

BARRY V. FREDERICK
5409 Trace Ridge Road
Hoover, Alabama 35244,

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

DOCKET NO. INC. 97-172

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed income tax against Barry V. Frederick ("Taxpayer") for 1990, 1992, and 1993. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, 40-2A-7(b)(5)a. A hearing was scheduled for May 20, 1997. The Taxpayer telephoned the Administrative Law Division on May 19 and requested a continuance. The continuance was granted, and the Taxpayer was notified over the telephone that the hearing would be reset for 1:00 p.m., June 16, 1997. The Administrative Law Division also issued an Order Resetting Hearing, which was mailed by certified mail to the address provided by the Taxpayer, 5409 Trace Ridge Lane, Hoover, Alabama 35244. The United States Postal Service returned the notice marked "unclaimed." The Department remailed the notice to the Taxpayer on June 9, 1997 by first class mail. The Taxpayer failed to appear at the June 16 hearing. Assistant Counsel Mark Griffin represented the Department.

The issue in this case is whether the Department correctly assessed the Taxpayer for the additional tax, penalty, and interest in issue. A second issue is whether the frivolous appeal penalty levied at Code of Ala. 1975, 40-2A-11(f) should be assessed.

The Taxpayer, an attorney in Birmingham, applied for an extension to file his 1990 Alabama income tax return. He also paid \$8,550 with the application. However, he failed to subsequently file a 1990 return. The Taxpayer also failed to file returns for 1992 and 1993. He did, however, make estimated payments of \$3,992 in 1992 and \$4,850 in 1993.

The Department repeatedly notified the Taxpayer that returns must be filed for the subject years. The Taxpayer failed to respond. The Department accordingly estimated the Taxpayer's liability and entered the final assessments in issue using the Taxpayer's law firm's partnership returns. The Taxpayer appealed to the Administrative Law Division, claiming that all taxes owed were previously paid.

All individuals residing in Alabama are subject to Alabama income tax, and are required to file annual Alabama income tax returns. Code of Ala. 1975, 40-18-2 and 40-18-27. Willful failure to file a return constitutes a misdemeanor under Code of Ala. 1975, 40-29-112.

If a taxpayer fails to file a return, the Department is authorized to calculate and assess the taxpayer's estimated liability using the best information available. Code of Ala. 1975, 40-2A-7(b)(1)a. Any resulting final assessment is prima facie correct on appeal. Code of Ala. 1975, 40-2A-7(b)(5)c.

The Taxpayer in this case failed to file Alabama returns for the subject years. The Department thus correctly assessed the Taxpayer using the best information available, the Taxpayer's partnership returns. The Taxpayer failed to offer any evidence showing that the assessments are incorrect. The final assessments are accordingly affirmed.

Code of Ala. 1975, 40-2A-11(f) levies a frivolous appeal penalty of \$250 or 25

percent of the tax due, whichever is greater.

The Taxpayer, as an attorney, certainly knew that he was required by Alabama law to file Alabama income tax returns. He failed to do so, despite repeated notices to file by the Department.

The Taxpayer nonetheless appealed the final assessments in issue, claiming only that the tax due was previously paid. But obviously, the Department cannot verify that no additional tax is due without returns from the Taxpayer. The Taxpayer has not otherwise explained why the assessments are wrong, or why he failed to file returns. He also failed to attend either the rescheduled hearing on June 16, or notify the Administrative Law Division that he would not appear, even though he requested the continuance and was notified over the telephone and by written notice of the continued hearing date. Under the circumstances, the frivolous appeal penalty is applicable and is assessed against the Taxpayer. See, Century Coin and Stamp Co., Inc. v. State, Inc. 94-469 (Admin. Law Div. 3/23/95), and Thomas P. Doyle v. State, Inc. 93-362 & Inc. 94-127 (Admin. Law Div. 7/18/94).

The final assessments are affirmed. Judgment is entered against the Taxpayer for 1990 income tax of \$7,563.89, plus a 25% penalty of \$1,890.97, 1992 income tax of \$7,166.30, plus a 25% penalty of \$1,791.57, and 1993 income tax of \$3,273.48, plus a 25% penalty of \$818.37, plus applicable interest.

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

Entered June 19, 1997.

BILL THOMPSON
Chief Administrative Law Judge

BT:dr

cc: Mark D. Griffin, Esq.
Barry V. Frederick
Kim Herman