RON KERVIN P.O. BOX 415 ALEX CITY, AL 35011,	§ §	STATE OF ALABAMA ALABAMA TAX TRIBUNAL DOCKET NO. INC. 11-875
Taxpayer,	§	
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER DENYING TAXPAYER'S MOTION TO VOID, VACATE, OR SET ASIDE ORDER

This appeal involves final assessments of 2000 through 2005 income tax entered against the above Taxpayer. A Final Order affirming the final assessments was entered on January 19, 2012. A Final Order on Rehearing affirming that Final Order was entered on February 28, 2012. The Final Order on Rehearing was not appealed. The Taxpayer has now filed a Motion to Void, Vacate, or Set Aside Order. A history of the events and proceedings in this case will help the reader understand the case.

The Revenue Department received IRS information indicating that the Taxpayer was domiciled in Alabama in the subject years and had income sufficient to require him to file Alabama returns for those years. The Department consequently entered preliminary assessments against the Taxpayer on August 7, 2009 based on the IRS information. The Taxpayer petitioned for a review of the preliminary assessments, in which he claimed that he was not liable for Alabama tax because he worked outside of Alabama in the construction industry in the subject years. A Department Hearing Officer reviewed the documents submitted by the Taxpayer, and subsequently denied the petition on October 19, 2011. The Department entered the final assessments in issue on October 26, 2011.

The Taxpayer timely appealed the final assessments to the Department's Administrative Law Division, now the Tax Tribunal. By Notice of Hearing dated December 19, 2011, the case was set for hearing on January 17, 2012. The Taxpayer failed to appear at the hearing, and a Final Order affirming the final assessments was entered on January 19, 2012.

In a letter to the Administrative Law Division dated January 18, 2012, the Taxpayer complained that he did not receive the Notice of Hearing until the day of the hearing – January 17, 2012. The Division responded by letter dated January 20, 2012, which reads in part:

> The Administrative Law Division has received your letter dated January 18, 2012. Contrary to your claim, we did timely send you notice of the January 17, 2012 hearing. Enclosed is a copy of the U.S. Postal Service tracking sheet, which shows that our December 19, 2011 Notice of Hearing arrived at the Alex City Post Office on December 21, 2011. The Post Office attempted delivery to you on that day, and again on December 31, 2011. Because you failed to sign for or accept delivery at the Post Office, the notice was returned to Montgomery on January 9, 2012. The Department remailed the notice to you by first class mail on January 10, 2012.
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> The January 17 hearing was conducted as scheduled. Enclosed is a Final Order that I entered on January 19, 2012. The Order explains why the Department assessed you for the tax for the years in issue.
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> I can assure you that it is the Administrative Law Division's goal to treat you and all other taxpayers fairly. I am a taxpayer myself and understand what it is like to deal with the government. Please review the enclosed Final Order. It appears that although you worked outside of Alabama for most of the years in issue, you remained domiciled in Alabama, and were thus liable for Alabama tax on your income in those years. As indicated in the Final Order, you would be entitled to a credit against your Alabama liability for any tax paid to another state.

The Taxpayer responded with a January 25, 2012 letter in which he reiterated his claim that he was not liable for Alabama tax because he worked outside of Alabama in the

subject years. The Division replied with a February 1, 2012 letter indicating that it had docketed the Taxpayer's January 25, 2012 letter as an application for rehearing. The matter was also set for a rehearing on February 23, 2012. The February 1 letter to the Taxpayer reads in part as follows:

> The legal issue concerning domicile is explained in the January 19, 2011 Final Order. Domicile is not necessarily where you lived and worked in the given year. Rather, it is your permanent home to which you intend to return at some point in the future. You will be allowed to explain your situation at the February 23 hearing. I will then decide the legal issue based on those facts.

