

WILLIAM J. & LORI T. MENKE  
55 Foxchase Drive  
Dothan, AL 36301-1145,

Taxpayers,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. INC. 98-228

FINAL ORDER ON DEPARTMENT'S  
MOTION TO DISMISS

The Revenue Department assessed 1989 through 1993 income tax against William J. and Lori T. Menke ("Taxpayers"). The final assessments were entered on January 20, 1998. The Department mailed the final assessments by certified mail to 55 Foxchase Drive, Dothan, Alabama 36301-1145. The U. S. Postal Service attempted to deliver the final assessments to the Taxpayers on January 23, 1998, January 28, 1998, and February 7, 1998. The Taxpayers failed to claim the final assessments, and the Postal Service returned the assessments to the Department marked **Unclaimed**. The Department subsequently remailed the assessments to the Taxpayers at the same address, presumably by first class mail.

The Taxpayers claim they received the final assessments on March 7, 1998. They subsequently appealed the final assessments to the Administrative Law Division pursuant to Code of Ala. 1975, '40-2A-7(b)(5)a. The Taxpayers' appeal letter is postmarked April 1, 1998, and was received by the Administrative Law Division on April 3, 1998.

The Department has moved to dismiss the Taxpayers' appeal because it was not timely filed. Section 40-2A-7(b)(5)a. requires that a notice of appeal must be filed within 30 days from when a final assessment was entered. The 30 day appeal period must be strictly followed. Dansby v. State, Department of Revenue, 567 So.2d 1066 (Ala.Civ.App. 1990). If an appeal is not timely filed, the appeal shall be dismissed for lack of jurisdiction. Code of Ala. 1975, ' 40-2A-7(b)(5)c.

The Taxpayers argue that the motion should be denied because (1) they appealed within 30 days from when they actually received the final assessments on March 7, 1998, and (2) the final assessments should have been delivered to their attorney, and not directly to the Taxpayers, because the attorney had previously filed a power of attorney with the Department. I disagree with the Taxpayers' arguments for the reasons stated below.

As indicated, ' 40-2A-7(b)(5)a. requires that a taxpayer must appeal a final assessment within 30 days from the date of entry of the final assessment. The final assessments in issue were entered on January 20, 1998. Consequently, the Taxpayers had 30 days from that date, or until February 19, 1998, to file their appeal, not 30 days from when the final assessments were actually received by the Taxpayers.

This issue was addressed in Williams v. State, Department of Revenue, 578 So. 2d 1345 (Ala.Civ.App.1991). In Williams, the Department mailed a final assessment by certified mail to Williams' last known address. The Postal Service attempted

delivery, and subsequently returned the assessment to the Department as Unclaimed.® The Department remailed the notice to Williams, who subsequently appealed outside of the 30 day appeal period. The Court of Civil Appeals affirmed the circuit court's dismissal of the appeal.

Williams contends that the intent of this section is for the taxpayer to receive actual notice, not just for the notice to be mailed. However, this Court must give effect to the clearly expressed intent of the Legislature. Ex parte, Holladay, 466 So.2d 956 (Ala. 1985). Clearly, the language of the statute requires only that the notice be mailed to the last known address and requires no proof of actual receipt of the notice. In addition, although Williams contends that he did not receive the September 12, 1989 notice, and receipt of the notice is not required, the record indicates that notice of the certified mail was delivered twice to his last known address.® Williams, 578 So.2d, at 1345.

This case is identical in substance to Williams. The Taxpayers had 30 days from when the final assessments were entered to appeal, not 30 days from actual receipt.

The Taxpayers also argue that the final assessments should have been delivered to their attorney because he had previously filed a power of attorney with the Department. There is a disputed question of fact whether a power of attorney was actually filed with or received by the Department. In any case, ' 40-2A-7(b)(4)c. requires only that a final assessment shall be mailed by the department to the taxpayer's last known address...® The Department thus clearly complied with the statute by mailing the final assessments to the Taxpayers at their last known address. The Taxpayers also were not denied due process because the

Postal Service attempted to deliver the final assessments to the Taxpayers well within the 30 day appeal period. It is the Taxpayers= fault that they failed to claim the final assessments.

The Taxpayers= appeal is dismissed. The Taxpayers may, however, pay the tax and then petition for a refund pursuant to Code of Ala. 1975, ' 40-2A-7(c)(1).

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

Entered July 31, 1998.

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BILL THOMPSON  
Chief Administrative Law Judge

BT:ks

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