

FREEMAN E. & DEBORAH JOCKISCH §  
3881 BEBEE POINT  
THEODORE, AL 36582, §

Taxpayers, §

v. §

STATE OF ALABAMA §  
DEPARTMENT OF REVENUE.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. INC. 06-1044

### FINAL ORDER

The Revenue Department assessed Freeman E. and Deborah Jockisch (together “Taxpayers”) for 1997, 1998, 1999, and 2000 income tax. The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on February 6, 2007. CPA Ted Langley represented the Taxpayers. Assistant Counsel Ron Bowden represented the Department.

Freeman Jockish (individually “Taxpayer”) was convicted in federal court in 2004 for filing false federal income tax returns for the years 1997 through 2000. The Taxpayer was found guilty of knowingly failing to report income on his federal returns that he had received in the subject years from various illegal activities. Specifically, the Taxpayer failed to report \$17,599 in 1997, \$36,351 in 1998, \$10,000 in 1999, and \$27,000 in 2000.

The Department adjusted the Taxpayers’ Alabama returns for the subject years by adding the above amounts to the Taxpayers’ income in those years. It then assessed the Taxpayers for the additional tax due, plus interest and the 50 percent fraud penalty levied at Code of Ala. 1975, §40-2A-11(d).

The Department argues that although the Taxpayer was convicted of filing false returns and not fraud or tax evasion, the underlying facts on which he was convicted establish that he filed fraudulent returns with the intent to evade tax. It contends that

because the Taxpayer filed fraudulent returns, it was authorized to assess the Taxpayer for additional tax due at any time, see Code of Ala. 1975, §40-2A-7(b)(2)a.

The Taxpayers' representative contends that the Department's adjustments are based on a draft federal Revenue Agent's Report that is erroneous and that was never issued by the IRS. He claims that the Taxpayers are entitled to additional deductions in the subject years, which if allowed, would result in no tax due or refunds in those years.

The representative also argues that the Taxpayer's federal conviction for filing false returns is not sufficient to show that he filed fraudulent returns, citing *McGowan v. Comm.*, (2006 CA 11) 98 AFTR 2d 2006-5081, aff. (2004) TC Memo 2004 – 146, RIATC Memo ¶2004 – 146, 87 CCH TCM 1421. He further asserts that because the Department failed to otherwise prove fraud, it failed to timely assess the Taxpayers within the three year statute of limitations at Code of Ala. 1975, §40-2A-7(b)(2).

The Department is authorized to assess a taxpayer for additional tax based on the best information available. Code of Ala. 1975, §40-2A-7(b)(1)a. The Department assessed the Taxpayers in this case based on income information obtained pursuant to the Taxpayer's federal conviction for filing false returns.<sup>1</sup> The final assessments based on that information are *prima facie* correct, and the burden was on the Taxpayers to prove that they are incorrect. Code of Ala. 1975, §40-2A-7(b)(5)c.

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<sup>1</sup> There is no evidence that the Department also received a draft RAR report concerning the Taxpayers for the subject years. In any case, contrary to the Taxpayers' representative's claim, the Department did not use a federal RAR to compute the tax in issue. It only used the income information obtained from the Taxpayer's criminal conviction.

As indicated, the Taxpayers' representative claims that the Taxpayers should be allowed additional deductions in the subject years. The representative failed, however, to present evidence supporting that claim. He also did not dispute that the Taxpayers had failed to report the income in issue on their returns for the subject years. Consequently, the tax due as assessed by the Department is affirmed.

Concerning the fraud issue, the *McGowan* case does hold that while a taxpayer's conviction for filing a false return is a badge or indication of fraud, the taxpayer is not estopped from contesting the fraud claim. The taxpayer in *McGowan* successfully did so. However, the facts in *McGowan* can be distinguished from the facts in this case.

In *McGowan*, the taxpayer conceded that he had failed to report income on his returns. He argued, however, that the underpayments resulted from a misunderstanding between him and his accountant. The tax court apparently agreed, finding that the accountant was at fault for not using the taxpayer's records when he prepared the taxpayer's returns. The court thus held that while the taxpayer's conviction for filing false returns was a badge of fraud, the taxpayer had presented sufficient evidence to establish that he did not intend to evade his tax liabilities. In other words, the taxpayer in *McGowan* refuted the government's evidence of fraud, i.e., his criminal conviction for filing false returns, by presenting evidence that he did not willfully and knowingly intend to evade tax. No such evidence was presented in this case.

The Taxpayer in this case received income from illegal sources and knowingly failed to report the illegal income on his federal and Alabama returns. He was subsequently convicted of filing false returns because, as stated in the indictment, "he did not believe (the

returns) to be true and correct,” and “he then and there well knew and believed” that he had received income in excess of the amounts reported in each year. See, Counts Twenty Five through Twenty Eight, Dept. Ex. 1 at pages 14 – 17.

The fact that the Taxpayer knowingly failed to report illegally obtained income constitutes clear and convincing evidence sufficient to carry the government’s burden of proving that the Taxpayer intended to evade tax. Unlike the taxpayer in *McGowan*, the Taxpayer has presented no evidence explaining why the income in issue was not reported. The fraud penalty is thus justified, and the Department was not time-barred from assessing the Taxpayers for the years in issue.

The final assessments, including the fraud penalty, are affirmed. Judgment is entered against the Taxpayers for 1997 tax, penalty, and interest of \$1,810.47; 1998 tax, penalty, and interest of \$3,561.86; 1999 tax, penalty, and interest of \$949.60; and 2000 tax, penalty, and interest of \$2,442.99. Additional interest is also due from the date the final assessment were entered, August 19, 2006.

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

Entered April 24, 2007.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Ron Bowden, Esq.  
Ted Langley, CPA  
Tony Griggs