

B&B ENTERPRISES, LLC
319 BRADFORD CIRCLE
TRUSSVILLE, AL 35173-3277,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
ALABAMA TAX TRIBUNAL

DOCKET NO. BPT. 14-439

FINAL ORDER

The Revenue Department assessed B&B Enterprises, LLC (“Taxpayer”) for 2013 business privilege tax. The Taxpayer appealed to the Administrative Law Division, now the Tax Tribunal, pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on August 28, 2014. CPA Bob Harris represented the Taxpayer. Assistant Counsel Christy Edwards represented the Department.

The Taxpayer was formed as an Alabama limited liability company (“LLC”) in 1999. The Taxpayer properly elected to be treated as a family limited liability entity (“family LLE”) on its Alabama business privilege tax returns for 1999 through 2012; thereby capping its annual business privilege tax liability at \$500.

The Taxpayer filed its 2013 business privilege tax return with the Department on September 6, 2013. The Taxpayer checked the box on the return labeled “Family LLE Election attached,” but did not enclose the election form – Form BPT-E – with the return.

The Department consequently disallowed the Taxpayer the family LLE status for 2013 because it had failed to file Form BPT-E with its 2013 return, as required by Department Reg. 810-2-8-.05. It adjusted the Taxpayer’s liability accordingly, and notified the Taxpayer of the adjusted liability on November 7, 2013. The Taxpayer’s representative subsequently provided the Department with a copy of the completed Form BPT-E for the

subject year. The Department later entered the final assessment in issue.

An “Electing Family Limited Liability Entity” is defined at Code of Ala. 1975, §40-14A-1(h). Subparagraph (2) of that section requires that to be considered an electing family LLE, the LLC must “[e]lect(s) annually (on or before the due date, including extensions, of the return for the tax levied by this chapter) in a manner prescribed by the department to be taxed for the taxable year as a family limited liability entity.”

The Department subsequently promulgated Department Reg. 810-2-8-.05 in 2005 entitled “Election To File As A Family Limited Liability Entity.” That regulation requires that the election must be attached to the subject year’s return on or before the return due date, and must be made on forms (Form BPT-E) prescribed by the Department. The regulation further provides that family LLE status will be disallowed if the election form is not filed with the return in a timely manner.

The Department does not dispute that the Taxpayer otherwise qualified to be treated as an electing family LLE for 2013, but for the fact that it failed to timely file a completed Form BPT-E with its 2013 return. It argues, however, that because Reg. 810-2-8-.05 requires that the election must be timely and made as proscribed by the Department, i.e., on Form BPT-E, the Taxpayer’s failure to timely file the form prohibits the Department from allowing family LLE status.

The Taxpayer argues that its failure to include the Form BPT-E with the return was a clerical mistake, and that the Department should accept the form after the fact and allow the Taxpayer family LLE status for 2013. The Taxpayer’s response (Answer) to the Department’s Answer reads in part as follows:

I disagree with the assessment by the Department of Revenue. The

Taxpayer was formed as an Alabama limited liability company in 1999. In each year since its inception, the Taxpayer has claimed the family limited liability company election in filing its Business Privilege Tax return. As a result of this election, the company's privilege tax has been limited to \$500.00 each year, the maximum tax for a family limited liability company. Since inception, the state has accepted these returns and agrees that the company qualifies under Alabama law as a family limited liability company. When the return in question was filed, as a result of a clerical error, one page was not attached to the return. This page (Form BPT-E) was the family designation form. As a result of this clerical mistake, the state is disallowing the company's family limited liability status, which results in the balance owed above. The state is not saying that they do not meet the definition of a family limited liability company, only that a form was missing from the return filed. While the Taxpayer understands that the form was required to be filed with the return, a penalty of over \$6,000 for a company whose true tax liability was only \$500.00 is excessive.

Taxpayer's Answer at 1 – 2.

As indicated, §40-14A-1(h)(2) requires an LLC to elect to be taxed as a family LLE “in a manner prescribed by the department. . . .” The manner prescribed by the Department in Reg. 810-2-8-.05 is to timely file a form, Form BPT-E, with the subject year return that includes information sufficient to show that the LLC qualified as a family LLE for the year.

A Department regulation must be followed unless it is contrary to or inconsistent with a statute, or if it is unreasonable. *Ex part White*, 477 So.2d 422 (Ala. 1985), on remand, 477 So.2d 425. Reg. 810-2-8-.05 is not contrary to or inconsistent with a statute. It thus must be followed unless it is unreasonable.

The Tribunal asked the Department to explain why it was reasonable not to accept the election form after the fact. The Department responded, but not to that exact question.

Upon further study, however, I find that the regulation properly requires LLCs to timely file the form with the return, or at least on or before the due date of the return, because doing

so is mandated by the controlling statute.

As discussed, §40-14A-1(h)(2) requires that for an LLC to be treated as a family LLE, it must elect in a manner prescribed by the Department, i.e., by filing a Form BPT-E, “on or before” the due date of the return. The timely filing of the form is thus required by statute. Consequently, family LLE status cannot be allowed in this case.

I agree with the Taxpayer’s representative that the results in this case are harsh, especially considering that the Taxpayer checked the box on its 2013 return indicating that Form BPT-E was attached to the return. But the Department is correct that the election is done by timely submitting the Form BPT-E, and not by checking the box on the return, which is not mentioned in the statute or Reg. 810-2-8-.05.

The Department could amend the regulation to hold that if an LLC checked the family LLE election box on a timely filed return, but failed to submit the Form BPT-E with the return, checking the box would be considered a timely election if the LLC submitted the completed Form within a specific period after the Department notifies the LLC that the Form was omitted. But that is for the Department to decide, not the Tribunal.

The final assessment, less the penalty, which is waived for cause, is affirmed. Judgment is entered against the Taxpayer for \$5,548.37. Additional interest is also due from the date the final assessment was entered, March 18, 2014.

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

Entered January 30, 2015.

BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr

cc: Craig A. Banks, Esq.
Robert L. Harris, CPA