

SHELBIE ANN BROWN  
4471 Alexandria Jacksonville Hwy.  
Jacksonville, AL 36265-5663,

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

BARBARA BROOME REID  
215 Midway Lane  
Anniston, AL 36206-7515,

Taxpayers,

DOCKET NOS. INC. 98-400  
INC. 98-333

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

### FINAL ORDER

The Revenue Department assessed 1994 income tax against Shelbie Ann Brown and Barbara Broome Reid (together **ATaxpayers**). The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, § 40-2A-7(b)(5)a. The appeals were consolidated and heard on October 7, 1998. The Taxpayers represented themselves. Assistant Counsel Antoinette Jones represented the Department.

The Taxpayers suffered a net operating loss (**ANOL**) in 1993. This case involves two issues:

(1) Did the Taxpayers properly elect to forego the NOL carryback to prior years as allowed at Code of Ala. 1975, § 40-18-15(16)d.; and,

(2) Should the Taxpayers still be allowed to carry the entire NOL forward, even if they failed to properly elect to forego the carryback.

The Taxpayers were 50% shareholders in B & A Manufacturing, Inc., an Alabama S corporation, during the subject years. B & A Manufacturing incurred a loss in 1993.

The Taxpayers passed through the loss to their individual 1993 Alabama returns. The loss reduced their 1993 income to zero. The Taxpayers discussed with their accountant whether to carry the remainder of the NOL back to prior years, or forward to subsequent years. They decided to forego the carryback, and instead carry the loss forward. According to the Taxpayers, their accountant elected to forego the carryback by completing a form NOL-85 for each of them, as required by Alabama law. The Taxpayers claim the accountant filed the NOL-85 forms with their respective 1993 Alabama returns. The Taxpayers subsequently carried the NOL forward to 1994.

The Department audited the Taxpayers' 1993 and 1994 returns and determined that neither Taxpayer had included a form NOL-85 with their 1993 return. The Department accordingly disallowed the loss carryforward to 1994, and instead carried the NOL back to 1991 and 1992.

The loss carryback to 1991 and 1992 resulted in an overpayment by the Taxpayers in both years. The Department refused, however, to issue the Taxpayers refunds for those years. The Department argues that the refunds are barred by the statute of limitations for claiming refunds at Code of Ala. 1975, § 40-2A-7(c)(2)a. The Department reduced the NOL by the amount of the Taxpayers' 1991 and 1992 income, and then allowed the reduced NOL as a carryover to 1994. The reduced 1994 NOL deduction resulted in the 1994 final assessments in issue.

Code of Ala. 1975, § 40-18-15(16) requires a taxpayer to carry an NOL back to prior years before carrying it forward to subsequent years. A taxpayer may, however, forego the carryback by filing a form NOL-85 election with the Department by the due date of the subject year return. Code of Ala. 1975, § 40-18-15(16)d.

The Taxpayers argue that they filed form NOL-85s and elected to forego the carryback when they filed their 1993 returns. The Department contends that NOL-85s were not attached to the returns. It is not necessary, however, to decide that factual issue. Even if the NOL-85 forms were not filed, the Taxpayers

should still be allowed to carry the entire NOL forward to 1994.

In State v. First National Bank of Auburn, 141 So.2d 196 (1962), the Revenue Department assessed 1953 financial institution excise tax (AFIET<sup>1</sup>) against the Bank based on income of \$8,985.51. The Bank did not appeal the final assessment. The Bank incurred losses in 1954 and 1955, and carried the losses back to 1953 for a refund under the FIET loss carryback provision. The FIET loss statute is similar in substance to the income tax NOL provision in that the loss must first be carried back to prior years.

The Department denied the 1953 refund because at the time, a final assessment that was not appealed was conclusive. The tax period involved could not be reopened.<sup>1</sup> The Department thus required the Bank to carry the loss forward to 1956, 1957, and 1958. As in this case, however, the Department also reduced the NOL by the amount of the Bank's 1953 income (\$8,985.51) against which the loss should have been applied. The Department's position, again as in this case, was that the amount of the loss that should have been carried back to offset income in 1953 was lost to the Bank, either as a carryback or a carryforward.

The Alabama Supreme Court rejected the Department's position, holding that if the Bank could not carry the loss back, it should be allowed to carry the entire loss forward, without reduction.

(Bank) unquestionably is entitled either to a refund of the excise tax paid in the amount of \$539.13 for the tax year 1953, by reason of a carry-back to that tax year of a loss in the amount of \$8,985.51, or to a credit of said loss against its net income for the tax year here involved as a carry-over to that

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<sup>1</sup>Under current law, if a taxpayer fails to timely appeal a final assessment, the taxpayer may pay the final assessment and petition for a refund. Code of Ala. 1975, § 40-2A-7(c)(1).

year. In either event, the same amount of excise tax is involved. Since the State has rejected appellee's application for a refund, by way of a carry-back, what ground is there for denying appellee relief by carrying the loss over to the tax year here involved? Aside from any other consideration, to deny such relief would be unjust. As said in *Bull v. United States*, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421: "If that which the sovereign retains was unjustly taken in violation of its own statute, the withholding is wrongful. Restitution is owed the taxpayer." Cf. *Crosset Lumber Co. v. United States*, (C.C.A. 8) 87 F.2d 930, 932-933, 109 A.L.R. 1348.®

State v. First National Bank of Auburn, 141 So.2d at 199.

The above rationale applies in this case. If the Taxpayers are not allowed to carry the loss back for refunds in 1991 and 1992, they should be allowed to carry the entire loss forward to 1994.

The NOL statute was amended in 1998 by Act 98-502. Under the amended statute, a taxpayer can forego an NOL carryback either by electing to do so on form NOL-85, as before, or by timely claiming the NOL as a carryover deduction on the subsequent year's return. See, Code of Ala. 1975, § 40-18-15.2(4). Thus, under current Alabama law, the Taxpayers clearly would be entitled to carry the entire 1993 loss over to 1994.

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

Entered March 23, 1999.

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BILL THOMPSON  
Chief Administrative Law Judge

BT:ks

cc: Antoinette Jones, Esq.  
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