

ALAN G. NASH
244 Woodcastle Drive
Florence, AL 35630,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. P. 98-513

FINAL ORDER

The Revenue Department assessed a 100 percent penalty against Alan G. Nash (ATaxpayer@), as an individual responsible for the 1994 withholding tax liability of Nash and Associates, Inc. (Acorporation@). 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 April 22, 1999. The Taxpayer represented himself. Assistant Counsel David Avery represented the Department.

This appeal involves two issues:

(1) Was the Taxpayer's appeal timely filed pursuant to Code of Ala. 1975, ' 40-2A-7(b)(5)a.; and

(2) Is the Department estopped from assessing the Taxpayer, individually, because it failed to timely file a claim in bankruptcy court against the Taxpayer's bankrupt corporation.

The Taxpayer owned and operated Nash and Associates, Inc. during the period in question. The corporation filed a petition in U. S. Bankruptcy Court in July 1994. The Taxpayer's attorney claims that the Revenue Department was notified

of the bankruptcy action. However, there is no independent evidence confirming that claim. In any case,

the Department failed to file a claim with the Bankruptcy Court by the claim bar date of November 16, 1994.

The corporation filed its annual Alabama withholding tax return in May 1995. The return indicated an underpayment of withholding tax for the year. The Department filed a claim for the unpaid tax with the Bankruptcy Court in June 1995. The Court disallowed the claim as time-barred. The Department assessed the corporation for the tax due on September 4, 1997. The Department failed to collect the tax from the corporation, and subsequently assessed the Taxpayer, individually, on October 28, 1998. The Taxpayer faxed a notice of appeal to the Administrative Law Division on November 30, 1998.

ISSUE I - WAS THE APPEAL TIMELY FILED?

A final assessment must be appealed within 30 days from when it was entered. Section 40-2A-7(b)(5)a. The 30 day appeal period is jurisdictional and must be strictly followed. Dansby v. State, Department of Revenue, 560 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 Department entered the final assessment in issue on October 28, 1998. Thirty days from that date was November 27, 1998. State offices were closed on that day because it was the Friday after Thanksgiving. Consequently, the deadline was pushed to the next business day, Monday, November 30, 1998. The appeal would have been timely filed if the Taxpayer had delivered or mailed the appeal

to the Administrative Law

Division on that date. Unfortunately, the Taxpayer faxed the appeal to the Administrative Law Division.

The Alabama Supreme Court has held that a faxed notice of appeal does not constitute a proper filing of the appeal, absent an agency rule to the contrary. Ex parte Tuck, 622 So.2d 929 (1993). The Revenue Department does not have a rule allowing the filing of an appeal with the Administrative Law Division by fax. Consequently, the faxed appeal was insufficient. The Taxpayer's appeal is dismissed.

Even though the appeal is dismissed, the Taxpayer may still pay the tax and apply for a refund. Code of Ala. 1975, ' 40-2A-7(c)(1). Consequently, I will address the substantive issue raised by the Taxpayer. Specifically, is the Department estopped from assessing the Taxpayer, individually, because it failed to timely file a claim in Bankruptcy Court against the corporation. The answer is no.

Alabama's 100 percent penalty statutes are modeled after 26 U.S.C. ' 6672. In such cases, federal case law should be followed. State v. Gulf Oil Corp., 256 So.2d 172 (1971). Federal courts have consistently held that the government is not required to attempt to collect the unpaid tax from a bankrupt corporation before proceeding against a responsible officer. In Hutchinson v. United States, 559 F. Supp. 890, 893-894 (1982), the court held as follows:

APlaintiff next argues that the government is estopped from assessing the 100 percent penalty against him because they failed to take steps to collect the

unremitted taxes from the bankrupt corporation.

The many courts that have previously considered this argument have found it unpersuasive. As has been succinctly stated in Van Westerhuyzen v. United States Treasury Dept., 407 F.Supp. 334, 335-36 (D.Minn.1975):

Section 6672 imposes a personal liability for the withheld amounts upon the individual officers or agents required to collect, account for, and pay over [employment taxes], who are responsible for the corporation's default. Kelly v. Lethert, 362 F.2d 629, 633 (8th Cir.1966). The result of this section is to make the responsible officers equally liable with the corporation to the Government and it may proceed against either in the order best suited in its judgment to collect the unpaid tax. Id. at 635. Therefore, defendant is not required to first try to satisfy the tax liability from the assets of the bankrupt corporation but may properly proceed in the first instance against the plaintiffs.

See also Monday v. United States, 421 F.2d 1210 (7th Cir.), cert. den. 400 U.S. 821, 91 S.Ct. 38, 27 L.Ed.2d 48 (1970), on remand, 342 F.Supp. 1271 (D.Wis.1972); Spivak v. United States, 370 F.2d 612 (2nd Cir. 1967), cert. den. 387 U.S. 908, 87 S.Ct. 1690, 18 L.Ed.2d 625 (1968).@

For additional cases on point, see U. S. v. Huckabee Auto Company, 783 F.2d 1546 (11th Cir. 1986); Matter of Taylor, 132 F.3rd 256 (5th Cir. 1998); State of Alabama v. Wilson, Docket P. 93-293 (Admin. Law Div. 1/6/94).

The Taxpayer's appeal is dismissed.

This Final Order may be appealed to circuit court within 30 days. Code of

Ala. 1975, ' 40-2A-9(g).

Entered May 5, 1999.

BILL THOMPSON
Chief Administrative Law Judge

BT:ks

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