STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. INC. 89-181
FRED B. & MILDRED M. JOHNSON Route 1 Box 287 Theodore, AL 36582,	§	
Taxpayer.	§	

FINAL ORDER

The Revenue Department entered preliminary assessments of income tax against Fred B. and Mildred M. Johnson ("Taxpayers') for the years 1981, 1982, 1983 and 1984. The Taxpayers appealed to the Administrative Law Division and a hearing was conducted on December 1, 1989. The Taxpayers were represented by R. Mark Kirkpatrick, Esq. Assistant counsel Duncan Crow appeared for the Department.

The following Final Order is entered based on the evidence and arguments submitted by both parties.

FINDINGS OF FACT

The Taxpayers filed Joint Alabama income tax returns for the years 1981 through 1984. The Revenue Department subsequently discovered that the IRS was investigating the Taxpayers' federal income tax liability for some of those years. Thus, to allow the Department sufficient time to review the expected federal adjustments, the Department and the Taxpayers entered into a waiver of the statute of limitations for entering assessments concerning the years 1981, 1983 and 1984. No evidence was presented as to why 1982 was excluded from the waiver. The waiver was executed on

December 28, 1987 and provided that income tax could be assessed for the subject years at any time on or before April 15, 1989. The waiver also included the following statement:

> The amount of any deficiency assessment is to be limited to that resulting from any adjustment made to the Federal Return by the Internal Revenue Service as said adjustments apply to the State Return.

The Department subsequently received a settlement agreement between the Taxpayers and the IRS dated August 23, 1988. The agreement included numerous adjustments to the Taxpayers' federal liability for the years 1980, 1981 and 1982. No other federal adjustments were received by the Department.

However, in adjusting the Taxpayers' Alabama liability, the Department concluded that various losses and deductions claimed by the Taxpayers in 1981 through 1984 were based on abusive tax shelter investments. The Department thus disregarded the partial adjustments made by the IRS, and instead disallowed in full the alleged tax shelter losses and deductions for the years 1981, 1983 and 1984. Initially, the Department considered 1982 to be closed to assessment. However, to prevent any benefit to the Taxpayers from the alleged tax shelters, the Department also added the Taxpayers' losses allowed for 1982 back to their 1981 liability based on the IRC mitigation provisions, 26 U.S.C.A. §§1311-1314.

Based on the above adjustments, the Department computed and prepared preliminary assessments for the additional tax due and prepared preliminary assessments for the years 1981, 1983 and 1984.

The preliminary assessment forms were dated April 14, 1989, but a review of the assessments shows that they were not signed where indicated by the Income Tax Division Chief.

After entry of the above preliminary assessments, the Department made several additional adjustments which reduced the Taxpayers' liability In each year. However, the Department also reopened and determined a deficiency for 1982. As a result, a preliminary assessment for 1982 was prepared dated June 26, 1989. However, again the preliminary assessment form was not signed where indicated by the Income Tax Division Chief.

CONCLUSIONS OF LAW

The Taxpayers argue (1) that the statute of limitations for entering assessments has expired for the years In question, and (2) any adjustments to the Taxpayers' Alabama liability must be limited to the same specific adjustments made by the IRS on the federal returns.

Code of Ala. 1975, §40-18-45(a) requires that income tax must be assessed within three years after the return is filed. Section 40-18-46(b) provides that at any time prior to the expiration of the original three year statute, the taxpayer and the Department may consent in writing to an extension, and tax may be assessed at any time before expiration of the agreed upon extension date. Section 40-29-50 was enacted in 1983 and provides that the statute of limitations set out in §40-18-45(a) shall be suspended upon

entry of a preliminary assessment by the Department.

