

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

V.

LEROY, JR. AND PEGGY OSBORNE
6 St. Joseph Road
Birmingham, AL 35243,

Taxpayers.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. INC. 87-196

ORDER

The Revenue Department assessed income tax against Leroy, Jr. and Peggy Osborne ("Taxpayers") for the calendar years 1981 and 1982. The Taxpayers appealed to the Administrative Law Division and a hearing was conducted on September 22, 1988. The Taxpayers were represented at the hearing by public accountant Gail L. Vaughn. Assistant counsel Mark Griffin appeared for the Department. Based on the evidence presented in the case, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

The Revenue Department audited the Taxpayers' Alabama income tax returns for 1981 and 1982. Various Schedule C deductions were disallowed on the 1981 return for lack of verification. Only minor adjustments were made to the 1982 return. However, the Taxpayers failed to pay the tax due for 1982, which resulted in a deficiency of \$7,105.00. Preliminary assessments were subsequently entered for both years.

The Taxpayers reported a net loss on their 1983 return. The 1983 return was mailed by the Taxpayers on December 31, 1986 and

received by the Department on January 5, 1987.

The Taxpayers subsequently attempted to carry the 1983 loss back to 1981 and 1982 by filing amended returns (petitions for refund) for those years along with the appropriate net operating loss ("NOL") carryback/carryforward schedules. The amended returns and NOL schedules were filed by the Taxpayers in July, 1987.

The Taxpayers do not dispute the adjustments made by the Department. Rather, the only issue in dispute is whether the Taxpayers timely filed their petitions for refund and NOL schedules for 1981 and 1982 so that the 1983 loss can be carried back to those years.

CONCLUSIONS OF LAW

Code of Ala. 1975, §40-18-15(a)(16) provides that a net operating loss can be carried back three years and/or forward fifteen years from the loss year. The statute is modeled in substance after 26 U.S.C. §172. However, the Alabama statute does not include a time limit within which a petition for refund based on a NOL carryback must be filed.

Under normal circumstances, a petition for refund of income tax must be filed within three years from payment of the tax, see generally §40-1-34 and specifically §40-18-43 relating to income tax. Further, §40-18-45 provides that "the amount of income tax imposed by this title shall be assessed within three years after the return was filed". The Alabama Supreme Court has ruled that an

income tax liability becomes fixed either upon entry of a final assessment by the Department, or after three years from the date the return is filed. Alabama Education Association v. Grayson, 382 So.2d 501, at 505. Thus, arguably a refund petition filed more than three years from the date the return (for the year to which the NOL is being carried back) was filed is barred by Section 100 of the Alabama Constitution, which prohibits the release of a fixed obligation owed to the State.

However, Department Reg. 810-3-15-.22 provides in pertinent part as follows:

(4) A claim for refund of tax based on a net operating loss carryback must be filed within three years from the last day of the year in which the loss occurred.

The above regulation is similar in substance to 26 U.S.C. §6511. Section 6511 allows that if a refund is attributable to an NOL carryback, the claim must be filed within three years of the due date for filing the return for the loss year. The only difference between Reg. 810-3-15-.22 and §6511 is that the regulation uses the last day of the loss year, whereas §6511 uses the due date of the loss year return.

Thus, by regulation the Department allows a possible maximum of six years from the end of the refund year within which a NOL refund petition can be filed. That is, if a loss is suffered in 1985, the taxpayer can apply for an NOL carryback to 1982 by filing a refund petition before December 31, 1988, or a total of six years from the

last day of 1982.

Code of Ala. 1975, §40-18-57 allows the Department to promulgate reasonable rules and regulations governing the application and enforcement of the income tax statutes. Any such regulation must be upheld unless it is determined to be unreasonable. Shellcast Corp. v. White, 477 So.2d 425.

The regulation in question, Reg. 810-3-15-.22, cannot be attacked as unreasonable in that it provides a longer period for filing a refund petition than allowed by §§40-1-34 and 40-18-43.

The regulation is more than reasonable from the taxpayer's point of view and cannot be rejected as too restrictive.

In the present case, the Taxpayers filed their 1983 return on December 31, 1986. However, their petitions for refund (amended returns) and NOL schedules relating to 1981 and 1982 were not filed until July, 1987, more than three years from the end of the loss year of 1983. Thus, the petitions were not timely filed within the purview of Reg. 810-3-15-.22 and thus the NOL carryback cannot be allowed in computing the Taxpayers' liability for 1981 and 1982.

The above considered, the preliminary assessments should be made final as entered, with interest as required by statute.

Entered this the 6th day of October, 1988.

BILL THOMPSON
Chief Administrative Law Judge