

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

vs.

§

DOCKET NO. INC. 93-259

EDWARD D. AND JOANN S. BURQUEZ
426 Chelsea Road
Columbiana, AL 35051,

§

§

Taxpayers.

§

FINAL ORDER

The Revenue Department denied a refund of 1989 income tax filed by Edward D. and Joann S. Burquez (Taxpayers). The Taxpayers appealed to the Administrative Law Division and a hearing was conducted on October 4, 1993. The Taxpayers were notified of the hearing by certified mail, but failed to appear. Assistant counsel Mark Griffin appeared for the Department.

The issue in this case is whether the Taxpayers timely claimed a refund of overpaid 1989 Alabama income tax.

The Taxpayers' 1989 return was due on April 15, 1990, but was not filed by the Taxpayers until October 28, 1992. The return showed tax withheld of \$1,320.00 and a refund due of \$1,198.00.

The Department accepted the return as filed, but denied the refund because the Taxpayers failed to request a refund "within two years from the date of payment of the tax", citing Code of Ala. 1975, §40-2A-7(c)(2)a.

This case is complicated by the fact that the statute of limitations for requesting a refund of income tax changed on

October 1, 1992. Prior to October, 1992, Code of Ala. 1975, §40-18-43 required that a refund of income tax must be requested within three years from when the tax was paid. Tax paid through withholding is deemed paid on the due date of the subject year return. Department Reg. 810-14-1-.19(3). Thus, the 1989 tax in issue was deemed paid by the Taxpayers on April 15, 1990, and under §40-18-43, the Taxpayers had three years from that date, or until April 15, 1993, to request a refund.

The three year period under §40-18-43 was still open when the Uniform Revenue Procedures Act (URPA) took effect on October 1, 1992. URPA repealed §40-18-43 and replaced it with §40-2A-7(c)(2)a. Section 40-2A-7(c)(2)a. provides that a petition for refund must be filed within (1) three years from the date the return was filed, or (2) two years from the date of payment of the tax, whichever is later.

The refund in issue was timely requested and should be granted for two reasons.

First, §83b of URPA provides that "the provisions of this act relating to the time limits . . . for filing petitions for refund or issuing refunds shall . . . (not) accelerate the closing of any tax period which is open on October 1, 1992". See, Code Commissioner's note at end of §40-2A-7. Thus, the time allowed under §40-18-43 cannot be shortened by URPA and consequently the

Taxpayers had until April 15, 1993 to petition for a refund. The Taxpayers did so by filing their return on October 28, 1992.

Second, the Department's interpretation of §40-2A-7(c)(2)a. is wrong. The Department argues that a petition for refund must be filed within two years from payment of the tax. I disagree. Section 40-2A-7(c)(2)a. clearly states that a petition can be filed within two years from when the tax is paid or within three years from when the return is filed, whichever is later. If an original return shows a refund due, the refund is timely claimed, even if the return is delinquent.

I recognize that §40-2A-7(c)(2)a. has created a loophole relating to the refund of taxes paid through withholding. That is, a taxpayer may obtain a refund of withholding tax within 3 years from when a return is filed, even if the return is filed after the due date.

The above loophole was not intended by the drafters and is not present under federal law because for federal refund purposes a delinquent return is deemed filed on its due date. Melchin v. U.S., 145 F.Supp. 193. Quite frankly, I cannot find a specific federal statute requiring the above treatment. Nonetheless, the plain wording of §40-2A-7(c)(2)a. must control. A refund is timely if requested within 3 years from when an original return is filed, even if the return is filed late.

For the above reasons, the refund in issue was timely requested and should be issued. This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on October 14, 1993.

BILL THOMPSON
Chief Administrative Law Judge