STATE OF ALABAMA, DEPARTMENT OF REVENUE, vs. CHARLES L. BANKS, JR. d/b/a Party Pack #5 Route 7, Box 448 Russellville, AL 35653, Taxpayer.	§ § § § § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. S. 93-207

FINAL ORDER

The Revenue Department assessed State, Colbert County and City of Littleville sales tax against Charles L. Banks, Jr., d/b/a Party Pack #5 ("Taxpayer") for the period April, 1987 through January, 1989. The Taxpayer appealed to the Administrative Law Division and the matter was submitted on a joint stipulation of facts. Sheree Martin represented the Taxpayer. Assistant counsel Wade Hope represented the Department. The Taxpayer does not dispute the amount of the tax in issue. Rather, the issue is whether the Department timely assessed the tax within the applicable statute of limitations set out at Code of Ala. 1975, §40-23-18(d).[1]

[1]Section 40-23-18 was repealed by the Uniform Revenue

The relevant facts are stipulated by the parties.

The Taxpayer operated a retail business during the period in issue at which he sold beer, wine, liquor, tobacco and other products.

The Taxpayer was a plaintiff in a class action lawsuit filed in Montgomery County Circuit Court on August 23, 1988. Dandy's Discount Package Store v. Sizemore, CV88-1705-PR. That case involved the issue of whether private package stores were due a refund of sales tax previously paid on liquor excise taxes included in the price of liquor sold by the stores.

The circuit judge handling the Dandy's Discount case ordered the Department on February 6, 1990 to audit all class members to determine if and in what amount they were due a refund. The Department subsequently audited the Taxpayer, but instead of finding a refund due, the Department set up the additional tax

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Procedures Act, effective October, 1992, and was replaced by the uniform statute of limitations at §40-2A-7(b)(2). However, §40-23-18(b) is relevant in this case because the assessment period in issue ended more than three years prior to the effective date of the new Act. If the statute of limitations had expired under §40-23-18(b), then it could not be reopened under the new Act.

liabilities in issue. The Department subsequently served the Taxpayer with separate "notice and demand" letters on May 25, 1990 for the State, Colbert County and City of Littleville sales tax in issue. However, the Department took no further action against the Taxpayer pending a resolution of the Dandy's Discount case.

The trial court ruled in Dandy's Discount on February 4, 1991, holding that most of the class members were not due a refund because the customers from which the class members had collected the tax were not plaintiffs in the action. The Court of Civil Appeals upheld the trial court's decision on January 24, 1992, and the Alabama Supreme Court denied certiorari on April 24, 1992.

The Department mailed the Taxpayer a billing letter for the tax in issue on August 11, 1992. The Taxpayer failed to pay and the Department subsequently entered preliminary assessments on November 17, 1992.

The Taxpayer filed a petition for review concerning the preliminary assessments on December 16, 1992, and a conference was conducted by the Department on January 28, 1993. The Department held to its position, and final assessments were subsequently entered on March 15, 1993. The Taxpayer timely appealed the final assessments to the Administrative Law Division on April 7, 1993.

The specific issue to be decided is whether the notice and demand letters mailed to the Taxpayer on May 25, 1990 tolled the three year statute of limitations set out at §40-23-18(b).

Section 40-23-18(b) read in pertinent part as follows:

> (b) Any notice, provided for by this division, of an amount due under this division shall be given or any action in court for the collection of such amount shall be begun within three years of the due date of such amount; . . .

During the period in issue, the Department was required by §§40-23-16 and 40-23-17 to give a taxpayer three separate notices in assessing additional sales tax due.[2] Section 40-23-16 provided that if the Department determined that a taxpayer owed additional tax, the Department "shall compute the amount of such deficiency and shall notify the taxpayer, and shall demand payment therefor". This is the authority for the notice and demand letters sent to the Taxpayer on May 25, 1990. Section 40-23-16 further provided that if the taxpayer failed to pay after notice and demand, "the department shall make an assessment against the taxpayer" for the amount due.

Section 40-23-17 then required the Department to notify the taxpayer of the preliminary assessment by certified mail. The taxpayer was then allowed 20 days to show cause why the assessment should not be made final. Thereafter, the Department could enter a final assessment and was required to "notify the taxpayer of the assessment as finally fixed".

