

JAMES W. TREMONTANA
979 Tremontana Drive
Prattville, AL 36067-4224,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

Taxpayer,

§

DOCKET NO. INC. 04-355

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

**PRELIMINARY ORDER DENYING
DEPARTMENT'S MOTION TO DISMISS AND DIRECTING
TAXPAYER TO FILE RETURNS AND SUPPORTING DOCUMENTS
WITH THE ADMINISTRATIVE LAW DIVISION**

This case involves disputed final assessments of 1997, 1998, and 1999 income tax entered against James W. Tremontana ("Taxpayer"). The Department has filed a motion to dismiss, arguing that the Taxpayer failed to appeal within 30 days from the date of entry of the final assessments, as required by Code of Ala. 1975, §40-2A-7(b)(5)a. The motion is denied for the reasons explained below.

The Department entered preliminary assessments of 1997, 1998, and 1999 income tax against the Taxpayer on February 17, 2004. The Taxpayer had 30 days to petition for a review of the preliminary assessments. Code of Ala. 1975, §40-2A-7(b)(4)a.

The Taxpayer executed a Petition for Review on April 8, 2004 and mailed it on that date to the Department's Individual Income Tax Division, Individual Hearing Section. That Section received the petition on April 12, 2004. The final assessments in issue were by coincidence also entered on April 12, 2004.

The Individual Hearing Section forwarded the Taxpayer's Petition to the Administrative Law Division on April 13, with copies of the final assessments entered on April 12. The Administrative Law Division docketed the Petition as an appeal from the final

assessments, and so notified the Taxpayer by acknowledgment letter dated April 13, 2004.

That letter reads in part:

The Administrative Law Division has received and docketed your notice of appeal concerning disputed final assessments of 1997, 1998, and 1999 income tax entered by the Department against James W. Tremontana. . . . You do not need to take any further action at this time

The Department claims that the Taxpayer's Petition for Review cannot be treated as an appeal because it was submitted to the Department before the final assessments in issue were entered. However, the Administrative Law Division did not receive the Petition until April 13, 2004, after the final assessments had been issued. The Administrative Law Division thus correctly treated the Petition as an appeal from the final assessments. The Individual Hearings Section also treated the Petition as an appeal of the final assessments because otherwise it would not have forwarded the Petition to the Administrative Law Division with copies of the final assessments.

A similar fact situation was involved in a prior appeal before the Administrative Law Division, *Press South, Inc. v. State of Alabama*, W. 02-152 (Admin. Law Div. O.P.O. 8/9/02). In that case, the Department billed the taxpayer for withholding tax, penalties, and interest. The taxpayer paid the tax and interest, but wrote a letter to the Department's Individual Income Tax Division asking that the penalties be waived. The Department denied the request, and entered a final assessment against the taxpayer.

The taxpayer's letter to the Individual Income Tax Division was subsequently forwarded to the Administrative Law Division on the same day the Department entered the final assessment against the taxpayer. The Administrative Law Division treated the letter as a timely filed appeal. The Department objected, arguing that the Administrative Law

Division was without jurisdiction because the Taxpayer's letter submitted to the Department before the final assessment was entered could not be treated as a timely filed appeal. The Administrative Law Division rejected the Department's position, as follows:

Code of Ala. 1975, §40-2A-7(b)(5)a. provides that a taxpayer may appeal a final assessment to the Administrative Law Division within 30 days from the date the final assessment is entered. If the appeal is not timely filed within 30 days, it must be dismissed for lack of jurisdiction. Code of Ala. 1975, §40-2A-7(b)(5)c.; *Dansby v. State, Dept. of Revenue*, 560 So.2d 1066 (Ala.Civ.App. 1990).

The Department argues that Marino's January 18, 2002 letter cannot be treated as a timely filed appeal because it pre-dated the February 8, 2002 final assessment. I disagree.

The Administrative Law Division received Marino's appeal letter on February 8, 2002, the same day the final assessment was entered. Consequently, the appeal was technically filed with the Administrative Law Division within 30 days from when the final assessment was entered. The Department is also estopped from challenging the timeliness of the appeal based on the rationale of *Ex parte Four Seasons*, 450 So.2d 110 (Ala. 1984).

In *Ex Parte Four Seasons*, a property owner appealed to the Lauderdale County Board of Equalization concerning a property appraisal. The Lauderdale County Tax Assessor notified the property owner on October 20, 1982 that on "this date," the Board had denied the appeal. The applicable statute allowed the property owner 30 days to appeal to circuit court. The property owner appealed to circuit court on November 18, 1982, within 30 days from October 20, 1982. The State moved to have the appeal dismissed for lack of jurisdiction because the Board of Equalization had actually made its final decision in the matter on October 4, 1982, not October 20, 1982, as the property owner had been informed by the Tax Assessor. The circuit court dismissed the appeal. The Court of Civil Appeals affirmed the circuit court. *Ex parte Four Seasons*, 450 So.2d 108 (Ala.Civ.App. 1983).

The Alabama Supreme Court reversed. That Court first recognized that the doctrine of equitable estoppel generally does not apply to the State or its subdivisions. It held, however, that where the untimeliness of an appeal was caused by misinformation furnished by the government, which was relied on by the appellant, the State should be estopped from arguing that the appeal was untimely.

The doctrine of estoppel has not been applied against the

State acting in its governmental capacity in the assessment and collection of taxes. *Community Action Agency of Huntsville, Madison County, Inc. v. State*, 406 So.2d 890 (Ala. 1981); *State v. Maddox Tractor & Equipment Co.*, 260 Ala. 136, 69 So.2d. 426 (1953). However, the petitioners in this case are not seeking to estop the state from assessing or collecting the tax owed. Rather, they are attempting to preserve their right to a hearing in a state court, where the untimeliness of the filing of their appeal was caused by misinformation furnished by the state's officer and then relied upon by the petitioners to their detriment.

Ex parte Four Seasons, 450 So.2d at 111.

The rationale of *Ex parte Four Seasons* applies in this case. The Administrative Law Division notified Marino by letter on February 12, 2002 that it had treated his January 18 letter as an appeal of the final assessment in issue. The letter also notified Marino that he did not need to take any further action concerning the matter. After receiving the above letter, Marino certainly and reasonably believed that the final assessment had already been appealed. Consequently, he took no further action in the matter, as instructed by the Administrative Law Division's February 12 letter, although the 30 day appeal period was still open. To dismiss the Taxpayer's appeal under the circumstances would constitute a denial of due process, and, as stated by Justice Adams in *Ex parte Four Seasons*, "would result in such manifest injustice that it cannot be allowed." *Ex parte Four Seasons*, 450 So.2d at 112.

Press South, at 2 – 4.

Paragraphs 4, 5, and 6 in the Department's motion to dismiss address the substantive issues of the case. Consequently, the motion will be treated as the Department's Answer in the case.

The Taxpayer is directed to file returns for the subject years with the Administrative Law Division by July 30, 2004. He should also submit proof that he had four dependents in the subject years, and also records substantiating all deductions claimed on the returns. The returns and records will be forwarded to the Income Tax Division for review. An appropriate Order will then be entered after the Department responds.

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Entered June 10, 2004.

BILL THOMPSON
Chief Administrative Law Judge