

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

v.

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DOCKET NO. INC. 87-138

PETER V. & JULIE G. SINTZ
3753 Professional Parkway
Mobile, AL 36609,

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Taxpayers.

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ORDER

The Revenue Department entered preliminary assessments of income tax against Peter V. and Julie G. Sintz ("Taxpayers") concerning the years 1981, 1982, 1983 and 1984. The Taxpayers appealed to the Administrative Law Division and a hearing was conducted on August 10, 1988. J. George Whitfield, Jr., Esq., appeared on behalf of the Taxpayers. Assistant counsel Sam Clenney was present and represented the Department. Based on the evidence presented by the parties, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

The Taxpayers failed to timely file Alabama income tax returns for the years 1979, 1980, 1981, 1982, 1983 and 1984. The Department investigated the Taxpayers in 1983 concerning the tax years 1979 and 1980. The Taxpayer informed the Department auditor during the examination that he had large losses in 1979 and 1980, but failed to provide any records by which the losses could be verified. Consequently, assessments were entered for 1979 and 1980 based on income information received from the Taxpayer's law firm

partnership. Final assessments were entered on August 15, 1983 (1980) and September 23, 1983 (1979). The Taxpayers failed to appeal the final assessments, and instead paid the entire amount of tax due.

The Taxpayers subsequently filed Alabama income tax returns for the years 1979, 1980, 1981, 1982, 1983 and 1984 on September 11, 1985. The tax due was not paid. Consequently, the Department entered preliminary assessments for the years 1981, 1982, 1983 and 1984. The 1979 and 1980 returns were rejected by the Department because of the final assessments that had been previously entered for those years.

The assessments for 1982, 1983 and 1984 were entered based on information from the Taxpayers' returns. The 1981 assessment was also based on the return as filed, except that the Department disallowed a net operating loss ("NOL") carryforward from 1980 to 1981. The Taxpayers computed the NOL by first reducing the 1980 loss by all carrybacks which could have been claimed and all other modifications required by the NOL statute, Code of Ala. 1975, §40-18-15(16). The balance of the loss was then carried over to 1981.

The Taxpayers argue that the NOL carryforward should be allowed based on the language of Department Reg. 810-3-15-.22. Conversely, the Department contends that the 1980 loss cannot be carried forward because entry of the final assessment for 1980 bars the reopening of liability for that year.

CONCLUSIONS OF LAW

The primary legal issue to be decided is whether the final assessment entered against the Taxpayers for the tax year 1980 precludes a NOL carryforward from that year to 1981.

A final assessment unappealed from is conclusive for the assessment period and cannot be overturned. Lambert v. State, 414 So.2d 983. However, no final assessment was entered for the year in dispute, 1981. The fact that a final assessment was entered for 1980 does not prevent the Taxpayers from carrying over a loss from that year to the subsequent year 1981 under the provisions of §40-18-15(16). To allow such a carryover would not alter the Taxpayers' liability for 1980.

In State v. First National Bank of Auburn, 141 So.2d 196, the taxpayer sought to carryover a NOL incurred in tax years 1954 and 1955 to subsequent years 1956, 1957 and 1958. The Department denied the carryover for the year 1958 on the following grounds:

It seems to be the State's position that, under the provisions of Act No. 568, a part of appellee's operating loss should have been applied first as a carry-back to the tax year 1953 in an amount (\$8,985.51) sufficient to offset the same amount of net income for that year; that, since such amount was not applied to the net income of that year, it has been lost to appellee as a deduction against its net operating losses, either as a carry-back or a carry-over. The basis for this contention is that the excise tax assessment for the tax year 1953 was made final on July 2, 1953; that appellee did not take an appeal therefrom within the required thirty days (Code 1940, Tit. 51, § 140); and that, accordingly, there is no way of crediting a part of the net operating loss against the net income for that year since the amount of tax liability for that tax year has become conclusively fixed and is not subject to being remitted, released, or in any way diminished

(citing Constitution 1901, § 100).

The Supreme Court rejected the Department's position and held that the taxpayer was entitled to either a refund for 1953 or a credit of the loss against income for 1958.

While the facts in the above case are not identical to the present facts, the case does hold for the proposition that a NOL can be carried over or back in accordance with the NOL statute, notwithstanding that a final assessment has been entered for one of the years involved. The Bank of Auburn case even strongly implies that the taxpayer's liability in the final assessment year can be reopened if necessary to allow the taxpayer the intended benefit of the statute. But in any case, if a loss in fact occurred during the year, the taxpayer should be allowed to use the loss in other years under the NOL statute.

In short, if the Taxpayers incurred a NOL in 1980, then they should be allowed to carryover the loss to 1981. A legitimate deduction should not be disallowed in 1981 only because the Taxpayers failed to appeal the final assessment entered against them for 1980.

But if the Taxpayers are to be allowed a NOL carryforward, they must present adequate records by which the claimed loss in 1980 can be verified. Accordingly, the Taxpayers are hereby directed to produce all relevant records within 30 days for examination by the Department. Thereafter, the Department will report to the Administrative Law Division whether the records adequately verify

the NOL for 1980. A second hearing will be set if necessary.

In light of the above, an in-depth discussion of Reg. 810-3-15-.22 is unnecessary. However, it should be noted that §40-18-15(16) does not contain a time limitation as to when a refund resulting from an NOL carryback must be claimed. Code of Ala. 1975, §§40-18-43 (income tax) and 40-1-34 (general) provide a three year statute for a refund of tax paid through mistake of law or fact. But those sections would not apply to NOL refunds because the tax paid in prior years is generally not paid through mistake. Thus, the three year statute of limitations set out in Reg. 810-3-15-.22(4) has no basis.

Entered this 19th day of August, 1988.

BILL THOMPSON
Chief Administrative Law Judge