The Taxpayer responded with a February 13, 2012 letter indicating, in substance, that he no longer wished to pursue his appeal. The Division replied with a February 17, 2012 letter, which reads in part as follows:

> I have received your February 13, 2012 letter. I can assure you that I have not made up my mind about your case. It appears, however, that you no longer wish to pursue your appeal. I will nonetheless keep your case on the docket for February 23, 2012. If you wish, you may appear at that time and explain your case to me. Even if you were domiciled in Alabama in the subject years, and thus liable for the tax and interest in issue, the penalties may be waived for cause if you can show reasonable cause why you believed that you did not owe Alabama tax on your income earned outside of Alabama in the subject years.

The Taxpayer did not attend the February 23, 2012 rehearing. A Final Order on Rehearing affirming the January 19, 2012 Final Order was entered on February 28, 2012. As indicated, the Taxpayer did not appeal that Final Order within 30 days, as required by Code of Ala. 1975, §40-2A-7(b)(5)a.

The Department issued a Final Notice Before Seizure against the Taxpayer for the years in issue in late 2013. The Taxpayer wrote the Administrative Law Division a December 1, 2013 letter in which he requested that the Department stay its collection

actions and allow him to file returns for the subject years. The Division responded by letter dated December 16, 2013 that it no longer had jurisdiction and could not interfere with the Department's collection actions, citing Code of Ala. 1975, §40-2A-8(c). It also indicated that the Taxpayer could contact the Department's Collection Services Division to arrange a payment plan.

The Taxpayer's attorney filed a Notice Of Appeal Of Final Assessments concerning the final assessments in issue on December 19, 2013. The Notice asserted in part that after the Department had entered preliminary assessments against the Taxpayer for the subject years, the Taxpayer requested a review of the preliminary assessments, but that the Taxpayer never heard back from the Department until December 2013. "The taxpayer never heard back from the Department concerning said preliminary assessments until December of 2013 when he received a telephone call from the collections department regarding collection on Final Assessments for the tax years 2000, 2001, 2002, 2003, 2004, and 2005." December 19, 2013 Notice of Appeal at 2.

The above assertion is incorrect because as discussed, the Department Hearing Officer issued a report on October 19, 2011 concerning the Taxpayer's petition for review. The Taxpayer also appealed the resulting final assessments to the Department's Administrative Law Division. As explained, the Division conducted two hearings in the case, and the Taxpayer eventually notified the Division that he no longer wished to pursue his appeal.

In any case, the Division responded to the December 19, 2013 Notice of Appeal by letter dated December 23, 2013. That letter again explained that the Administrative Law Division no longer had jurisdiction in the case. The Taxpayer's attorney did not respond.

Another attorney for the Taxpayer filed the currently pending Motion to Void, Vacate, or Set Aside Order with the Tax Tribunal on December 17, 2014. The motion asserts that the Taxpayer had filed a Chapter 13 bankruptcy petition on June 10, 2011, which was converted to a Chapter 7 on March 2, 2012, and terminated on August 3, 2012. It further asserts that an automatic stay resulted from the June 10, 2011 filing, and that the January 19, 2012 Final Order issued by the Administrative Law Division was void because it violated the stay.

The Department responded to the Taxpayer's motion on March 9, 2015. Because of the complex nature of the applicable law in this case, the Department's response is included below in its entirety:

> The Taxpayer's motion is due to be denied. As relevant to the actions under consideration in this case, Section 362(a) bars only the commencement or continuation of judicial or administrative actions "against the debtor" or similar actions to "recover a claim against the debtor." 11 U.S.C. § 362(a)(1). The proceeding before this Court that culminated in the entry of the Final Order was initiated by the Taxpayer for a redetermination of his tax liability for the tax years in issue. As such, this proceeding was not an action commenced "against" the Taxpayer in violation of the automatic stay. *See, e.g., Roberts v. C.I.R.*, 175 F.3d 889 (11th Cir. 1999) (taxpayer's initiation of proceeding for redetermination of notice of tax deficiency issued by the Internal Revenue Service ("IRS") did not constitute a proceeding "against the debtor" under section 362(a)(1)). Moreover, because this Court has no statutory authority to issue orders in aid of the Department's collection of assessed taxes, the Taxpayer's appeal of the Final Assessments to this tribunal was not a proceeding to "recover a claim" against the Taxpayer. *See id.* at 895-96.
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> Finally, even assuming that the Taxpayer's appeal of the Final Assessments can be characterized as a continuation of the Department's tax assessment process, rather than an independent proceeding initiated by the Taxpayer, this administrative action is expressly excepted from the operation the automatic stay imposed under section 362(a). *See* Section 362(b) (excepting from the stay imposed under paragraph (a) administrative proceedings to determine tax liability, including the "making of an assessment for any tax").

