

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. INC. 91-106

BARNEY D. & GLENDA F. YODER
405 Portwood Lane
Brewton, AL 36426,

§

§

Taxpayers.

§

FINAL ORDER

The Revenue Department assessed income tax against Barney D. and Glenda F. Yoder (Taxpayers) for the years 1978, 1979 and 1980.

The Taxpayers appealed to the Administrative Law Division and a hearing was conducted on January 30, 1992. The Taxpayers represented themselves. Assistant counsel Mark Griffin appeared for the Department. This Final Order is based on the arguments and evidence submitted by both parties.

FINDINGS OF FACT

The Department received a "Notice of Deficiency - Waiver" from the IRS in August, 1988 indicating that the Taxpayers had been assessed additional federal tax and a fraud penalty for the years 1978, 1979 and 1980. The IRS adjustments were dated March 1, 1988.

The Department assessed additional State tax for 1978, 1979 and 1980 on January 8, 1991 based on the IRS adjustments. The Department also included a 50% fraud penalty in each assessment pursuant to Code of Ala. 1975, §40-18-49.

The Taxpayers argue that the IRS audit is incorrect, that they were not guilty of fraud during the subject years, and that the

Department is barred from assessing additional tax by the statute of limitations. The Taxpayers explained at the administrative hearing that the IRS audit was the result of a vendetta against them by the IRS examining agent. However, the Taxpayers failed to challenge or contest the IRS adjustments based on the advice of their attorney. The Taxpayers subsequently filed bankruptcy and are now making monthly payments against the federal tax due.

CONCLUSIONS OF LAW

The assessments in issue are based on IRS information and establish a prima facie case that the additional tax is due. The burden then shifted to the Taxpayers to present records or other evidence that the assessments are incorrect. The Taxpayers have failed to do so in this case.

However, concerning the fraud penalty, the burden is on the Department to affirmatively prove fraud by clear and convincing evidence. Biggs v. C.I.R., 440 F.2d.1 (1971). Fraud is not established by the fact that a taxpayer fails to provide adequate records or to otherwise prove that the government's adjustments are incorrect. Biggs, supra, at page 5.

The Department has failed to present any substantive evidence that the Taxpayers filed fraudulent returns for the subject years with the intent to evade tax. The Taxpayers' failure to challenge the federal fraud penalties is not sufficient. Also, the Taxpayers are not barred by the doctrine of collateral estoppel from

contesting the State fraud penalties because they were never convicted and never admitted to fraud in the federal proceeding, see generally, Gray v. U.S., 708 F.2d 243. Consequently, if no other issues were involved I would hold that the additional tax was correctly assessed by the Department, but that the fraud penalties should be dismissed.

However, the Taxpayers also argue that the assessments were not timely entered as required by Alabama law. Income tax generally must be assessed within three years after a return is filed. Code of Ala. 1975, §40-18-45. The three year statute is suspended upon entry of a preliminary assessment. Code of Ala. 1975, §40-29-50.

In this case there is no question that the preliminary assessments were not entered within three years after the returns were filed. Nonetheless, the Department argues (1) that the tax could be assessed at any time because the Taxpayers filed fraudulent returns, citing Code of Ala. 1975, §40-18-46(a), and (2) the assessments were timely entered pursuant to Code of Ala. 1975, §40-18-45(b), as amended April, 1990.

The Department's first argument is rejected because, as previously stated, the Department failed to carry its burden of proving that the Taxpayers filed fraudulent returns for the subject years.

Concerning §40-18-45(b), that section provides in subsection

(b)(1) that when a federal return is changed and the changes result in additional Alabama tax due, the Department can assess such tax within three years from when the federal changes became final. However, subsection (b)(2) reads in pertinent part that "when the Department receives notification of a final determination to the federal income tax return of a taxpayer or notification of proceedings which result in such a change, the Department shall have one year from the date of such notification or from the date of such change, whichever is later, to assess and institute proceedings as provided in subdivision (1) herein." In other words, the Department has one year from when it is notified of the federal changes within which to assess additional tax.

In this case, the IRS adjustments upon which the State changes are based were issued on March 1, 1988 and were not appealed. Thus, for purposes of applying §40-18-45(b), the final determination of federal liability was made on March 1, 1988. Pursuant to §40-18-45(b)(1), the Department was generally allowed three years from that date to assess additional tax.

However, the Department was notified of the federal changes in August, 1988. Pursuant to §40-18-45(b)(2), the Department had only one year from that date to assess additional tax. The Department entered the assessments in issue on January 8, 1991, or more than one year after being notified of the federal changes. Consequently, the assessments were not timely entered and therefore

should be dismissed.

The above considered, the Department is directed to reduce and make final the assessments showing no additional tax due. The Department may then appeal pursuant to Code of Ala. 1975, §40-2-22.

Entered on February 5, 1992.

BILL THOMPSON
Chief Administrative Law Judge