

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

v.

§

DOCKET NO. INC. 93-368

GLENN W. AND RUTH A. GILBERT §
8930 County Road 24
Fairhope, AL 36532, §

Taxpayers. §

FINAL ORDER

The Revenue Department denied a refund of 1988 income tax to Glenn W. and Ruth A. Gilbert ("Taxpayers"). The Taxpayers appealed to the Administrative Law Division and a hearing was conducted on March 4, 1994 in Mobile, Alabama. CPA Ann Brooks appeared for the Taxpayers. Assistant counsel Duncan Crow represented the Department.

The issue in this case is whether the Taxpayers should be prohibited from carrying a 1991 net operating loss ("NOL") back to 1988 because they unintentionally signed the election to forfeit the carryback provision at the bottom of form NOL-85.

The facts are undisputed.

The Taxpayers' CPA prepared their 1991 Alabama return which included a NOL of \$34,597.00. The CPA also prepared the required form NOL-85 at the same time. In signing the form NOL-85, the Taxpayers were erroneously instructed by a clerical employee at the CPA's office to sign the election to forfeit carryback provision at the bottom of the form. The Taxpayer signed the election, and the return and accompanying form NOL-85 were subsequently mailed by the

Taxpayers on June 29, 1992 and received by the Revenue Department on June 30, 1992.

Shortly thereafter, the CPA prepared an amended 1988 return for the Taxpayers which carried the 1991 NOL back for a refund in that year. The 1988 amended return was signed by the Taxpayers on July 6, 1992 and received by the Department on July 13, 1992.

The Department denied the carryback to 1988 and the resulting refund in that year because the Taxpayers had previously elected to forfeit the carryback provision on the form NOL-85.

Code of Ala. 1975, §40-18-15(16)d. provides that a taxpayer may elect to relinquish a NOL carryback and instead carry the NOL forward only. The election must be made by signing the election on the bottom of form NOL-85, and once made, the election shall be irrevocable for that tax year.

The election to carry a NOL forward only is modeled after 26 U.S.C. §172(b)(3)(C). The provision was intended to benefit taxpayers by allowing a taxpayer to carry an entire loss forward to offset expected large taxable income in the future. See, Young v. C.I.R., 783 F.2d 1201, at 1206. The election was made irrevocable to prevent a taxpayer from later attempting to carry the loss back in later years after he fails to realize the future profits he expected at the time of the election.

For the election to be binding, a taxpayer must knowingly intend to forfeit the carryback at the time of the election. In this case, the Taxpayers obviously intended to carry the 1991 NOL

back to 1988. Their election to forego the carryback was clearly inadvertent and unintended and should not be binding.

A similar result was reached in a prior Administrative Law Division case, Department of Revenue v. Youngblood, Docket No. Inc. 92-307. In that case, the taxpayers unintentionally signed the election to forego the carryback on form NOL-85. The loss year return, the form NOL-85, and the amended return carrying an NOL back to a prior year were all filed with the Department at the same time. The carryback was allowed despite the inadvertent election because the taxpayers obviously intended to carry the loss back when the returns and form NOL-85 were filed. The same is true in this case. The fact that the amended 1988 return was filed with the Department a few days after the 1991 return and the form NOL-85 is inconsequential. The Taxpayers clearly intended to carry the 1991 loss back to 1988, and thus should not be bound by their inadvertent signing of the election to forfeit the carryback.

The above considered, the carryback to 1988 should be allowed and the refund in issue should be granted. This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on March 31, 1994.

BILL THOMPSON
Chief Administrative Law Judge