In sum, the above-styled proceeding was not initiated or continued in violation of the automatic stay imposed by section 362(a). As such, the Court's Final Order, from which the Taxpayer failed to prosecute a timely appeal, is a final, binding order that is not due to be set aside as void.

I. BACKGROUND

The Taxpayer filed the Chapter 13 bankruptcy case in issue on or about September 13, 2011. Thereafter, on October 20, 2011, the Department filed claims in the bankruptcy based on the Taxpayer's indebtedness to the Department for individual income tax for the 2000 through 2005 tax years. The Department's claims were based on preliminary assessments for these tax years. On October 26, 2011, the Department entered final assessments for these same periods (the "Final Assessments").

On November 2, 2011, the Debtor filed objections in the bankruptcy case to the Department's claims. In his objections, the Taxpayer contended that he was not liable of Alabama income tax for the years in issue because he was not a resident of the state during these years. In addition to filing objections to the Department's claims in the bankruptcy proceeding, the Taxpayer filed a timely notice of appeal of the Final Assessments with the Administrative Law Division (the predecessor to this Court) on November 9, 2011. In his Notice of Appeal, the Taxpayer raised the same objection to the propriety of the Final Assessments as presented in his objections to the Department's claims in the bankruptcy case. (footnote omitted)

The bankruptcy court scheduled a hearing on the Taxpayer's objections to the Department's claims on December 14, 2011, as well as a hearing on the Department's objection to confirmation of the Taxpayer's Chapter 13 plan. Case No. 11-81424, Doc. 43. On December 5, 2011, the Taxpayer, through counsel, filed a motion in the bankruptcy proceeding to continue the scheduled hearing. Case No. 11-81424, Doc. 49. (footnote omitted) As grounds for his motion, the Taxpayer stated that confirmation of his Chapter 13 plan hinged, in part, "on the propriety and the amount of priority tax liability owed to the Alabama Department of Revenue." Ex. E. The Taxpayer went on to state that "[a]s allowed under [Bankruptcy Code] § 362(b), the Department has issued a final assessment against [the] Debtor during the pendency of the instant Chapter 13 Bankruptcy case." *Id.* The Taxpayer concluded by advising the bankruptcy court that his administrative appeal of the Final Assessments would likely be held in January or February of 2012 and requesting that the bankruptcy court continue the scheduled hearing on his objections to the Department's claims and confirmation of his plan until after the administrative appeal hearing. *Id.*

On March 2, 2012, following the entry of this Court's Final Order and Final Order on Rehearing affirming the Final Assessments, the Taxpayer withdrew his objections to the Department's claims in the bankruptcy case. Case No. 11-81424, Doc. 63. (footnote omitted) On this same date, the Taxpayer converted his Chapter 13 "reorganization" case to a Chapter 7 liquidation case. Case No. 11-81424, Doc. 61. The bankruptcy court granted the Taxpayer a Chapter 7 discharge on August 3, 2012. Case No. 11-81424, Doc. 82. However, because the Taxpayer had not filed returns for the 2000 through 2005 tax years, his indebtedness to the Department for these tax years was excepted from the court's order of discharge. 11 U.S.C. § 523(a)(1)(b)(i).

II. ANALYSIS

Upon the filing of a bankruptcy petition, section 362(a)(1) stays "the commencement or continuation…of a judicial or administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy case]." The second clause of section 362(a)(1) further stays the commencement of such proceedings "to recover a claim against the debtor that arose before the commencement of the case…."

