

BYNUM & PARTNERS, INC.  
2101 Magnolia Avenue, Suite 100  
Birmingham, AL 35205,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. W. 98-463

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

### FINAL ORDER

The Revenue Department assessed withholding tax against Bynum & Partners, Inc. (Taxpayer) for January 1995 through January 1998. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, § 40-2A-7(b)(5)a. A hearing was conducted on January 5, 1999. Joe Ezelle represented the Taxpayer. Assistant Counsel David Avery represented the Department.

The issue in this case is whether the late filing and late payment penalties assessed by the Department should be waived for reasonable cause.

The Taxpayer is located in Birmingham, Alabama, and is owned by Carl Bynum. Bynum hired a trusted childhood friend, Randy Goss, as comptroller to handle the corporation's bookkeeping and financial matters. According to the Taxpayer's representative, Bynum believed that Goss was properly filing the corporation's tax returns and paying all tax due.

Unfortunately, Goss engaged in a scheme whereby he embezzled over \$225,000 from the corporation. Bynum discovered the scheme in October 1997, and Goss was convicted of embezzlement in Jefferson County Circuit Court in mid-

1998. Bynum also discovered in late 1997 that Goss had not filed Alabama withholding tax returns for the corporation since 1994. The corporation also had not paid federal or state withholding tax during that period. The corporation filed the delinquent Alabama withholding returns, with W-2 statements, in March 1998. The corporation failed, however, to pay the tax due at that time.

The Department assessed the Taxpayer for the tax due, plus penalty and interest. The Taxpayer's representative met with the Department's Taxpayer Advocate on numerous occasions concerning payment of the tax due and possible waiver of the penalties. The Taxpayer Advocate agreed in April 1998 to waive the penalties if the Taxpayer paid the tax due within two months. That date was extended to July 15, 1998. The Taxpayer made some payments, but was unable to pay the entire amount due. The Department consequently assessed the tax due, plus penalties.

As owner of the business, Bynum knew or should have known that the corporation was not paying its Alabama withholding tax. Only Bynum could sign checks for the corporation. Certainly he was aware that he was not signing monthly checks in payment of the withholding tax liabilities.

In any case, the Taxpayer's representative for the first time presented evidence to the Department at the administrative hearing that the IRS had waived all penalties relating to the corporation's failure to file and pay federal withholding taxes during the subject period. The Department's Taxpayer Advocate has a policy

of waiving any penalty that has been waived by the IRS. Given the unfortunate circumstances surrounding the Taxpayer's business, I see no reason not to follow that reasonable policy in this case.

The final assessment, less the penalties, is affirmed. Judgment is entered against the Taxpayer for \$39,107.09, plus interest from the date of entry of the final assessment, September 22, 1998.

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

Entered March 2, 1999.

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BILL THOMPSON  
Chief Administrative Law Judge

BT:ks

cc: David Avery, III, Esq.  
Joe A. Ezelle  
Ewell Berry

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FINAL ORDER ON APPLICATION  
FOR REHEARING

The final assessment in issue in this case totaled \$49,694.32. Of that amount, \$10,587.23 constituted penalties. The Final Order entered on March 2, 1999 affirmed the tax, but waived the penalties. The Department applied for a rehearing.

The Department first argues that the penalties assessed by the IRS were not waived, but rather were refunded after being paid. That is correct, but it is irrelevant for purposes of determining whether the Alabama penalties should be waived. Alabama law does not require a taxpayer to pay a penalty before it can be waived. The Department has agreed in numerous cases before the Administrative Law Division to waive a penalty without the taxpayer first paying the penalty.

The Department agreed to waive the penalties if the Taxpayer paid the tax due by a date certain. The Department extended the date on several occasions, but the Taxpayer was still unable to pay the full amount due. The Department thus

claims the penalties cannot now be waived.

I recognize the Department's use of penalties as a collection tool. But if reasonable cause exists to waive a penalty, a taxpayer is not required or obligated to pay the tax in issue before the penalty can be waived. Again, the Department has agreed in

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numerous cases before the Administrative Law Division to waive a penalty while the tax was still being contested.

The Department also argues that the IRS waived only the late payment penalties, and not the late filing penalties (except for the quarter ending September 1996). But with only a few exceptions, the IRS statements submitted by the Taxpayer indicate that several different penalties were decreased for each tax period. For example, for June 1996, the IRS document indicates a penalty decrease of \$4,917.33, and a second penalty decrease of \$1,194.18. At the bottom of the document is the statement - ~~A~~\$1,194.18 Late Payment Penalty Removed~~@~~. The \$4,917.33 penalty that was also waived obviously was some penalty other than the late payment penalty. Likewise, for March 1995, the IRS decreased separate penalties of \$4,322.69, \$6,484.03, and \$3,602.24. At the bottom of the document, again there is the statement - ~~A~~\$3,602.24 Late Payment Penalty Removed~~@~~. Although unidentified, the other penalties waived by the IRS for that month were something other than the failure to timely pay penalty. In

total, the IRS waived over \$80,000 in penalties concerning the Taxpayer.

In any case, the Department is correct that it is not obligated to waive a penalty because it was waived by the IRS. But even if the IRS had not waived the federal penalties, reasonable cause exists to waive the Alabama penalties.

Carl Bynum owns the Taxpayer corporation. Bynum hired a trusted childhood friend as comptroller. He trusted the friend to take care of the business= financial and tax matters. Unfortunately, the friend embezzled over \$227,000 from the business over a

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three year period. The friend misled and deceived Bynum concerning what bills were being paid, including what taxes were being reported and paid. It can be argued that Bynum should have suspected that the business= withholding taxes were not being paid. Under the circumstances, however, the late penalties should be waived for reasonable cause.

The Department should collect the delinquent amount owed by the Taxpayer pursuant to established procedures. Bynum is on notice that all current and future taxes owed by his corporation must be timely reported and paid. Failure to do so will subject the corporation to all applicable penalties, absent extraordinary circumstances.

The Department's Application For Rehearing is denied. The Final Order previously entered in this case is affirmed. This Final Order On Application For

Rehearing may be appealed to circuit court within 30 days. Code of Ala. 1975,  
' 40-2A-9(g).

Entered April 9, 1999.

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BILL THOMPSON  
Chief Administrative Law Judge

BT:ks

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Joe A. Ezelle  
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