The Taxpayers argue in effect that §§40-18-45(a) and 40-18-46(b) provide for two separate statute of limitations, and that based on the specific language of §40-29-50, only the original three year period set out in §40-18-45(a) is suspended upon entry of a preliminary assessment. That is, a preliminary assessment will stay the original three year statute, but has no effect on the running of any extended date agreed upon by waiver under §40-18-46(b). Thus, the Taxpayers contend that entry of the preliminary assessments on April 14, 1989 was ineffective to stay the agreed upon waiver date of April 15, 1989, and that because final assessments were not entered by that date, the statute has run and no assessments can now be issued.

However, all three sections must be construed together. The clear intent of the Legislature is that a final assessment must be entered within three years, but that the three year period can be extended upon waiver and agreement by the parties. Any additional period agreed upon under §40-18-46(b) is merely an extension of the initial three year period. Thus, entry of a preliminary assessment before expiration of the statute, either the original three years or any additional agreed upon period, would suspend the running of the statute of limitations so as to allow the Department sufficient time to enter a final assessment in the matter.

However, notwithstanding the above, the assessments in issue

were not timely entered because none of the assessments were properly executed by the designated Department employee before the April 15, 1989 deadline.

The Alabama Revenue Code does not set out the mechanics of how an assessment must be entered by the Department. However, federal law is clear that to be valid, an assessment must be properly signed by the appropriate IRS employee, see 26 U.S.C.A. §6201, et seq. In Brafman v. United States, 384 F.2d court stated as follows:

> The recordation is to be accomplished through "machine operations", but the actual and final assessment step, that step which establishes a prima facie case of taxpayer liability, can be taken only with the approval of a responsible officer of the Internal Revenue Service. The Government may want to postpone assessment in certain cases because of the limitations on collection and lien Perfection that begin to run at the time of assessment. This might be accomplished, after the computers have run their course, only by the assessment officer refusing to sign the already prepared certificate. What is important in any case is that assessment is not automatic upon recordation; it requires the action of an assessment officer. That action, as defined explicitly in the Treasury Regulations, is the signing of the certificate.
>
> We recognize that in sustaining Mrs. Brafman's contention regarding lack of proper assessment within the limitations period we are disposing of this case on what could be termed a "technical defense.' As the district court said in United States v. Lehigh, W.D.Ark.1961, 201 F.Supp. 224, this is both true and immaterial:
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> > Any procedural defense is in a sense "technical." The procedures set forth in the Internal Revenue Code were prescribed for the protection of both Government and taxpayer. Neglect to comply with those procedures may entail consequences which the neglecting

> party must be prepared to face, whether such party be the taxpayer or the Government.
>
> Certainly the courts have not hesitated to enforce strictly the Code requirement that a taxpayer's returns must be signed to be effective. Thus, unsigned returns, even with remittances, have been viewed as nullities from commencement of the running of the statute of limitations. It has availed the taxpayer little that his failure to sign was inadvertent.
>
> Finally, where state taxation is involved compliance with a statutory provision requiring an assessment list to be signed by the assessors is usually considered essential to the validity of further proceedings. 84 C.J.S. Taxation §473 (1954).

An noted, Alabama law does not set out the mechanics of how an assessment must be entered. However, the reasoning contained in the above quote is equally applicable to assessments made by the Department. An assessment is not "entered" by the Department when it is printed out, but rather only when it is signed by the designated Department officer at the space provided on the assessment form. Consequently, because the assessments in issue were never signed, they were not timely entered by the April 15, 1989 deadline and should be dismissed.

While the above finding is dispositive of the assessments in issue, it should be noted that the waiver signed by the Taxpayer limits the adjustments that could be made to only those made by the IRS. Thus, in any case, the Department could not have made wholesale adjustments to the Taxpayers' liability for 1981, 1982, 1983, and 1984, but rather could only have adopted the specific changes designated on the IRS settlement agreement. In that 1982

was out of statute and the settlement agreement did not include 1983 and 1984, changes could have been made for 1981 only.

The above considered, the Department is hereby directed to reduce and make final the assessments in issue showing no tax due.

Entered this 23rd day of January, 1990.

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BILL THOMPSON
Chief Administrative Law Judge