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PALMETTO, FL 34221-4221, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayers, §

DOCKET NO. INC. 12-751

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

**PRELIMINARY ORDER ON DEPARTMENT'S
MOTION TO DISMISS**

This appeal involves final assessments of 2002, 2003, and 2004 Alabama income tax entered against the above Taxpayers. The Revenue Department has moved to have the appeal dismissed because the Taxpayers failed to timely appeal the final assessments in issue within 30 days, as required by Code of Ala. 1975, §40-2A-7(b)(5).

A taxpayer must appeal a final assessment within 30 days. Code of Ala. 1975, §40-2A-7(b)(5)a. The 30 day appeal period must be strictly followed. *Dansby v. State, Dept. of Revenue*, 560 So.2d 1066 (Ala. Civ. App. 1990). If the appeal is not timely filed, "the appeal shall be dismissed for lack of jurisdiction." Code of Ala. 1975, §40-2A-7(b)(5)c.

The Department entered the final assessments in issue on May 16, 2012. The Taxpayers' appeal letter was postmarked July 2, 2012, and was received by the Administrative Law Division on July 3, 2012. The appeal was thus not timely filed within 30 days; nor can it be treated as timely mailed within 30 days as allowed by Code of Ala. 1975, §40-1-45. To be treated as timely mailed, the appeal must be postmarked within the required 30 days.

The Taxpayers claim in their notice of appeal that they did not receive the final assessments until June 25, 2012, or after the 30 day appeal period had run. The

Department asserts in its motion to dismiss that it timely mailed the final assessments to the Taxpayers' address in Palmetto, Florida by certified mail. The U.S. Postal Service attempted delivery on May 23, 2012, May 30, 2012, and June 8, 2012. The Taxpayers failed to claim the certified mail, and the envelope was returned to the Department marked "unclaimed." A copy of the certified mail envelope is attached to the Department's Answer. The Department remailed the assessments by regular mail on June 22, 2012.

A taxpayer cannot refuse to claim a final assessment served by certified mail, and thereby avoid the 30 day appeal deadline. *Williams v. State, Dept. of Revenue*, 578 So.2d 1345 (Ala. Civ. App. 1991); see also, *Robert A. Beach v. State of Alabama, Inc.* 00-615 (Admin. Law Div. O.D.A. 11/28/00). For federal cases on point, see, *Erhard v. C.I.R.*, 87 F.3d 273 (1996); *Patman and Young Professional Corp. v. C.I.R.*, 55 F.3d 216 (1995).

The above rule of law presupposes, however, that the final assessment was mailed to the correct last known address of the taxpayer. In this case, the Department mailed the final assessments to the Taxpayers' address in Palmetto, Florida. The Taxpayers' representative claims, however, that the Taxpayers had executed a power of attorney, Department Form 2848A, designating the representative as the Taxpayers' authorized representative. The representative claims that the Department failed to mail the final assessments to him, even though the Form 2848A indicates that "[n]otices and other written communications will be sent to" the authorized representative. The representative also asserts that Department personnel verbally agreed to mail him a copy of the final assessments.

The above raises the due process issue of whether the Department properly mailed the final assessments to the Taxpayers' "last known address," as required by Code of Ala.

1975, §40-2A-7(b)(4)c.

The Department should explain by September 14, 2012 why it failed to send the final assessments in issue to the Taxpayers' representative, as specified in Form 2848A. It should also state its position as to the legal effect of its failure to mail the final assessments to the representative. The Department should specifically address the holding in *Maranto v. Commissioner*, T.C. Memo 1999-266, which reads in pertinent part as follows:

A validly executed power of attorney may suffice to render an attorney's address the Taxpayers' "last known address" if it directs that all original notices and communications be sent to the taxpayer at the attorney's address. (cites omitted)

* * *

The new Form 2848,. . . provides simply that "notices and other written communications will be sent" to the taxpayer's designee. (page cite omitted)
We have previously held that the language is sufficient to render the address of the taxpayer's representative the "last known address" of the taxpayer. (cites omitted)

The Department's motion to dismiss will be set for hearing, or other appropriate action will be taken, after the Department responds.

Entered August 21, 2012.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Gwendolyn B. Garner, Esq. (w/*Maranto* case)
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