

MAXWELL C. & RITA M. HUDSON
P.O. Box 43424
Birmingham, AL 35243,

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayers,

DOCKET NO. INC. 97-356

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed 1995 income tax against Maxwell C. and Rita M. Hudson ("Taxpayers"). The Taxpayers appealed pursuant to Code of Ala. 1975, 40-2A-7(b)(5)a. A hearing was conducted on December 17, 1997. The Taxpayers' authorized representative, CPA Charles Stewart, submitted a written response in lieu of appearing. Assistant Counsel David Avery represented the Department.

The two issues in dispute are:

(1) Should the appeal be dismissed for lack of jurisdiction because the Taxpayers failed to timely appeal the final assessment in issue within 30 days, as required by Code of Ala. 1975, 40-2A-7(b)(5)a.; and,

(2) If the Taxpayers timely appealed, should they be allowed to carry over a 1994 net operating loss ("NOL") to 1995. That issue turns on whether the Taxpayers timely elected to forgo the NOL carry back to prior years.

The Taxpayers filed their original 1994 Alabama income tax return on May 24, 1995. Enclosed with the return was a federal extension request that had been filed

with the IRS. The Taxpayers failed to file either an Alabama or a federal extension request with the Department before the April 15, 1995 due date of the 1994 return.

The Taxpayers filed a duplicate 1994 Alabama return on June 26, 1995. That return included a form NOL-85, on which the Taxpayers elected to forego the carryback of a NOL claimed on the return .

The Taxpayers carried over and claimed the 1994 NOL on their 1995 Alabama return. The Department denied the carryover loss because the Taxpayers failed to timely elect to forego carrying the loss back. Based thereon, the Department entered the final assessment in question on July 21, 1997. The Taxpayers appealed to the Administrative Law Division.

The Taxpayers' appeal is dated August 18, 1997. However, it was not received by the Administrative Law Division until August 26, 1997. The envelope in which the appeal was mailed has a postage meter date of August 20, 1997. Unfortunately, the envelope was not postmarked by the U. S. Postal Service. The Taxpayers' representative later submitted a copy of a certified mail return receipt card addressed to the Administrative Law Division, showing a delivery date of August 26, 1997, the date on which the appeal was actually received by the Administrative Law Division.

ISSUE I - WAS THE FINAL ASSESSMENT TIMELY APPEALED?

A taxpayer is required to file a notice of appeal with the Administrative Law Division within 30 days from when a final assessment was entered. Code of Ala.

1975, 40-2A-7(b)(5)a. The 30 day appeal period must be strictly followed. Dansby v. State, Dept. of Revenue, 567 So.2d 1066 (Ala.Civ.App. 1990). If the appeal is not timely filed, "the appeal shall be dismissed for lack of jurisdiction." Code of Ala. 1974, 40-2A-7(b)(5)c.

To be timely filed, the appeal must either be received by the Administrative Law Division by the due date, or postmarked by the U. S. Postal Service by the due date. Code of Ala. 1975, 40-1-45.

The Taxpayers' notice of appeal in this case was not received by the Administrative Law Division within the required 30 days. Nor can it be treated as timely filed under 40-1-45 because it was not postmarked by the U. S. Postal Service within the required 30 days. A postage meter stamp within the 30 day period is not sufficient. Consequently, because the appeal was not timely filed, the appeal is dismissed for lack of jurisdiction.

ISSUE II - SHOULD THE NOL CARRYOVER BE ALLOWED?

Although this appeal must be dismissed as indicated above, the Taxpayers may still pay the assessment in full and then petition for a refund. See, Code of Ala. 1975, 40-2A-7(c)(1). Consequently, to avoid future litigation, the NOL issue will also be addressed.

Code of Ala. 1975, 40-18-15(a)(16) requires that a NOL must first be carried back to prior years. Subparagraph (16)(d) allows a taxpayer to elect to relinquish or forego a carryback, and instead carry an NOL forward to subsequent years.

However, the statute requires that the election "shall be made by the due date, including extensions of time", for filing the loss year return. See also, Dept. Reg. 810-3-15-.22. That regulation provides that if an election to forego is not timely filed, an NOL must first be carried back and applied to prior years.

The Taxpayers in this case failed to timely file either an Alabama or a federal extension by the due date of their 1994 Alabama return. Consequently, the form NOL-85 election to forego the carryback filed with the duplicate return in June 1995 was not timely

filed by the due date. The NOL carryover to 1995 was thus correctly denied by the Department.

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

Entered January 23, 1998.

BILL THOMPSON
Chief Administrative Law Judge

BT:ks

cc: David E. Avery, III, Esq.
Charles W. Stewart, CPA
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