

COMPAQ COMPUTER CORPORATION
20555 SH 249
Houston, Texas 77205-0804,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

§

§

§

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. F. 95-435

FINAL ORDER

The Revenue Department assessed franchise tax, penalty, and interest against Compaq Computer Corporation ("Taxpayer") for the years 1991, 1992, and 1993. The Taxpayer paid the tax and interest, but appealed the penalty to the Administrative Law Division. A hearing was conducted on January 8, 1996. The Taxpayer notified the Administrative Law Division prior to the hearing that it would not appear. Assistant Counsel Jeff Patterson represented the Department.

The issue in this case is whether the penalty assessed by the Department should be waived. That issue involves two sub-issues:

(1) Is the Administrative Law Division authorized to waive the penalty; and

(2) Does "reasonable cause" exist to waive the penalty as required by Code of Ala. 1975, §40-2A-11(h).

The Taxpayer failed to file Alabama franchise tax returns for the years in question. The Department audited the Taxpayer and assessed the tax due, plus penalty and interest. As stated, the Taxpayer does not dispute and has paid the tax and interest assessed by the Department. Rather, the Taxpayer argues that the

penalty should be waived for reasonable cause. The Taxpayer's appeal letter to the Administrative Law Division reads as follows:

Compaq voluntarily began filing Alabama corporate income tax returns in 1991 when changes in the way Compaq did business established nexus in the State of Alabama. As a first time taxpayer in Alabama, Compaq's tax department was unaware of the Alabama franchise tax provision and Annual Report requirements and therefore overlooked the filing of these returns. Upon learning in audit of the requirements, the Company was extremely cooperative in providing accurate information expeditiously in order to be in full compliance with Alabama law. Compaq has remitted all franchise tax, annual report fees and interest without delay. Although Alabama law does not include specific waiver of penalties in situations such as this, the Company was clearly not fraudulent and therefore respectfully requests abatement of the penalties assessed.

Issue I. Does the Administrative Law Division have the authority to waive the penalty in issue?

Prior to October 1, 1992, the Alabama Revenue Code, Title 40, contained numerous penalty provisions for failure to timely file a return and/or pay the tax due. The pre-1992 Code also included numerous statutes giving the Department the discretion to waive a penalty for good cause. For example, §40-23-16 related to sales tax and provided "that the Department may, if a good and sufficient reason is shown, waive or remit the penalty . . ." Section 40-1-6 provided "the state department of revenue is hereby empowered and authorized, if and when good and sufficient reason is shown, to waive or remit" the general late filing and late payment penalties levied at §40-1-5. Because the waiver statutes specified that "the department" may or was authorized to waive a penalty, Alabama's appellate courts construed the statutes as giving only the

Department the sole discretion to waive a penalty, not a reviewing circuit or appellate court. State v. Leary and Owens Equipment, Co., 304 So.2d 604 (1974).

The Uniform Revenue Procedures Act ("URPA") was enacted effective October 1, 1992. URPA repealed the numerous penalty and waiver provisions contained in Title 40, and in their stead provided a comprehensive uniform penalty statute now codified at Code of Ala. 1975, §40-2A-11. Section §40-2A-11(h) included a general penalty waiver provision, which again authorized "the department" to waive any penalty for reasonable cause. As were the prior statutes, §40-2A-11(h), as initially enacted, was construed as giving the Department the exclusive authority to waive a penalty, not the Administrative Law Division or a circuit or appellate court. See generally, S.C. Bass Lumber Co., Inc. v. State, Admin. Law Docket Inc. 95-271, decided July 31, 1995; Winston C. Bailey v. State, Admin. Law Docket Inc. 95-110, decided March 22, 1995.

Act 95-607 was signed into law on July 31, 1995. That Act amended §40-2A-11(h) as follows, with the deleted language struck and the added language underlined:

Waiver of penalties. -- The department is authorized to reduce or waive any penalties Notwithstanding the foregoing, no penalty under Title 40 or Section 10-28-15.02 shall be assessed, or if assessed, shall be waived upon a determination of reasonable cause. Reasonable cause shall include, but not be limited to, those instances where in which the taxpayer has acted in good faith. in filing a return or reporting or paying any

tax. However, the The burden of proving reasonable cause shall be on the taxpayer.

What was the intent of Act 95-607? Specifically, does §40-2A-11(h), as amended, now give the Administrative Law Division and the courts the authority to waive a penalty for reasonable cause. In my opinion, it does.

As stated, the Department had sole discretion under prior statutes because those statutes specifically authorized "the department" to waive a penalty. However, Act 95-607 deleted the word "department" from §40-2A-11(h). It must be presumed that the Legislature did not do a meaningless thing. Powers v. State, 591 So.2d 587 (1991). Consequently, the Legislature must have intended something by removing the word "department" from subparagraph (h).

The only reasonable explanation is that the Legislature no longer intended that only the Department could waive a penalty, but instead intended to also give the Administrative Law Division and the courts the ability to waive a penalty for reasonable cause. Otherwise, the amendment to subparagraph (h) would be meaningless.