Examining the scope of the prohibition encompassed by the first clause of section 362(a)(1), courts have universally applied a bright line, mechanical test. Under this test, the determinative inquiry is whether the proceeding in question was initiated "against" the debtor" or, conversely initiated "by the debtor." The former actions or proceedings are stayed under section 362(a)(1). The latter are not. *See, e.g., Haag v. United States*, 485 F.3d 1, 4 (1st Cir. 2007) (Under section 362(a)(1), "Congress chose to stay only actions against the debtor and not those by him even though each can have adverse effects on the estate and other third party interests.").

The question of whether an action or proceeding is "initiated by the debtor" or "against the debtor," and therefore subject to the automatic stay under section 362(a)(1), must be determined at its inception. *Schoppe v. C.I.R*, 711 F.3d 1190 (10th Cir. 2013). In making this determination in the present case, it is helpful to consider the statutory procedures under which assessments are entered by the Department and the implications of the Department's entry of a final assessment of tax.

As in effect at the time of the entry of the Final Assessments and currently, Section 40-2A-7(b) of the Alabama Taxpayers' Bill of Rights ("ATBOR") sets forth the procedures the Department must follow to assess taxes, including individual income tax, against taxpayers. When a final assessment is entered in accordance with these procedures, the tax is deemed "finally

assessed." *Moore v. State of Alabama Dep't of Revenue*, 447 So. 2d 744, 746 (Ala. Civ. App. 1983). No further action is required by the Department to finalize the assessment.

A taxpayer, however, may elect to challenge or seek a redetermination of the final assessment by filing notice of appeal with this Court or in circuit court within the time prescribed by section 40-2A-7(b)(5). This action, however, is initiated solely by and at the discretion of the taxpayer. As such, it does not fall within the prohibition of actions or proceedings "against a debtor" set forth in section 362(a)(1).

Faced with the similar question of whether an appeal to the United States Tax Court of a notice of deficiency issued by the IRS under section 6212 of the Internal Revenue Code ("IRC"), (footnote omitted) federal courts of appeal have concluded almost unanimously that such appeals are initiated by the taxpayer and, therefore, not subject to the stay imposed by section 362(a)(1). *See Freeman v. C.I.R.*, 799 F.2d 1092 (5th Cir. 1986); *Roberts v. C.I.R.*, *supra* at 895 ("Given that the [debtors] themselves initiated the proceeding by filing their petition for redetermination with the Tax Court…, it would be difficult to reach any other conclusions."); *Rhone-Poulenc Surfactants and Specialties, L.P. v. C.I.R*, 249 F.3d 175 (3rd Cr. 2001); *Schoppe v. C.I.R.*, *supra*. (footnote omitted)

The Ninth Circuit is alone in holding that an appeal of an IRS notice of deficiency to the Tax Court was not "initiated" by the debtor that prosecuted the appeal. *Delfit v. C.I.R.*, 18 F.3d 768 (9th Cir. 1994). In *Delfit*, the court found that the appeal was instead a "'continuation [by the IRS] of an administrative proceeding 'against the debtor' within the meaning of the first clause of Section 362(a)(1)." *Delfit* at 770. The Ninth Circuit's reasoning in this regard has been soundly and universally rejected by other federal courts considering the same issue. *See, e.g., Roberts v. C.I.R.*, *supra*, at 896 and n.5.

Furthermore, even if the Ninth Circuit's reasoning was valid under the law applicable to the case before it, subsequent amendments to the Bankruptcy Code and in effect at the time the Taxpayer filed his bankruptcy case, render the conclusion in *Delfit* inapplicable to the facts before this Court. The court in *Delfit* was considering the scope of the stay imposed by section 362(a)(1) prior to the amendment of this section by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 116, 108 Stat. 4106, 4119 (1994). Pursuant to this amendment, Congress expressly exempted from the scope of the automatic stay administrative actions and proceedings to determine and assess taxes due. 11 U.S.C. § 362(b)(9)(A)-(D). (footnote omitted) In sum, these exceptions to the automatic stay allow the Department and other

governmental units to proceed with administrative actions and proceedings necessary to the determination and fixing of a taxpayer's liability. As such, to the extent that an administrative appeal of a final assessment to this Court or its predecessor could be characterized as a continuation of the Department's administrative procedures for assessing taxes, rather than proceeding initiated by the taxpayer, these procedures are now expressly exempted from the automatic stay. *Id.*

