

WADE H. GRIFFIN  
2909 Government Blvd.  
Mobile, AL 36606-2615,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. INC. 04-165

v.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

### FINAL ORDER

The Revenue Department assessed Wade H. Griffin (“Taxpayer”) for 1994 income tax, penalties, and interest. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on June 16, 2005. Michael Smith represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

This case involves two issues: (1) was the tax timely assessed by the Department; and, (2) was the tax and/or penalty discharged in bankruptcy.

The facts are undisputed. The Taxpayer filed his 1994 Alabama income tax return on October 17, 1995. The IRS subsequently determined that the Taxpayer owed additional federal tax in 1994 based on a \$4,997,896 settlement he received in that year. The Taxpayer appealed to the U.S. Tax Court, which ruled for the IRS. The Eleventh Circuit Court of Appeals affirmed the Tax Court on February 2, 2002.

The Department received the IRS information concerning the Taxpayer’s additional 1994 federal liability. It adjusted the Taxpayer’s 1994 Alabama liability accordingly, and billed the Taxpayer on November 13, 2002 for the additional tax, penalty, and interest due. The Taxpayer failed to respond. The Department consequently entered a preliminary assessment for the amounts due on January 23, 2003.

The Taxpayer petitioned for a review of the preliminary assessment. The Department reviewed the case, and determined on December 17, 2003 that the preliminary assessment should be made final. Shortly thereafter, the Taxpayer filed a petition in U.S. Bankruptcy Court on December 19, 2003. The Department entered the final assessment in issue on December 29, 2003. As indicated, the Taxpayer timely appealed to the Administrative Law Division. The Taxpayer was also discharged from bankruptcy on May 5, 2004.

**Issue (1). Was the tax timely assessed?**

Code of Ala. 1975, §40-2A-7(b)(2)g.1. allows the Department one year after it is notified or otherwise learns that an IRS adjustment has become final within which to enter a preliminary assessment based on the IRS adjustment. Subparagraph (b)(2)g.3. specifies that an IRS change becomes final on “the date of any administrative or judicial order, judgment, or decree from which no further appeal was or may be taken.”

In this case, the Eleventh Circuit affirmed the Tax Court on February 2, 2002. The Department had one year from when it was notified or otherwise learned of that decision within which to assess the Taxpayer for additional Alabama tax due. The Department entered the preliminary assessment against the Taxpayer on January 23, 2003, which was within one year from the Eleventh Circuit’s decision, and thus clearly within one year from when the Department was notified or otherwise learned of the decision. The tax, penalty, and interest were thus timely assessed.

**Issue (2). Was the tax and/or penalty dischargeable?**

The U.S. Bankruptcy Code provides that a priority tax is not dischargeable in bankruptcy. 11 U.S.C. §523(a)(1)(A). Pre-petition income tax constitutes a priority tax in

the three instances specified in §§507(a)(8)(i), (ii), and (iii). Subparagraph (i) is not relevant to this case. Subparagraph (ii) provides priority status for unsecured income tax assessed within 240 days before the petition is filed. Subparagraph (iii) provides priority status for income tax that was not assessed before the bankruptcy filing, but which was assessable after the filing under applicable law or by agreement.

The Department argues in its brief that the taxes in issue were not dischargeable pursuant to either subparagraphs (ii) or (iii). Subparagraph (ii) does not apply, however, because the final assessment in issue was not entered, i.e., the tax was not assessed, until December 29, 2003, after the Taxpayer filed for bankruptcy.

Subparagraph (iii) does apply because although the tax in issue was not finally assessed before the petition was filed, it was assessable post-petition. As discussed, the one year statute of limitation for assessing tax based on IRS information was satisfied when the Department entered the preliminary assessment on January 23, 2003. The tax was thereafter assessable because if a preliminary assessment is timely entered, Alabama law does not specify a time period within which a final assessment must be entered. Consequently, because the income tax in issue was assessable after the Taxpayer's petition was filed, it was a priority tax, and thus not dischargeable. For cases supporting the above conclusion, see *In Re Carl T. Anderson v. U.S. of America Internal Revenue Service*, 157 B.R. 104 (May 7, 1993); *In Re Ronald Doerge v. U.S.*, 181 B.R. 358 (April 16, 1995); *In Re Lemke, William R. & Lemke, Mary Ann*, 145 B.R. 1005 (Feb. 4, 1991).

The Taxpayer argues that the penalty in issue is dischargeable pursuant to 11 U.S.C. §523(a)(7). He contends that pursuant to the above statute, a penalty is dischargeable, even if the tax is not, if the transaction giving rise to the penalty occurred

more than three years before the bankruptcy petition was filed. The Taxpayer's argument is correct. In *In re Burns*, 887 F.2d 1541 (11th Cir. 1989), the Eleventh Circuit held as follows:

While the language of this subsection frames nondischargeable tax penalties as an exception to an exception to an exception, once the triple negative is taken into account the meaning of the provision gains clarity. A tax penalty is discharged if the tax to which it relates is discharged (in the precise terms of the statute, not nondischargeable) or if the transaction or event giving rise to the penalty occurred more than three years prior to the filing of the bankruptcy petition. Since the statute uses the disjunctive, a tax penalty that does not qualify for discharge under one of the two aforementioned circumstances may still qualify under the other.

*Burns*, 887 F.2d at 1544.

In this case, the transaction that gave rise to the penalty was the Taxpayer's failure to timely pay the full amount due on or before the October 15, 1995 due date of the 1994 return. Because that transaction occurred more than three years before the Taxpayer filed for bankruptcy, the penalty was discharged.

The final assessment, less the penalty, is affirmed. Judgment is entered against the Taxpayer for \$151,113.29. Additional interest is also due from the date of entry of the final assessment, December 29, 2003.

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

Entered September 21, 2005.

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BILL THOMPSON  
Chief Administrative Law Judge