

GERRY W. & CAROL C. ROLLINS
County Road 16
Danville, AL 35619,

Taxpayers,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. INC. 01-442

FINAL ORDER

The Revenue Department denied a refund of 1997 income tax requested by Gerry W. and Carol C. Rollins (Taxpayers). The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, ' 40-2A-7(c)(5)a. A hearing was conducted on August 21, 2001. CPA Ronald Burkett represented the Taxpayers. Assistant Counsel Margaret McNeill represented the Department.

ISSUE

The issue in this case is whether the Taxpayers timely claimed a refund of 1997 income tax as required by Code of Ala. 1975, ' 40-2A-7(c)(2)a.

FACTS

In April 1998, the Taxpayers applied for a four month extension to file their 1997 Alabama income tax return. They paid \$10,000 with the extension request. They filed a second extension request in August 1998, extending the due date of the return to October 15, 1998.

The Taxpayers= CPA claims he timely mailed the Taxpayers= 1997 Alabama and federal returns on October 15, 1998. The Taxpayers subsequently received the refund claimed on their federal return in November 1998. However, they never received their

Alabama refund. As discussed below, the Department claims it never received the Taxpayers' Alabama return.

The Taxpayers filed their 1998 Alabama return in October 1999, but failed to pay the reported tax due. They subsequently received a notice from the Department concerning the 1998 liability. They claim they returned the notice to the Department with instructions that the 1997 refund due them should be applied to the 1998 liability. Unfortunately, they cannot remember when the notice was received. The Department has no record that it ever received the notice back from the Taxpayers.

The Taxpayers received a garnishment notice from the Department in March 2001 concerning the 1998 liability. Before receiving that notice, the Taxpayers had assumed that the 1997 refund had been applied to satisfy the 1998 liability. The Taxpayers' CPA inquired with the Department, and discovered that the Department had never received the Taxpayers' 1997 return. The CPA subsequently submitted a copy of the 1997 return to the Department on May 3, 2001. The Department denied the refund requested on the return because it was not timely claimed. The Taxpayers appealed.

ANALYSIS

Section ' 40-2A-7(c)(2)a. reads as follows:

A petition for refund shall be filed with the department or an automatic refund issued pursuant to Section 40-29-71, or a credit allowed, 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. For purposes of this paragraph, taxes paid through withholding or by estimated payment shall be deemed paid on the original due date of the return.

The Taxpayers paid tax through withholding in 1997. The Department claims that the Taxpayers failed to request a refund of that tax within two years from the original due date of the return, as required by the above statute. I must agree.

If a return is not timely filed, any tax paid by withholding is deemed paid on the original due date of the return, in this case, April 15, 1998. The Taxpayers-CPA claims he mailed the Taxpayers- return to the Department on October 15, 1998, within the two year statute. Unfortunately, there is no evidence to verify his claim. The Department has no record of receiving the Taxpayers- 1997 return before May 2001.

The Taxpayers also claim they directed the Department to apply the 1997 refund to their 1998 liability. That action could be construed as a petition or claim for refund. But there is no evidence that the request was made before April 15, 2000, the two year deadline for claiming the 1997 refund. Mr. Rollins testified at the August 21 hearing that he could not remember when the request was made. Because there is no tangible evidence that the Taxpayers requested a refund or credit within the two year statute, a refund of the tax withheld in 1997 was properly denied by the Department. *State v. Pettaway*, [Ms. 2000030 March 9, 2001] ____ So.2d ____ (Ala.Civ.App. 2001).

The Taxpayers also paid \$10,000 with their first extension request in April 1998. The special rule applicable to tax paid through withholding does not apply to that payment. But '40-2A-7(c)(2)a. still requires generally that if a return is not timely filed, as in this case, a refund must be claimed within two years from when the tax was paid. As discussed above, there is no evidence establishing that the Taxpayers claimed a refund or credit within two

years from when the \$10,000 payment was made. The Taxpayers thus also failed to timely claim a refund of the tax paid with their extension request.

The Taxpayers=CPA inquired at the August 21 hearing as to why Alabama's statute of limitations is different from the federal three year statute. Before 1995, ' 40-2A-7(c)(2)a. required that a refund must be claimed within three years from when the return was filed, or two years from when the tax was paid, whichever was later. That statute contained a loophole because it allowed taxpayers that failed to timely file a return to later file a return and claim a refund at any time, even years after the due date of the return. In effect, there was no statute of limitations for taxpayers that failed to timely file, whereas a taxpayer that timely filed had only three years to claim a refund.

The Legislature amended the statute to close the loophole in 1995. See, Act 95-607. Unfortunately, the amendment also created a two year statute for tax paid by withholding or estimated payments if a return is not timely filed. The CPA is correct that the federal government allows a taxpayer three years to claim a refund in such cases. 26 U.S.C. ' 6511.

The controversial two year statute in issue has been the subject of much litigation before the Administrative Law Division. *Carlisle v. State of Alabama, Inc.* 00-584 (Admin. Law Div. 12/12/00); *Baisouny v. State of Alabama, Inc.* 00-314 (Admin. Law Div. 10/5/00); *Sheridan v. State of Alabama, Inc.* 00-347 (Admin. Law Div. 9/7/00); *Reed v. State of Alabama, Inc.* 00-243 (Admin. Law Div. 7/6/00), to name only a few of the cases. In every case, the statute has required the Administrative Law Division to deny any refund claimed outside of the two year statute. Alabama's appellate courts have affirmed that holding. *Pettaway, supra.*

Because the statute is inconsistent with federal law on the subject, the Department has attempted to have legislation passed conforming Alabama law with the federal law. Unfortunately, the Legislature has failed to act to date.

I sympathize with the Taxpayers in this case. I must add, however, that if the Taxpayers had timely inquired concerning the 1997 refund, they would have learned that the Department had never received their 1997 return. They then could have filed a return within the two year period, and obtained the refund in question.

The Department's denial of the Taxpayers' refund is affirmed.

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

Entered September 13, 2001.