In sum, the Taxpayer's appeal of the Final Assessments to this Court was not a proceeding "against" the Taxpayer that was stayed under the first clause of section 362(a)(1). Furthermore, to the extent that it might be characterized as a continuation of the administrative procedures necessary for the making of an assessment of tax by the Department, section 362(b)(9) exempts such activities from the operation of the stay imposed by section 362(a).

As to the stay effected by the second clause of section 362(a)(1), i.e., the stay of actions to recover a claim against the debtor, again, with one exception federal courts interpreting this provision have determined that an appeal of an IRS notice of deficiency to the Tax Court does not fall within the scope of this stay. *See*, *e.g.*, *Roberts v. C.I.R.*, *supra*. In *Roberts*, the Eleventh Circuit aptly reasoned that, because the Tax Court had no statutory authority to issue orders in aid of IRS collection activities, the taxpayer's/debtor's appeal for a redetermination of an IRS notice of deficiency could not be characterized as a proceeding "to recover a claim against the debtor." *Roberts* at 895-95 ("'A proceeding in the Tax Court is, of course, not a suit for the collection of taxes, but a proceeding for the review of the Commissioner's action in determining a deficiency.'") (citation omitted). Similarly, at the time the Taxpayer filed his Notice of Appeal, this Court had (and currently continues to have) no statutory authority to aid in the collection of assessments entered by the Department. Accordingly, employing the rationale of the Eleventh Circuit, this Court should find that the Taxpayer's appeal of the Final Assessments to this forum was not an action to recover a claim against the taxpayer and, therefore, was not prohibited under the second clause of section 362(a)(1).

III. CONCLUSION

The Taxpayer in this case had a choice. Following the entry of the Final Assessments, he could have sought a redetermination of the Final Assessments in his bankruptcy case, rather than invoking the jurisdiction of this Court for this purpose. *See* 11 U.S.C. § 505(a) (providing that the bankruptcy court "may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously

> assessed, whether or not previously paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction."). This grant of authority is broad, but, with one narrow exception not applicable in this case, this authority is not exclusive during the pendency of the bankruptcy proceeding. (footnote omitted)
> Rather than invoking this authority, the Taxpayer, instead, chose to challenge the Final Assessments in this Court and in fact, asked the bankruptcy court to continue hearings on his objections to the assessments and the confirmation of his plan, pending this Court's decision. Moreover, when this Court rendered its decision affirming the Final Assessments, the Taxpayer abandoned his challenge to Final Assessments in his bankruptcy case and did not seek appellate review of the decision in the courts of this state.
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> Having chosen to submit the matter to this Court and abandon any challenge to the Final Assessments in the bankruptcy case or otherwise, the Taxpayer is bound by this Court's decision. As discussed above, his submission of this determination to this Court was not a violation of the stay imposed by section 362(a). As such, the Court's Final Order and Final Order and Final Order on Rehearing are not subject to collateral attack as having been entered a violation of the stay.
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> Accordingly, based on the foregoing, the Department requests that the Court enter an order denying the Taxpayer's Motion to Void, Vacate, or Set Aside the Court's Final Order.

The Taxpayer's attorney responded to the above by arguing that the Taxpayer's appeal before the Department's Administrative Law Division had been, in substance, a continuation of the Department's actions "against" the Taxpayer, in which case the bankruptcy stay applied during the pendency of the Taxpayer's appeal. The attorney also claims that the Department violated the Taxpayer's due process rights because it repeatedly failed to mail notices and other documents to the Taxpayer at his last known address.

