

DEBORAH A. STEPHENS  
c/o EDWARD L. THOMAS, JR., CPA  
P.O. BOX 43103  
BIRMINGHAM, AL 35243,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. INC. 09-835

### SEVENTH PRELIMINARY ORDER

The Revenue Department assessed Deborah A. Stephens ("Taxpayer") for 2003 Alabama income tax. 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 January 20, 2011. The Taxpayer and her CPA, Edward Thomas, attended the hearing. Assistant Counsel Lionel Williams represented the Department.

The Taxpayer and her husband equally owned D & G Enterprises, Inc., which operated a grocery store during the subject year. The Taxpayer worked at the store, and the Taxpayer's husband managed the store. The corporation and the Taxpayer both failed to file 2003 Alabama income tax returns.

The Department audited the corporation for 2003 and other years. The Taxpayer had previously separated from her husband and moved to Ohio. They are currently getting divorced. The soon-to-be ex-husband operated the store and owned 100 percent of the corporation when the audit was being conducted.

The husband failed to provide the Department examiner with most of the corporation's records, and was otherwise uncooperative during the audit. The Department subsequently determined the grocery store's gross income based on the

gross sales reported on the store's sales tax returns for the year. It deducted from that gross income amount the store's cost of goods sold, and also wages as shown on the store's withholding tax returns. It subsequently determined that the store's net profit for 2003 was \$496,279.

Because the Taxpayer co-owned the corporation in 2003, the Department attributed one-half of the net profit as income to the Taxpayer as a constructive dividend. It assessed her accordingly.

The Taxpayer submitted a 2003 return with her appeal, on which she reported her wages of \$23,920. She contends that she did not receive a dividend, constructive or otherwise, in 2003. She argues that her estranged husband refused to give her the corporation's records concerning 2003 (or any other year), but that she recently obtained the corporation's 2003 bank records.

It was agreed at the January 20 hearing that the Taxpayer's CPA would complete a 2003 return for the corporation using the bank records (and any other relevant records). The CPA should file the return with the Administrative Law Division in due course. It will then be forwarded to the Department for review and response.

The Taxpayer's representative also argued at the January 20 hearing that the final assessment should be voided because the Department failed to properly deliver the final assessment by certified mail to the Taxpayer's last known address, as required by Code of Ala. 1975, §40-2A-7(b)(4)c. The Department's response to this issue is enclosed with the Taxpayer's copy of this Order.

The representative claimed that the Department had mailed the 2003 preliminary assessment entered against the Taxpayer to the Taxpayer's address in Tuscaloosa.

The Taxpayer had, however, previously moved to Ohio. The U.S. Postal Service consequently returned the preliminary assessment to the Department. The Postal Service also notified the Department of the Taxpayer's current address in Ohio. The Department accordingly remailed the preliminary assessment to the Taxpayer's Ohio address by first class mail.

The Department subsequently mailed the final assessment in issue to the Taxpayer's old Tuscaloosa address. The Postal Service returned the envelope to the Department, and again notified the Department of the Taxpayer's current Ohio address. The Department remailed the final assessment to the Ohio address by first class mail.

Section 40-2A-7(b)(4)c. requires that the Department must mail a final assessment over \$500 to a taxpayer's last known address by certified mail. The Taxpayer's representative argues that the Department failed to mail the final assessment to the Taxpayer's Ohio address, i.e., her last known address, by certified mail. He also contends that the Department had previously been notified by the Postal Service that the Taxpayer had moved to Ohio, and consequently, the Department should have known that the Ohio address was her correct address.

The Department states in its enclosed response, at 3, 4, that it mailed the final assessment to the Tuscaloosa address because it does not rely on "extrinsic sources of address information, including those derived from the U.S. Post Office . . . (because such sources) are often subject to changes without notice and are not deemed reliable indicators of taxpayer's true last known address."

I do not necessarily agree with the Department's policy of not utilizing Post Office notices for purposes of updating a taxpayer's last known address. But even if it was

determined that the Department failed to technically comply with the statutory notice provision in this case, that technical error did not deny the Taxpayer due process, nor is it grounds to void the final assessment.

Alabama's appellate courts have held that even if the Department fails to follow the statutory service of assessment notice provision or any other assessment procedure, the failure to do so is cured and causes no harm if the taxpayer is allowed to later appeal or otherwise contest the assessment or other matter in dispute.

In any case, even if the Department did not properly serve the preliminary assessment at the Taxpayer's last known address, Alabama's courts have held that if a taxpayer is allowed an opportunity to contest an assessment, any prior procedural defects are cured. "The due process requirement is satisfied if there is opportunity to question the validity or amount of a tax either before the amount is determined or in subsequently proceedings for its collection and enforcement . . ." *Rabren v. Baxter*, 239 So.2d 206, 212 (Ala. Civ. App. 1970), citing 51 Am. Jur. Taxation §731 and §732. See also, *Jackson v. State of Alabama*, P. 04-796 (Admin. Law Div. 1/4/05); *Matthews v. State of Alabama, Inc.* 03-740 (Admin. Law Div. 10/29/03).

*Hesser v. State of Alabama*, Docket No. S. 05-225 (Admin. Law Div. 8/17/2005).

The above applies in this case. The Taxpayer actually received the final assessment and appealed within the 30 day appeal deadline. The final assessment thus will not be dismissed on procedural grounds.<sup>1</sup>

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<sup>1</sup>The Department also entered 2000, 2001, 2002, 2004, 2005, and 2006 final assessments against the Taxpayer on the same day as the 2003 final assessment, July 27, 2010. The Taxpayer appealed the 2003 final assessment to the Administrative Law Division on August 20, 2010 (postmark date), but appealed the remaining final assessments to the Administrative Law Division on August 28, 2010 (postmark date). The Administrative Law Division dismissed the appeal of the other final assessments as untimely. See, *Stephens v. State of Alabama*, Docket No. Inc. 09-869 (Admin. Law Div. 9/10/2010). The Taxpayer applied for a rehearing on September 28, 2010. The Administrative Law Division also rejected the application as untimely.

(continued)

Entered January 27, 2011.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Lionel C. Williams, Esq.  
Edward L. Thomas, Jr., CPA (w/enc.)  
Tony Griggs

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The 2003 final assessment was entered on the same date as the other final assessments, and the Department asserts that the other assessments were mailed in the same envelope as the 2003 final assessment, and were thus received by the Taxpayer in Ohio on the same date. It is not known why the Taxpayer also did not timely appeal the other final assessments together with the 2003 final assessment.

In any case, the Administrative Law Division no longer has jurisdiction concerning the 2000, 2001, 2002, 2004, 2005, and 2006 final assessments. The Taxpayer may, of course, seek legal advice concerning those disputed final assessments.