In addition, the Administrative Law Division and the circuit courts are empowered generally to review a final assessment on appeal and either increase or decrease the assessment to reflect the correct amount due. §40-2A-7(b)(5)d.1. Consequently, if a penalty is included in a final assessment, on appeal the Administrative Law Division or a circuit court has the specific statutory authority to review and adjudge if reasonable cause

exists to waive the penalty. That authority applies to all penalties on appeal or otherwise open on the effective date of Act 95-607, July 31, 1995.

Taxpayers in other penalty cases pending before the Administrative Law Division have argued that the clear intent of the drafters and also the supposed intent of the Legislature in amending §40-2A-11(h) by Act 95-607 was to give the Administrative Law Division and the courts the discretion to waive penalties. However, the intent of a statute can only be determined from the language used. What the drafters or even the individual legislators subsequently claim what may have been intended does not control. Pilgrim v. Gregory, 594 So.2d 114, 119 (Ala.Civ.App. 1991).

The wording of subsection (h), as amended by Act 95-607, is not crystal clear. But by deleting "department" from subsection (h), the Legislature could only have intended that the Department would no longer have sole discretion to waive penalties. Consequently, the Administrative Law Division and the courts, under their general review authority, can now review a penalty on appeal and waive it for reasonable cause.

Issue II. Is there "reasonable cause" to waive the penalty in issue?

Section 40-2A-11(h) provides that "reasonable cause shall include, but not be limited to, those instances in which the

taxpayer has acted in good faith." There are no Alabama cases defining "reasonable cause" or "good faith" for purposes of waiving a penalty. However, the Alabama waiver provision is similar in substance to the federal waiver provision at 26 U.S.C. §6651(a)(1). Where an Alabama statute is modeled after or is similar in substance to a federal statute, federal authority should be considered in construing the Alabama statute. Best v. State, Dept. of Revenue, 417 So.2d 197 (Ala.Civ.App. 1981). For federal purposes, reasonable cause is established if a taxpayer has exercised "ordinary business care and prudence" in attempting to timely file a return and pay the tax due. U. S. v. Boyle, 105 S.Ct. 687, 689 (1985).¹

¹ In Boyle, at footnote 1, page 689, the court discusses what the IRS considers to be reasonable cause, as follows:

The Internal Revenue Service has articulated eight reasons for a late filing that it considers to constitute "reasonable cause." These reasons include unavoidable postal delays, the taxpayer's timely filing of a return with the wrong IRS office, the taxpayer's reliance on the erroneous advice of an IRS officer or employee, the death or serious illness of the taxpayer or a member of his immediate family, the taxpayer's unavoidable absence, destruction by casualty of the taxpayer's records or place of business, failure of the IRS to furnish the taxpayer with the necessary forms in a timely fashion, and the inability of an IRS representative to meet with the taxpayer when the taxpayer makes a timely visit to an IRS office in an attempt to secure information or aid in the preparation of a return. Internal Revenue Manual (CCH) §4350, (24) ¶22.-2(2) (Mar. 20, 1980) (Audit Technique Manual for Estate Tax Examiners). If the cause asserted by the taxpayer does not implicate any of these eight reasons, the district director determines whether the asserted cause is reasonable. "A cause for

delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly negatives willful neglect will be accepted as reasonable." *Id.*, ¶22.2(3).

The "good faith" standard set out in §40-2A-11(h) is perhaps more lenient than the federal standard of ordinary business care and prudence. For example, in In re Brown, 743 F.2d 664 (1984), a taxpayer's good faith but erroneous belief that certain employees were independent contractors did not excuse the taxpayer's failure to timely remit withholding taxes concerning the employees. But if the good faith standard of §40-2A-11(h) is applied, that same taxpayer, having acted in good faith, would perhaps be relieved of the penalty. In any case, the federal standard should still be used as a general guideline by the Department.

In summary, §40-2A-11(h), as amended, provides that if an Alabama taxpayer has attempted in good faith and with reasonable diligence to properly and timely file a return and/or pay the tax due, a penalty should not be assessed, and if assessed, should be waived. What constitutes good faith and reasonable cause must be decided on the facts of each case.

The Taxpayer argues that it failed to file or pay Alabama franchise tax because it was not aware of the tax. However, as a large corporate taxpayer, the Taxpayer was under a duty and certainly had the ability to ascertain what Alabama taxes would be due when it began doing business in Alabama. The Alabama franchise tax is not an obscure or unusual tax, and the Taxpayer could easily have learned of the tax by inquiring with the Department. The Taxpayer apparently failed to do so. Consequently, under the

circumstances, reasonable cause does not exist to waive the penalty in issue.

The penalty assessed by the Department is affirmed. Judgment is entered against the Taxpayer in the amount of \$6,250.89.

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

Entered February 12, 1996.

BILL THOMPSON
Chief Administrative Law Judge