I agree with the Department that the 11 U.S.C. §362(a)(1) bankruptcy stay does not apply in this case. As pointed out in the Department's brief, the stay applies only to actions against the debtor, not actions by the debtor. *Haag v. U.S.*, 485 F.3d 1 (1st Cir. 2007). The

Taxpayer's appeal to the Administrative Law Division was a voluntary action by the Taxpayer to challenge the 2000 – 2005 final assessments. The appeal was not a continuation of the Department's action against the Taxpayer, and thus was not a proceeding against the Taxpayer within the purview of the §362(a)(1) stay.

The Taxpayer also was not denied due process. As explained above, he was allowed a hearing before the Revenue Department's Hearing Officer. After the Department entered final assessments against the Taxpayer, he timely appealed to the Department's Administrative Law Division. That Division duly mailed him notice of the January 17, 2012 hearing by certified mail on December 19, 2011. The Postal Service attempted to deliver the notice on December 21 and December 31, 2011. The notice was unclaimed and returned on January 9, 2012. The Division remailed the notice by first class mail on January 10, 2012.

The Taxpayer subsequently complained by letter dated January 18, 2012 that he was not properly notified of the hearing. Alabama's courts have held, however, that a taxpayer cannot fail or refuse to claim a notice sent by certified mail letter and thereafter argue that he was denied due process. *Williams v. State, Dept. of Revenue*, 578 So.2d 1345 (Ala. Civ. App. 1991). The Division explained to the Taxpayer in a January 20, 2012 letter that he had been timely mailed a notice of the January 17 hearing, and also why the final assessments had been affirmed.

The Taxpayer responded by letter dated January 25, 2012, which the Division treated as a timely application for rehearing. The Taxpayer was also notified that a rehearing would be conducted on February 23, 2012. The Taxpayer subsequently informed the Division that he no longer wished to pursue his appeal. The Division

nonetheless kept the case on its February 23 docket in case the Taxpayer changed his mind and wanted to pursue his appeal. The Taxpayer failed to appear, and the previously entered Final Order affirming the final assessments was affirmed. The Taxpayer failed to timely appeal to circuit court.

The above clearly illustrates that the Taxpayer was allowed every opportunity to present his case to the Administrative Law Division. Due process was satisfied. And even if the Department had mailed some documents to the wrong or an old address, when the Taxpayer timely appealed to the Administrative Law Division, "he waived any (prior) irregularities in the proceeding of the Department of Revenue as to notice." *State v. Overby*, 89 So.2d 525, 527 (Ala. 1956).

I understand and appreciate the Taxpayer's claim that he represented himself pro se before the Administrative Law Division because he could not afford to hire an attorney. But the final assessments in issue were not affirmed because the Taxpayer failed to adequately represent himself or due to some procedural mistake. Rather, it appears that the Taxpayer simply failed to understand that although he worked outside of Alabama during the subject years, he retained his Alabama domicile, and was thus liable for Alabama income tax on his foreign-sourced income in those years. The Administrative Law Division explained the above to the Taxpayer in the January 19, 2012 Final Order, and on several occasions thereafter, to no avail.

The Taxpayer also has never disputed that he never abandoned Alabama as his domicile during the subject years. In a September 21, 2009 letter to the Department, he stated – "Let the record reflect that I did not abandon the State of Alabama. That word implies negative actions on my part. I simply worked in the construction industry." He also

filed a Chapter 13 bankruptcy in the Middle District of Alabama in September 2004 in which he verified his Alabama residency, and that he had not lived outside of Alabama for the two preceding years.

Because the §362(a)(1) bankruptcy stay provision did not apply, and because the Taxpayer was allowed due process, and because the Tax Tribunal no longer has jurisdiction in the case, the Taxpayer's motion is denied.

I will add, however, that it appears that the taxpayer mistakenly but in good faith believed that he was not liable for Alabama tax in the subject years because he earned his income outside of Alabama. Consequently, if the Taxpayer had pursued his appeal, the penalties included in the final assessments could have been waived for reasonable cause under the circumstances. But as indicated, the Tribunal no longer has jurisdiction in the case.

This Final Order Denying Taxpayer's Motion may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2B-1(m).

Entered March 27, 2015.

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BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr
cc: Kelley A. Gillikin, Esq.
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