

MICHAEL C. & JUNE M. ABERNATHY §
618 TOMAHAWK TRAIL
ANNISTON, AL 36206, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayers, §

DOCKET NO. INC. 09-1128

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed Michael C. and June M. Abernathy (“Taxpayers”) for 2005 and 2006 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 4, 2010. The Taxpayers’ representative was notified of the hearing by certified mail, but failed to appear. Assistant Counsel David Avery represented the Department.

The Taxpayers reported a Schedule D loss on their 2004 Alabama return. The loss resulted in an excess net operating loss (“NOL”) of \$286,350. The Taxpayers subsequently carried the NOL over to 2005 and 2006.

The Department audited the Taxpayers’ 2004 return and determined that the loss claimed on the return was a non-business loss. Non-business losses can only be applied to off-set non-business income in the loss year, and cannot be carried forward or back to other years. Code of Ala. 1975, §40-18-15.2(5)c. The Department accordingly disallowed the NOL carryover to 2005 and 2006, and assessed the Taxpayers for the additional tax due.

Alabama law allows a taxpayer to carry a business-related loss back to prior years and over to later years. Code of Ala. 1975, §40-18-15.2. As previously stated, however, a

non-business loss cannot be carried back or forward, and can only be applied to offset non-business income in the loss year. Section 40-18-15.2(5)c. The burden is also on the taxpayer claiming an NOL carryover to prove that the dominant motive for entering into the transaction that resulted in the loss was business-related. *United States v. Generes*, 92 S. Ct. 827 (1972).

The 2004 loss in issue resulted from a loan by the Taxpayers to a corporation 100 percent owned by the Taxpayers. The loss was thus a non-business loss, and could not be carried over to 2005 and 2006.

The 2005 and 2006 final assessments are affirmed. Judgment is entered against the Taxpayers for \$6,619.33 and \$1,278.19, respectively. Additional interest is also due from the date the final assessments were entered, October 13, 2009.

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

Entered February 8, 2010.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Gwendolyn B. Garner, Esq.
Jason G. King, CPA
Kim Peterson