

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. INC. 91-224

WALTER C. & LORINE MASSEY
876 Dallas Road 212
Selma, AL 36701,

§

§

Taxpayers.

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FINAL ORDER

Walter C. & Lorine C. Massey (Taxpayers) claimed a net operating loss (NOL) carryforward deduction on their 1989 Alabama return. The Department denied the deduction and the Taxpayers appealed to the Administrative Law Division. The matter was submitted on a joint stipulation of facts. CPA Clint Wilkerson and attorney Alston Keith represented the Taxpayers. Assistant counsel Duncan Crow represented the Department.

FINDINGS OF FACT

The Taxpayers filed short form 40A Alabama income tax returns for the years 1984 through 1988. The returns included farm losses and civil service retirement pay in excess of \$1,500.00. A loss was reported in each year. The Department accepted the returns as filed.

The Taxpayers subsequently filed amended form 40 returns for 1984 through 1988 and attempted to carryforward the losses in those years to 1989. The Department denied the NOL carryforward, which resulted in additional tax due for 1989.

The Department's position is that a NOL cannot be established

by filing a short form 40A, citing Department Reg. 810-3-15-.22(1).

The Department also argues that the Taxpayers' election to file short form returns during 1984 through 1988 is irrevocable and cannot now be amended, citing Code of Ala. 1975, §40-1.8-81 and Department Reg. 810-3-81-.01.

CONCLUSIONS OF LAW

Section 40-18-81 provides that a taxpayer may elect to file a short form 40A return if the taxpayer has adjusted gross income of less than \$20,000.00 (\$40,000.00 if joint) and received less than \$1,500.00 in income not subject to withholding during the subject year. The election is irrevocable and cannot be changed after the due date for the return. Department Reg. 810-3-15-.22 also provides that a NOL cannot be established by filing a short form return.

The Taxpayers in this case incorrectly used the short form in 1984-1988 because losses should not be reported on a 40A return.

The returns, although filed on form 40A, were in substance regular returns and should be treated as such by the Department. The fact that the Taxpayers incorrectly used form 40A instead of form 40 should not prohibit them from now carrying the losses reported on the returns forward to 1989 as allowed by Code of Ala. 1975, §40-18-15(16). Substance over form must control in tax matters. Basic, Inc. v. U.S., 549 F.2d 740.

If the Taxpayers had properly filed short form returns, then

the election would be irrevocable and they could not now claim losses by filing amended returns. But the losses were claimed on the original returns and the fact that the Taxpayers technically used the wrong form should not be fatal.

Also, while Reg. 810-3-15-.22 does provide that a NOL cannot be established on a short form return, that statement is premised on the assumption that the taxpayer has properly used the short form. A NOL cannot be established by a 40A return because it should not be reported on that form in the first place.

The Department has not otherwise challenged the losses claimed on the returns. Consequently, the NOL carryforward to 1989 should be allowed and the Department should reduce and make final the assessment for that year showing no tax due.

Entered on April 22, 1992.

BILL THOMPSON
Chief Administrative Law Judge