STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NOS. INC. 91-228 INC. 91-229
BARRON FLOTECH, INC. 1700 Financial Center 505 North 20th Street Birmingham, AL 35203-2607,	§	
BARRON MACHINING AND FABRICATING, INC. 1700 Financial Center 505 North 20th Street Birmingham, AL 35203-2607,	§	
Taxpayer.	§	

FINAL ORDER

The Revenue Department assessed withholding tax against Barron Flotech, Inc. for the period January, 1988 through September, 1990 and against Barron Machining and Fabrication, Inc. for the period January, 1989 through September, 1990. Both Taxpayers appealed to the Administrative Law Division. The cases were consolidated and submitted on a joint stipulation of facts and briefs. Charles H. Moses, III represented the Taxpayers. Assistant counsel Beth Acker represented the Department.

FINDINGS OF FACT

The Taxpayers withheld more than $1,000.00 in Alabama withholding tax from their employees' wages during the first and second months of the quarters in issue. The Taxpayers failed to timely remit the tax to the Department by the 15th day of each succeeding month as required by Code of Ala. 1975, §40-18-74(a). Rather, the Taxpayers filed quarterly returns and remitted the tax

due on or before the quarterly due date.

The Department subsequently assessed the Taxpayers for penalty and interest calculated on the taxes withheld by the Taxpayers in the first and second months of each quarter but not timely remitted by the 15th of the succeeding month. The preliminary assessment against Barron Machining and Fabrication was entered on August 12, 1991. The preliminary assessment against Barron Flotech was entered on September 3, 1991.

CONCLUSIONS OF LAW

This is a statutory construction case. The issue is whether the 25% penalty levied by §40-18-80(b) is applicable where an employer properly withholds tax but fails to timely remit the tax monthly as required by §40-18-74(a). As will be discussed, the Taxpayers contend that the penalty can be assessed only if an employer fails to both withhold and remit the tax. The two statutes in issue are set out below:

> §40-18-74. Payment of amounts withheld.
>
> (a) Every employer required to deduct and withhold tax under section 40-18-71 shall, for the quarterly period beginning January 1, 1956, and for each quarterly period thereafter, on or before the last day of the month following the close of each quarterly period make return and pay over to the department of revenue the tax required to be withheld under section 40-18-71. Where the aggregate amount required to be deducted and withheld by any employer for either the first or second month of a calendar quarter exceeds $1,000.00 the employer shall by the fifteenth day of the succeeding month pay over such aggregate amount to the department of revenue. The amount so paid shall be allowed as a credit against the liability shown on the employer's quarterly withholding

> return required by this section. Any employer required under this section to make monthly payments of the aggregate amount required to be deducted and withheld that does not pay over such aggregate amount by the prescribed date shall be subject to the same penalties provided in subsection (b) of section 40-18-80.
>
> § 40-18-80. Penalties.
>
> (b) Any employer required under the provisions of section 40-18-71 to withhold taxes on wages and make quarterly returns and payment of amounts withheld to the department who fails to withhold such taxes or to make such returns, or who fails to remit amounts collected to the department, shall be liable for the payment of the amount of taxes which should have been withheld and, in addition, shall be subject to a civil penalty equal to 25 percent of the amount of taxes that should have been properly withheld and paid over to the department for each such failure. Such tax and penalty shall be assessed and collected by the department and the assessment of such tax and penalty may be assessed in the manner provided in section 40-18-40.

Every employer subject to withholding is required to withhold tax from employee wages and report and remit the tax to the Department on a quarterly basis. See, first sentence §40-18-74(a).

The second sentence of §40-18-74(a) requires that employer that withholds more than $1,000.00 in the first second month of any quarter "shall by the fifteenth day of the succeeding month pay over such" amount to the Department. The monthly payment shall

then be allowed as a credit on the employer's quarterly return.[1]

Any employer required to make the quarterly returns and remit the tax withheld, "who fails to withhold such taxes or to make such returns, or who fails to remit amounts collected to the department..... shall be subject to a civil penalty equal to 25% of the amount of taxes that should have been properly withheld and paid over . . . ". See, §40-18-80(b).

The last sentence of §40-18-74(a) provides that any employer required to make monthly payments "that does not pay over such aggregate amount by the prescribed due date shall be subject" to the same penalties provided in §40-18-80(b).

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[1]Section 40-18-74(a) does not require a monthly return to be filed along with the monthly payment. However, as a practical matter a return is necessary to identify the taxpayer, the amount paid, and the period involved. The Department provides all employers subject to withholding with forms for both quarterly and monthly filing.

As stated, the Taxpayers argue that the penalty can be assessed only if an employer fails to both withhold and remit the tax. I disagree.

The penalty is levied against any employer "who fails to withhold such taxes or to make such returns, or who fails to remit amounts collected to the department". By using the conjunctive "or", the Legislature clearly intended to impose the 25% penalty for failure to either withhold or file a return or remit the tax due. The penalty applies if the tax is not timely paid, whether tax is withheld or not. Otherwise the monthly remittance requirement would be meaningless because an employer could withhold the tax, ignore the monthly payments, and no penalty would apply.

The last sentence of §40-18-74(a) reads that any employer that does not timely pay over the tax monthly shall be subject to the "penalties" provided by §40-18-80(b). The use of the word "penalties" shows that the Legislature intended separate penalties for failure to either withhold or report or remit the tax due. In any case, §40-18-74(a) imposes the penalty if the employer fails to "pay over" the monthly amount due. I f the §40-18-80(b) penalty can be applied only if an employer fails to both withhold and pay, the clear intent of §40-18-74(a) to impose the penalty for failure to pay would be thwarted. Also, the monthly payments must be remitted "by the prescribed date". Thus, the fact that the Taxpayers eventually remitted the taxes in full with the quarterly

returns does not relieve them of the penalty.

The intent of the Legislature must be considered when construing a statute. Volkswagen of Am. Inc. v. Dilliard, 579 So.2d 1301. In this case the intent of the Legislature was to impose a penalty against any employer that failed to report and remit all withholding tax due. The Taxpayers in this case admittedly failed to pay the tax monthly as required by §40-18-74(a). Accordingly, the penalty is applicable and was properly assessed by the Department.

The Taxpayers also argue that at least part of the assessments are barred by the three year statute of limitations.

Under current law, the Department is required to assess income tax within three years after a return is filed, see §40-18-45(a). The three year statute is suspended by entry of a preliminary assessment, see 40-29-50.[2]

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[2]The newly enacted Uniform Procedures Act becomes effective October, 1992 and requires generally that for all taxes a preliminary assessment must be entered within three years f rom the due date of the return or the date the return is filed, whichever is later, or if no return is required, then three years from the due date of the tax, see Section 6, paragraph (B)(2).

The preliminary assessment against Barron Machining is for the period beginning January, 1989 and was entered within the three year statute on August 12, 1991. However, the Barron Flotech assessment includes the entire year 1988 but was not entered until September 3, 1991. Consequently, penalty and interest relating to any tax f or which a return was due before September 3, 1988 is barred by the three year statute of limitations.

The Department is directed to adjust the Barron Flotech assessment as indicated above and then make both assessments final, plus applicable interest.

Entered on July 16, 1992.

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BILL THOMPSON
Chief Administrative Law Judge