

GREGORY F. & BRANDI M. YAGHMAI §
391 LAREDO DRIVE
HOOVER, AL 35226, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayers, §

DOCKET NO. INC. 13-423

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

**FINAL ORDER ON TAXPAYERS'
APPLICATION FOR REHEARING**

This appeal involves a final assessment of 2008 income tax. The Revenue Department moved to have the appeal dismissed because the Taxpayers failed to timely appeal the final assessment in issue within 30 days, as required by Code of Ala. 1975, §40-2A-7(b)(5). The motion was granted, and a Final Order Dismissing Appeal was entered on May 15, 2013. The Taxpayers timely applied for a rehearing.

As indicated in the Final Order Dismissing Appeal, 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 2008 final assessment in issue on September 18, 2012. The Taxpayers' appeal letter was postmarked May 7, 2013, and was received by the Administrative Law Division on May 8, 2013. 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 claimed in their notice of appeal and in their application for rehearing that they did not receive the final assessment until after the 30 day appeal period had run.

The Department claimed that it correctly mailed the final assessment on or about September 18, 2012 to the Taxpayers' last known address – 391 Laredo Drive, Hoover, AL 35226. The USPS tracking confirmation sheet shows that the final assessment was returned to the Department as unclaimed on October 25, 2012. A copy of the tracking confirmation sheet was attached to the Department's motion to dismiss.

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).

If the Postal Service returned the final assessment to the Department as unclaimed on October 25, 2012, it follows that, per Postal Service procedures, the Postal Service attempted delivery on the Taxpayers on at least two occasions before returning the final assessment as unclaimed. If the Postal Service attempted delivery on a date or dates that would have allowed the Taxpayers to timely appeal, then the Taxpayers' appeal must be dismissed.

The Postal Service confirmation sheet showing that the final assessment was unclaimed also states that “[a]dditional information for this item is stored in files offline.” Presumably, that additional information could show exactly when the Postal Service attempted to deliver the final assessment to the Taxpayers. The Department was directed

to obtain that information and submit it to the Administrative Law Division.

The Department has submitted a letter from the Postal Service which states – “[w]e regret to inform you that we were unable to locate any delivery information in our records regarding your item number 71926722001000287411.” Assistant Counsel David Avery took the letter to the AUM Postal Service office in Montgomery, and was informed that a copy of the actual letter showing the attempted delivery dates “was in archives and is probably too old for them to have retained.”

It is unfortunate that the Postal Service cannot provide the specific dates on which it attempted delivery on the Taxpayers of the final assessment in issue. The fact remains, however, that the Department mailed the final assessment by certified mail to the Taxpayers’ last known address, and that the Postal Service returned the final assessment on October 25, 2012 marked “unclaimed.”

Research reveals that the Postal Service’s usual procedure for delivering certified mail is to initially attempt physical service on the addressee by a Postal Service employee. If there is no one at the address, the employee will leave a notice indicating that service was attempted, and that the addressee should pick up the letter at the appropriate Postal Service facility. The Postal Service will thereafter leave two additional notices at the address. It then holds the letter for 15 days after the third notice, and if the letter is not claimed in that period, it is returned to the sender marked “unclaimed.”

As indicated, the final assessment is issue was returned to the Department by the Postal Service on October 25, 2012. Assuming the Postal Service followed its usual procedures, delivery was attempted on the Taxpayers, or notices provided, on three

occasions before October 11, 2012. Given that fact, I must conclude that the final assessment was delivered to the Taxpayers' last known address in sufficient time to allow the Taxpayers to timely appeal.

Neither the Department nor the Administrative Law Division has asserted or even suggested that the Taxpayers intentionally failed to claim the certified mail envelope in which the final assessment was mailed, as claimed by the Taxpayers' representative. But regardless of why the final assessment was not claimed, the rule of law remains that a final assessment mailed by certified mail to a taxpayer's last known address, as in this case, must be deemed as being properly delivered pursuant to Code of Ala. 1975, §40-2A-7(b)(4)c.

The dismissal of the Taxpayers' appeal on jurisdictional grounds also does not deny the Taxpayers "any and all avenues of relief," as asserted by the Taxpayers' representative in his appeal letter.

Before 1992, a final assessment unappealed from was as conclusive as a final judgment of a circuit court. See generally, *Sparks v. Brock & Blevins, Inc.*, 145 So.2d 844 (1962). A taxpayer could not petition for a refund of any tax included in an unappealed from final assessment before 1992, and otherwise had no avenue of relief if it was later determined, through newly discovered evidence or otherwise, that the tax as assessed was not owed.

Recognizing the harsh consequences that sometimes resulted from the above rule of law, the drafters of the Taxpayers' Bill of Rights and Uniform Revenue Procedures Act, now codified at Code of Ala. 1975, §40-2A-1 et seq., included a provision that now allows a

taxpayer to pay a final assessment unappealed from in full and then petition for a refund of any or all of the amount paid. Code of Ala. 1975, §40-2A-7(c)(1). Consequently, the Taxpayers can still contest the amount in issue by paying the final assessment (\$1,250.27) in full and petitioning for a refund. If the refund is denied, then the Taxpayers can appeal to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(c)(5)a

The May 15, 2013 Final Order Dismissing Appeal is affirmed.

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

Entered June 13, 2013.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

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