period in issue a petition for refund based on a NOL carryback must have been filed within three years from the end of the loss year. See, Reg. 810-3-

15-.22. Thus, the Department denied the refund in issue because the Taxpayers failed to carry the 1987 NOL back to 1984 within three years from the end of 1987, or by December 31, 1990.

The Taxpayers argue that an NOL carryback can be claimed at any time within three years, including extensions, from the due date of the loss year return. The Taxpayers' 1987 return was filed on October 14, 1988. The Taxpayers thus argue that they timely claimed the 1984 refund because the amended return was filed prior to October 14, 1991. I agree.

Alabama's NOL statute, Code of Ala. 1975, §40-18-15(a)(16), is modeled after the federal NOL statute, 26 U.S.C.A. §172. The federal statute provides that a NOL carryback can be claimed at any time within three years, including extensions, from the due date of the loss year return. See, 26 U.S.C.A. §6511. Alabama does not have a statute similar to 26 U.S.C.A. §6511. However, implicit in Alabama's NOL statute is a three year statute of limitations similar to the federal statute. In cases where an Alabama statute is modeled after a federal statute, the federal statute should be used as a guideline.¹ State v. Gulf Oil Corp, 256 So.2d 172.

¹ The Uniform Revenue Procedures Act, effective October 1, 1992, and codified at Code of Ala. 1975, §40-2A-7, et seq., specifically provides that the period for filing a petition for refund based on a NOL carryback shall be the same as prescribed in 26 U.S.C. §6511(d)(2). See, Code of Ala. 1975, §40-2A-7(c)(2)b.

The Taxpayers filed extensions and had until October 15, 1988 to file their 1987 return. They filed amended returns and carried the 1987 loss back to 1984 within three years from that date. Consequently, the 1987 NOL carryback to 1984 should be allowed and the 1984 refund in issue should be granted. See also, Administrative Law Docket INC. 89-245.

The 1989 Refund.

The issue here is whether losses claimed by the Taxpayers on their 1989 return were "business" or "non-business" for purposes of computing the NOL carryback. Code of Ala. 1975, §40-18-15(16)f.3. provides that a non-business deduction can be considered in computing a NOL carryback or carryforward deduction only up to the amount of the taxpayer's non-business income for the subject year.

A business deduction is a deduction incurred by a taxpayer in an regular trade or business. Thus, the losses claimed by the Taxpayers in 1989 can be allowed as an NOL carryback only if incurred in the Taxpayers' regular trade or business.

The Taxpayers claimed three bad debts on their 1989 return, \$31,546.00 loaned to Glisson Construction Company, Inc., \$5,000.00 loaned Lyon-Glisson Construction Company, Inc. and \$8,447.00 resulting from the default on a second mortgage on a house at 5905 Dixie Lane.

The loans to Glisson Construction and Lyon-Glisson Construction were made so that those companies could pay their bills and continue operating and not go into bankruptcy. The loans were made piecemeal as necessary beginning in 1987.

In my opinion, the loans were not business loans because the Taxpayer was not in the business of making loans. The transactions were not made in the regular course of the Taxpayer's trade or business. The loans were transactions entered into for profit and thus deductible in the year they became worthless, but they cannot be used in computing an NOL.

Concerning the \$8,447.00 loss on the Dixie Lane property, the loss resulted from the default on a second mortgage held by the Taxpayers. The default occurred in 1989. The Taxpayers commonly accepted second mortgages from homebuyers to help sell their houses in the regular course of business. Consequently, the loss from the defaulted second mortgage on the Dixie Lane property was a business loss incurred in the regular course of business and thus should be allowed as a NOL carryback to 1986. The Department should recalculate the amount of the 1989 NOL carryback available to 1986 and issue a refund accordingly.

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

Entered on September 7, 1993.

BILL THOMPSON
Chief Administrative Law Judge