

WILLIS J. & DIANE M. BRAYMAN § STATE OF ALABAMA  
48499 Highway 25 South § DEPARTMENT OF REVENUE  
Sterrett, Alabama 35147, § ADMINISTRATIVE LAW DIVISION  
Taxpayers, § DOCKET NO. INC. 95-411  
v. §  
STATE OF ALABAMA §  
DEPARTMENT OF REVENUE.

FINAL ORDER  
DENYING APPLICATION FOR REHEARING

A Final Order was entered in this case on March 5, 1996. The Department timely applied for a rehearing on March 20, 1996. The rehearing is denied for the reasons stated below.

The crux of the March 5 Final Order is that the 1991 tax overpaid by the Taxpayers and carried over as a credit to 1992 was not an "estimated payment" as that term is used in Code of Ala. 1975, §40-2A-7(c)(2)a., as amended by Act 95-607. Consequently, that amount should not be deemed paid on the original due date of the 1991 return. That holding is affirmed.

The Department argues that the amount must be treated as an estimated tax payment because the Alabama return refers to the credit as an "estimated tax". Line 30 of the return reads - "Amount of line 29 (amount overpaid) to be applied to your 1992 estimated tax." But the fact that the return uses the term "estimated tax" does not mean that the amount is an "estimated payment" within the scope of §40-2A-7(c)(2)a. The Department's own instructions concerning Line 30 of the return (see, page 2 of Department's Application for Rehearing) also contradicts the

Department's position in this case - "The amount entered on this line (Line 30) can only be claimed as a credit on your 1992 Alabama return." (emphasis added).

Section 40-2A-7(c)(2)a. was amended by Act 95-607 to rectify a specific loophole. Prior to Act 95-607, if a taxpayer overpaid income tax through withholding or estimated payments during the subject year, then the taxpayer had a full three years from when his return was filed to claim a refund of those amounts, even if the return was filed late. Act 95-607 added the "deemed paid" language relating to withholding and estimated tax payments to eliminate the loophole. Clearly, the amendment was intended to apply only to tax withheld during the subject year pursuant to Code of Ala. 1975, §§40-18-70 et seq. and tax paid by estimated payments during the subject year pursuant to Code of Ala. 1975, §§40-18-82 and 40-18-83. An amount overpaid in a prior year and carried over as a credit to a subsequent year is not an estimated payment within the meaning of §40-2A-7(c)(2)a.

I agree with the Department that the Department still may audit the Taxpayers for either 1991 or 1992. The returns for those years were filed on February 22, 1994 and August 18, 1995, respectively. The Department has at least three years from the filing of those returns to enter a preliminary assessment against the Taxpayers. See, Code of Ala. 1975, §40-2A-7(b)(2).

I also agree that the minimum \$50.00 failure to timely file

penalty is applicable in this case. The Taxpayers, without reasonable cause, failed to timely file their 1992 return.

However, the failure to timely pay penalty is not applicable because the Taxpayers had effectively paid the tax through withholding in 1992. (\$4,087.00 withheld during 1992 versus total liability for the year of \$3,205.00). The negligence penalty also is not applicable.

I disagree that the Taxpayers are in effect revoking their election to carry over the 1991 overpayment to apply to their 1992 liability. That amount was in fact carried over as a credit to 1992, effective when the Taxpayers filed their 1992 return in August 1995. However, because the 1992 liability had already been previously paid in full through withholding in 1992, the credit resulted in an overpayment for 1992, which should be refunded or allowed as a credit to the subsequent year.

The Final Order previously entered in this case is affirmed, except that the amount of the refund should be reduced by the minimum \$50.00 failure to timely file penalty.

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

Entered March 26, 1996.

BILL THOMPSON  
Chief Administrative Law Judge