

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

vs.

§

DOCKET NO. INC. 93-221

MARCO, JR. & ANN L. TORRES
502 Victoria Drive
Enterprise, AL 36330,

§

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Taxpayers.

§

FINAL ORDER

The Revenue Department denied a refund of 1988 income tax requested by Marco, Jr. and Ann L. Torres (Taxpayers). The Taxpayers appealed to the Administrative Law Division and a hearing was conducted on June 22, 1993. The Taxpayers appeared at the hearing. Assistant counsel Gwen Garner represented the Department.

The Department agrees that the Taxpayers overpaid their 1988 Alabama income tax. Rather, the issue in dispute is whether the refund was timely requested by the Taxpayers.

The Taxpayers claim that they filed their 1988 Alabama income tax return on April 14, 1989. The return included military retirement income of \$21,212.00. The reported liability was \$943.00. After taking a credit for tax withheld of \$571.00, the Taxpayers submitted a check along with the return for the balance due of \$372.00. As discussed later, the Taxpayers' original return and payment were never received by the Department.

The Taxpayers later learned that a state could not tax military retirement income based on the United States Supreme Court

decision in Davis v. Michigan, 109 S.Ct. 1500. Based thereon, the Taxpayers submitted amended Alabama returns and requested refunds for 1985, 1986, and 1987. However, before filing a 1988 amended return, the Taxpayers received a letter from the Department acknowledging receipt of the amended returns and stating that no action would be taken on the refunds until a final decision on the taxability of military retirement pay was made. The letter concluded that "it will not be necessary for you to inquire further regarding any possible refund due to you". The Taxpayers interpreted the letter as meaning that an amended 1988 return was not required and that any refunds due, including 1988, would be automatically paid when the issue was settled.

The Alabama Court of Civil Appeals applied the Davis case to Alabama in Sizemore v. Rinehart, 611 So.2d 1064, and held that military retirement benefits are not subject to Alabama income tax.

The Court upheld the trial court's holding that a refund was due for all taxes paid on military retirement income after April 12, 1986.

Certiorari was denied by the Alabama Supreme Court in Rinehart in January 1993. The Department subsequently issued refunds in February 1993 to all military retirees that had filed returns and paid tax on retirement income during the subject years. The Taxpayers in this case received refunds for 1985, 1986 and 1987 at that time.

However, the Department also discovered that the Taxpayers had not filed a 1988 income tax return. The Department contacted the Taxpayers and the Taxpayers provided a copy of the first page of the return. The Taxpayers later filed a complete copy of the 1988 return and also submitted a check for the tax due of \$372.00 on March 29, 1993.

The Department excluded the military retirement income of \$21,212.00 from the return, which resulted in negative taxable income of \$722.00. The Department returned the \$372.00 check previously submitted by the Taxpayers, but refused to refund the \$571.00 previously withheld. The Department's position is that a refund cannot be issued because the Taxpayers failed to file a return within three years from the date the tax was paid. The Taxpayers appealed that decision to the Administrative Law Division.

Tax paid through withholding is deemed paid on the due date of the subject year's return. Department Reg. 810-3-43-.02. Consequently, the 1988 tax withheld in this case was deemed paid on April 15, 1989, the due date of the 1988 return.

During the period in issue, Code of Ala. 1975, §40-18-43 required that a petition for refund of income tax must be filed within three years from the date the tax was paid. Consequently, the Department argues that because the Taxpayers failed to file a

1988 return within three years from April 15, 1989, no refund can be issued. I disagree.

Under normal circumstances the Taxpayers would have been required to petition for a refund within three years from payment of the tax. However, a petition for refund was not necessary in this case and a refund should be issued based on the Rinehart decision.¹

Rinehart was a class action and the court held that each member of the class was due a refund. Individual petitions for refund by each class member were not necessary. A refund was ordered for all taxes paid on military retirement income after April 12, 1986. The tax in issue was paid after that date on April 15, 1989. Accordingly, the Taxpayers are due a refund of the entire \$571.00 withheld in 1988. The Department is directed to issue a refund for that amount, plus applicable interest.

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

Entered on July 7, 1993.

¹Also, the Department is incorrectly equating the filing of a return with the filing of a petition for refund. A return may or may not request a refund, and even if the Taxpayers had timely filed a 1988 return (which they claim they did), it would have showed tax due because at the time military retirement income was considered taxable (above the \$10,000.00 exemption).

BILL THOMPSON
Chief Administrative Law Judge