

LEOHA B. SCOTT
1627 Jerome Street
Selma, AL 36701,

§
§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

vs.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

DOCKET NO. INC. 94-450

FINAL ORDER

The Revenue Department denied a refund of 1990 income tax requested by Leoha B. Scott ("Taxpayer"). The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on February 6, 1995. The Taxpayer represented herself at the hearing. Assistant counsel Antoinette Jones represented the Department.

The issue in this case is whether the Taxpayer timely applied for a refund of the 1990 income tax in issue. The facts are undisputed.

The Taxpayer paid her 1990 Alabama income tax through withholding. The Taxpayer subsequently filed her 1990 Alabama return on October 11, 1994. The return claims a refund due of \$75.60.

The Department does not dispute that the Taxpayer overpaid her 1990 Alabama income tax. However, the Department denied the refund based on its position that the Taxpayer failed to timely request the refund.

Code of Ala. 1975, §40-18-43 required that a petition for refund of income tax must be filed within 3 years from when the tax was paid. Tax paid through withholding is deemed paid on the due date of the subject year return. See, Department Reg. 810-3-43-

.02. Consequently, under §40-18-43, the Taxpayer had 3 years from the due date of the 1990 return, or until April 15, 1994, to request a refund of the 1990 tax in issue.

Code of Ala. 1975, §40-18-43 was repealed by Act 92-186 (the Uniform Revenue Procedures Act, or URPA), effective October 1992.

Section 83 of Act 92-186 provided that "the provisions of this act relating to the time limits for entering assessments and filing petitions for refunds or issuing refunds shall apply to all tax periods for which the time for entering any assessment or issuing any refund has not expired under existing law prior to October 1, 1992." The statute of limitations for issuing refunds under URPA is §40-2A-7(c)(2)a.

The statute of limitations for the Taxpayer to request a refund under §40-18-43 was still open on the effective date of URPA. Consequently, as specified by §83 of Act 92-186, the new statute of limitations in URPA, §40-2A-7(c)(2)a., now governs in this case. That section provides that a petition for refund must be filed within 3 years from the date the return was filed or 2 years from the date of payment of the tax, whichever is later.

I have previously recognized that §40-2A-7(c)(2)a. created a loophole concerning refunds of income tax paid through withholding.

That is, under the specific language of §40-2A-7(c)(2)a., a refund is timely and must be granted if requested within 3 years from when a return is filed, even if the return is filed late. The loophole was explained in Department of Revenue v. Edward D. and Joann S.

Berquez, Admin. Law Docket No. INC. 93-259, entered October 14, 1993, as follows:

I recognize that §40-2A-7(c)(2)a. has created a loophole relating to the refund of taxes paid through withholding. That is, a taxpayer may obtain a refund of withholding tax within 3 years from when a return is filed, even if the return is filed after the due date.

The above loophole was not intended by the drafters and is not present under federal law because for federal refund purposes a delinquent return is deemed filed on its due date. Melchin v. U.S., 145 F.Supp. 193. Quite frankly, I cannot find a specific federal statute requiring the above treatment. Nonetheless, the plain wording of §40-2A-7(c)(2)a. must control. A refund is timely if requested within 3 years from when an original return is filed, even if the return is filed late.

The Taxpayer in this case petitioned for a refund of the 1990 tax in issue by filing her 1990 return on October 11, 1994. The return itself requested the refund. Consequently, under the specific language of §40-2A-7(c)(2)a., the refund was timely requested and must be granted.

I acknowledge that I have previously denied a refund under the exact circumstances in this case. See, Admin. Docket No. INC. 94-392, decided January 9, 1995. That case and all other cases where I denied the refund under similar circumstances are incorrect. As stated above, the specific language of the statute must control, and until the statute is amended, a taxpayer must be granted a refund if the refund is requested within 3 years from when a return is filed, even if the return is filed after the due date.

The above considered, the Department is directed to issue the refund to the Taxpayer. 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 1, 1995.

BILL THOMPSON
Chief Administrative Law Judge