

ROBERT T. & FAYE E. BLAIR
345 Mountain View Lake Road
Sylacauga, AL 35150,

Taxpayers,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. INC. 00-257

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Robert T. and Faye E. Blair (ATaxpayers@) for 1998 income tax. The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, ' 40-2A-7(b)(5)a. A hearing was conducted on July 6, 2000. CPA Rocky Jackson represented the Taxpayers. Assistant Counsel David Avery represented the Department.

The Taxpayers failed to pay their fourth quarter 1998 estimated tax. The issue in this case is whether the Taxpayers are subject to the estimated tax underpayment penalty levied at Code of Ala. 1975, ' 40-18-80(a). If so, can and should the penalty be waived for reasonable cause.

The Taxpayers timely reported and paid their estimated tax for the first three quarters of 1998. They realized a large gain in the last quarter of 1998, but failed to timely pay their fourth quarter estimate by the January 15, 1999 due date. They timely filed their 1998 return and paid the balance due of \$66,880.

The Department assessed the Taxpayers for the 6 percent penalty levied at ' 40-18-80(a) because they failed to pay their fourth quarter estimate. The Taxpayers appealed.

The first sentence of ' 40-18-80(a) levies a penalty on any individual that fails to make estimated payments of at least 90 percent of the tax due for the year. The penalty is the lesser of (1) the difference between 90 percent of the tax owed for the year and the estimated tax paid, or (2) 6 percent of the difference between the tax owed for the year and the estimated tax paid.

The Taxpayers concede they failed to pay their fourth quarter estimate. They argue, however, that the 6 percent penalty does not apply under the specific wording of the second sentence of ' 40-18-80(a). That part of the second sentence relied on by the Taxpayers reads as follows:

AThis subsection shall not apply . . . to the taxable year in which the taxpayer makes a timely payment on April 15, June 15, or September 15 of such year, or on January 15 of the year succeeding the taxable year, . . .@

The Taxpayers claim the penalty does not apply because they timely paid their estimates for the first three quarters of 1998, and the statute specifies that the penalty does not apply if Atimely payment@is made for any one quarter of the year. But a different result is required when the second sentence of ' 40-18-80(a) is read in its entirety. The second sentence of ' 40-18-80(a) reads in pertinent part as follows:

This subsection shall not apply . . . to the taxable year in which the taxpayer makes a timely payment on April 15, June 15, or September 15 of such year, or on January 15 of the year succeeding the taxable year, or in the case of farmers exercising an election under Section 40-18-82 within the last quarter and making payment in an amount at least as great as though computed on the basis of the facts shown on his return for the preceding taxable year.

If a comma is added after Aquarter,@the clause relating to farmers is properly set apart, and the meaning of the sentence is clarified.

This subsection shall not apply . . . to the taxable year in which the taxpayer makes a timely payment on April 15, June 15, or September 15 of such year, or on January 15 of the year succeeding the taxable year,...,and making payment in an amount at least as great as though computed on the basis of the facts shown on his return for the preceding taxable year.

Adding the comma clarifies that the penalty does not apply if a taxpayer pays estimated tax in one or more quarters of the year in an amount at least equal to his past year's liability.¹ Repunctuating a statute is appropriate when necessary to find the true intent of the statute. Palmer v. State, 312 So.2d 399 (1975) (ACourts do not hesitate to repunctuate, when it is necessary to arrive at the true meaning (of a statute).@ Palmer, at 404. See also, Daugherty v. Town of Silverhill, 672 So.2d 813 (Ala.Civ.App. 1995); Guy H. James Const. Co. v. Boswell, 366 So.2d 271 (Ala. 1979). The Taxpayers failed to pay at least as much as their 1997 liability with their three 1998 estimates. Consequently, the safe harbor provided by the second sentence of ' 40-18-80(a) does not apply.

¹This same safe harbor is also contained in the federal estimate underpayment Apenalty@statute, 26 U.S.C. ' 6654.

The Department contends that the ' 40-18-80(a) penalty cannot be waived because it is modeled after federal ' 6654, which cannot be waived. The federal penalty can, however, be waived in some instances, including underpayments due to casualties, disasters, or other unusual circumstances, see ' 6654(e)(3)(A), and for reasonable cause relating to newly retired and disabled individuals, see ' 6654(e)(3)(B). But while ' 6654 and ' 40-18-80(a) are similar in nature, ' 40-18-80(a) is not modeled after ' 6654. The two statutes are clearly different in substance.² In any case, the ' 40-18-80(a) penalty can be waived because the Alabama Reasonable cause penalty waiver statute, Code of Ala. 1975, ' 40-2A-11(h), specifically applies to all penalties levied in Title 40, including the ' 40-18-80(a) penalty.

The Department contends that even if the penalty can be waived, which it can, the Taxpayers failed to establish reasonable cause in this case. I disagree. Rev. Proc. 97-003 and Reg. 810-14-1-.33.01(3)(a)l(iv) both define Reasonable cause to include a Nonrecurring honest mistake. The Taxpayers timely filed for the first three quarters of 1998. Their CPA timely filed their fourth quarter federal estimate, but simply overlooked filing with the Department. That nonrecurring honest mistake constitutes reasonable cause to waive the penalty.

The Taxpayers are liable, however, for interest on the underpayment pursuant to Code of Ala. 1975, ' 40-1-44. Section 40-1-44 requires that interest shall be added to any tax not paid by the due date. Delinquent estimate payments clearly constitute tax not paid

²Section ' 6654 levies a penalty equal to interest at the rate established by 26 U.S.C. ' 6621, applied to the amount of the underpayment for the period of the underpayment. That penalty is clearly different from the penalty at ' 40-18-80(a).

by the due date. Interest is owed on the underpayment from the January 15, 1999 due date of the fourth quarter estimate until the tax was paid.³

³Charging the Taxpayers interest on the underpayment in effect requires the Taxpayers to pay the same amount to Alabama that would have been required under '6654.

The Department should recompute the Taxpayers= 1998 liability as indicated above. The Department should notify the Administrative Law Division of the adjusted amount due. An appropriate Final Order will then be entered.

This Opinion and Preliminary Order is not a Final 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 25, 2000.

BILL THOMPSON
Chief Administrative Law Judge