

NATIONAL CITY COMMERCIAL  
CAPITAL CORPORATION  
95 DALTON AVENUE  
CINCINNATI, OH 45203-1101,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 09-1099

**PRELIMINARY ORDER DENYING TAXPAYER'S  
MOTION TO DISMISS**

This appeal involves final assessments of local, sellers use, and rental tax for September 2001 through December 2006, and a final assessment of consumer use tax for February 2003 through February 2006 entered against the above Taxpayer. The Taxpayer has moved to have the final assessment dismissed because the Department has failed to file its Answer within 30 days as required by Code of Ala. 1975, § Code of Ala. 1975, §40-2A-9(c). The motion is denied.

The Taxpayer timely appealed on October 28, 2009. The Administrative Law Division notified the Department's Legal Division by letter dated October 30, 2009 that the Taxpayer had appealed, and that it should file an Answer in the case. It is not known when the Legal Division received the letter.

The Administrative Law Division may dismiss an appeal or grant relief to either party if the opposing party fails to comply with a statute or regulation concerning appeals to the Administrative Law Division. See, Code of Ala. 1975, §40-2A-9(b) and Reg. 810-14-1.24(3). The decision to do so, however, is discretionary with the Division. "The Administrative Law Judge shall have discretion to dismiss the appeal, grant all of or part of the relief sought by the taxpayer, or take any other action appropriate under the

circumstances.” Reg. 810-14-1-.24(3).

In *JSC Brewton, Inc. v. State of Alabama, Corp.* 07-554 (Admin. Law Div. Order Denying Taxpayer’s Motion to Dismiss 12/3/2007), the issue was whether the Administrative Law Division was required to grant the taxpayer relief because the Department had failed to file its Answer within 90 days. The Administrative Law Division found that the Answer had been timely filed. It also held that even if the Answer had been untimely, the Administrative Law Division was not required to grant the taxpayer relief, but rather had the discretion to do so.

The Administrative Law Division has also held that the 90 day Answer period is mandatory. On reconsideration, however, Reg. 810-14-1-.24 gives the Administrative Law Division discretion to grant a taxpayer the requested relief. Granting relief is thus discretionary, not mandatory. If there is reasonable cause or a plausible explanation why the Department did not timely file its Answer, then the Administrative Law Division, in its discretion, may not grant a taxpayer relief. If, however, there is no reasonable cause why the Department failed to comply with §40-2A-9(c), relief will be granted.

*JSC Brewton* at 3.

Likewise, the Administrative Law Division is not required to grant the Taxpayer relief in this case because the Department still has time to file its Answer within the 90 day statute of limitations.

The Department is directed to file its Answer by January 28, 2010. The case will then be set for hearing, or other appropriate action will be taken.

Entered December 21, 2009.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: J. Wade Hope, Esq. (w/enc.)  
Bruce P. Ely, Esq.  
Joe Cowen  
Mike Emfinger