

PRESS SOUTH, INC.  
P.O. Box 847  
Pelham, AL 35124,  
DIVISION

§ STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
§ ADMINISTRATIVE LAW

Taxpayer,

§ DOCKET NO. W. 02-152

v.

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE

§

**OPINION AND PRELIMINARY ORDER ON  
DEPARTMENT'S APPLICATION FOR REHEARING**

A Final Order was entered in this case on April 23, 2002 waiving the penalties in issue for reasonable cause. The Department timely applied for a rehearing. The Department argues in its application for rehearing that (1) the Administrative Law Division was without jurisdiction to hear the Taxpayer's appeal, and (2) the penalties in issue should not have been waived for reasonable cause.

**FACTS**

The Taxpayer failed to file its monthly withholding tax returns with the Department from January 2000 through April 2001. The Taxpayer is a closely held corporation, and is solely owned by Nickolas Marino. Marino testified at an April 18, 2002 hearing in the matter that he was unaware that the corporation's chief financial officer, who was responsible for filing the corporation's withholding tax returns, had failed to file returns for the months in issue. After being notified by a Department examiner in mid-2001 that the returns had not been filed, Marino immediately filed the returns and arranged to pay the tax and interest due in full. The chief financial officer left the corporation soon after Marino discovered that the returns had not been filed.

Marino also wrote the Department's Individual Income Tax Section on January 18, 2002 and requested that the failure to timely file and pay penalties assessed by the Department be waived. The Department denied the request and entered the final assessment in issue on February 8, 2002.

Also on February 8, 2002, the January 18 letter from Marino to the Individual Income Tax Section was received by the Administrative Law Division via Department hand mail. The Administrative Law Division inquired with the Individual Income Tax Section concerning the matter, and was provided a copy of the February 8, 2002 final assessment. The Administrative Law Division accordingly treated Marino's letter as an appeal from the final assessment. It notified Marino by letter dated February 12, 2002 that it had received and docketed his appeal of the final assessment. The letter also informed Marino that he would receive a notice of hearing within 30 to 60 days, and that he did not need to take any further action at that time concerning the appeal. As discussed, a hearing was conducted on April 18, 2002, after which the Final Order was entered waiving the penalties in issue for reasonable cause.

**Issue (1). The jurisdictional issue.**

Code of Ala. 1975, §40-2A-7(b)(5)a. provides that a taxpayer may appeal a final assessment to the Administrative Law Division within 30 days from the date the final assessment is entered. If the appeal is not timely filed within 30 days, it must be dismissed for lack of jurisdiction. Code of Ala. 1975, §40-2A-7(b)(5)c.; *Dansby v. State, Dept. of Revenue*, 560 So.2d 1066 (Ala.Civ.App. 1990).

The Department argues that Marino's January 18, 2002 letter cannot be treated as a timely filed appeal because it pre-dated the February 8, 2002 final assessment. I disagree.

The Administrative Law Division received Marino's appeal letter on February 8, 2002, the same day the final assessment was entered. Consequently, the appeal was technically filed with the Administrative Law Division within 30 days from when the final assessment was entered. The Department is also estopped from challenging the timeliness of the appeal based on the rationale of *Ex parte Four Seasons*, 450 So.2d 110 (Ala. 1984).

In *Ex Parte Four Seasons*, a property owner appealed to the Lauderdale County Board of Equalization concerning a property appraisal. The Lauderdale County Tax Assessor notified the property owner on October 20, 1982 that on "this date," the Board had denied the appeal. The applicable statute allowed the property owner 30 days to appeal to circuit court. The property owner appealed to circuit court on November 18, 1982, within 30 days from October 20, 1982. The State moved to have the appeal dismissed for lack of jurisdiction because the Board of Equalization had actually made its final decision in the matter on October 4, 1982, not October 20, 1982, as the property owner had been informed by the Tax Assessor. The circuit court dismissed the appeal. The Court of Civil Appeals affirmed the circuit court. *Ex parte Four Seasons*, 450 So.2d 108 (Ala.Civ.App. 1983).

The Alabama Supreme Court reversed. That Court first recognized that the doctrine of equitable estoppel generally does not apply to the State or its subdivisions. It held, however, that where the untimeliness of an appeal was caused by misinformation furnished by the government, which was relied on by the appellant, the State should be estopped from arguing that the appeal was untimely.

The doctrine of estoppel has not been applied against the State acting in its governmental capacity in the assessment and collection of taxes. *Community Action Agency of Huntsville, Madison County, Inc. v. State*, 406 So.2d 890 (Ala. 1981); *State v. Maddox Tractor & Equipment Co.*, 260 Ala. 136, 69 So.2d. 426

(1953). However, the petitioners in this case are not seeking to estop the state from assessing or collecting the tax owed. Rather, they are attempting to preserve their right to a hearing in a state court, where the untimeliness of the filing of their appeal was caused by misinformation furnished by the state's officer and then relied upon by the petitioners to their detriment.

*Ex parte Four Seasons*, 450 So.2d at 111.

The rationale of *Ex parte Four Seasons* applies in this case. The Administrative Law Division notified Marino by letter on February 12, 2002 that it had treated his January 18 letter as an appeal of the final assessment in issue. The letter also notified Marino that he did not need to take any further action concerning the matter. After receiving the above letter, Marino certainly and reasonably believed that the final assessment had already been appealed. Consequently, he took no further action in the matter, as instructed by the Administrative Law Division's February 12 letter, although the 30 day appeal period was still open. To dismiss the Taxpayer's appeal under the circumstances would constitute a denial of due process, and, as stated by Justice Adams in *Ex parte Four Seasons*, "would result in such manifest injustice that it cannot be allowed." *Ex parte Four Seasons*, 450 So.2d at 112.

**Issue (2). Waiver of the penalties.**

Marino is the sole owner of Press South, Inc. He was unaware before being contacted by a Department examiner in mid-2001 that the subject withholding returns had not been filed. He immediately and in good faith worked with the examiner to remedy the situation. The corporation is now current with its return filings, and all past due taxes and interest have been paid. Under the circumstances, the failure to file and pay penalties assessed by the Department should be waived. However, the five percent negligence penalty levied at Code of Ala. 1975, §40-2A-11(c) should apply. While Marino was unaware that the

returns had not been filed, as owner he was careless in not discovering that the returns were not being filed.

The Department is directed to recompute the Taxpayer's liability by applying only the five percent negligence penalty. A Final Order will then be entered for the adjusted amount due.

This Opinion and Preliminary Order on Department's Application for Rehearing is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered August 9, 2002.