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[2] Sections 40-23-16 and 40-23-17 were also repealed and replaced by the Uniform Revenue Procedures Act, effective October, 1992.

The Department claims that the notice and demand letters required by §40-23-16 and mailed to the Taxpayer on May 25, 1990 tolled the three-year statute in issue. I disagree. Section 40-23-18(b) required that "any notice provided for by this division" must be given to a taxpayer within three years. Thus, the Department failed to comply with §40-23-18(b) if it failed to provide a taxpayer with any of the three notices required by §§40-23-16 and 40-23-17. In other words, the Department was required not only to issue a notice and demand letter within three years, but also to enter both a preliminary and a final assessment and notify the taxpayer of the amount finally assessed within three years from the due date of the taxes.

Section 40-23-18(b) was in issue in a prior Administrative Law Division case, Docket No. S.87-183. In that case, I ruled as follows:

> Section 40-23-17 required the Department to notify a taxpayer of entry of a preliminary assessment, and §40-23-18(b) required that "any notice", i.e. a preliminary assessment notice, shall be given within three years. Under the above statute the Department was required to enter a preliminary assessment for sales and use tax within three years from the due date of the tax.

The above reasoning is affirmed, except, as discussed above, the Department was also required to enter and give notice of a final assessment within the three year statute period.

The second part of §40-23-18(b) concerning "any action in court" is not relevant because no action was ever taken by the Department is circuit court.

The Department argues that issuance of the notice and demand letters constituted an action in court because the Department is a quasi-judicial body, i.e. a court, relating to the assessment and collection of taxes. State v. Pollock, 38 So.2d 870. However, while I recognize that the Department has quasi-judicial authority in the assessment and collection of taxes, clearly the "court" referred to in §40-23-18(b) was a circuit court, not the Department.

In Docket No. Misc. 92-143, the issue was whether a notice and demand letter by the Department was sufficient to toll the three year statute of limitations for assessing motor fuel tax set out in §40-17-41. That section provided that "all actions by the state . . . shall be commenced within a period of three years . . .". I held that the notice and demand letter from the Department commenced an action by the Department and thus tolled the three year statute under §40-17-41.

However, this case can be distinguished because §40-17-41 only required the Department to commence an action against a taxpayer within three years. On the other hand, §40-23-18(b) specifically required that an action in court must be started within three years. Issuance of a notice and demand letter commences an action

for collection of tax by the Department, but clearly it does not constitute an action in circuit court as required by §40-23-18(b).[3]

The Department is correct that a statute of limitations should be construed in favor of the government and against a taxpayer. Badaracco v. C.I.R., 104 S.Ct. 756, 464 U.S. 386 (1984). However, that rule of construction cannot overcome the clear wording of §40-23-18(b) requiring that any notice, including the notice of final

[3] The hodgepodge of different statutes of limitations relating to the different taxes administered by the Department were all repealed by the Uniform Revenue Procedure Act in October, 1992. The uniform statute at §40-2A-7(b)(2) now requires that for all taxes a preliminary assessment must be entered within three years from (1) the due date of a return, or (2) the date the return is filed, whichever is later. Exceptions to the general rule are set out in sub-paragraphs a. - j. of §40-2A-7(b)(2).

assessment required by §40-23-17, must be sent to a taxpayer within three years.

The Department's delay in entering preliminary and final assessments against the Taxpayer in this case is understandable. The Taxpayer's liability was involved in the Dandy's Discount case and the Department believed it had tolled the statute of limitations when it issued the notice and demand letters in May, 1990.

However, the Dandy's Discount litigation did not automatically toll the three year statute of limitations set out in §40-23-18(b), nor, as discussed above, was the statute stopped by the notice and demand letters issued by the Department.

The above considered, the Department failed to timely enter and give the Taxpayer notice of the final assessments in issue within the applicable three year statute of limitations at §40-23-18(b). Accordingly, the assessments are dismissed.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on February 23, 1994.

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BILL THOMPSON
Chief Administrative Law Judge