

MOMENTUM MOTORWORKS, INC. §
2040 OLD MONTGOMERY HWY. §
BIRMINGHAM, AL 35244-1655, §

Taxpayer, §

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE. §

STATE OF ALABAMA
ALABAMA TAX TRIBUNAL

DOCKET NO. W. 15-116

FINAL ORDER

The Revenue Department assessed Momentum Motorworks, Inc. (“Taxpayer”) for withholding tax for January, February, April, and May 2014, and the quarters ending March 31, 2014 and June 30, 2014. The Taxpayer appealed to the Tax Tribunal pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on August 13, 2015. Steve Schniper represented the Taxpayer. Assistant Counsel Kelley Gillikin represented the Department.

The Taxpayer failed to electronically file and pay its withholding taxes during the periods in issue, as required by Code of Ala. 1975, §41-1-20. It did, however, timely file paper returns and pay the tax due for those periods. The Department subsequently entered the final assessments in issue for the negligence and failure to file electronically penalties of \$50 for each tax period involved.

The Department had previously assessed the Taxpayer for withholding tax for various months in 2009 and 2010. Those assessments consisted mainly of penalties because the Taxpayer had erroneously filed quarterly withholding returns, and not monthly returns, as required by Code of Ala. 1975, §40-18-71. The Taxpayer appealed to the Department’s now-defunct Administrative Law Division, now the Tax Tribunal. The

penalties were waived for cause under the circumstances. See *Momentum Motorworks, Inc. v. State of Alabama*, Docket W. 11-194 (Admin. Law Div. 10/17/2011).

In the prior appeal, the Department submitted into evidence as Exhibit B an August 18, 2009 notice to the Taxpayer's representative informing the Taxpayer that because it was making monthly withholding payments of more than \$750, it was required by §41-1-20 to pay the amounts due electronically. The Department also stated in its Answer filed in the prior appeal that "because the payments are \$750 or more, the Taxpayer is required to file and pay electronically." Answer, at 2.

The Department also subsequently mailed notices to the Taxpayer's representative informing the Taxpayer that it was required to file and pay its withholding taxes electronically. The notices were dated April 11, 2011, May 23 and November 19, 2012, and March 31, 2014. The notices also included the Taxpayer's account number, sign on ID, and access code. Importantly, the Taxpayer electronically filed and paid its withholding taxes for the months of May through August 2011, and January 2015.

The Taxpayer's representative argues that the Taxpayer should not be penalized under the circumstances for not electronically filing its withholding tax returns for the periods in question. He claims that the Department's notices informing the Taxpayer to file electronically were mailed to an old address, and that the Taxpayer's owner relied in good faith on his in-house bookkeeper to properly file the returns and pay the tax due. Finally, he points out that the Taxpayer has always timely filed paper withholding tax returns and paid the tax due.

Code of Ala. 1975, §41-1-20(b)(2)a. requires that all payments to the Revenue Department of over \$750 must be paid electronically. As discussed, the Department sent

numerous notices to the Taxpayer's representative in this case indicating that the Taxpayer was required to electronically file and pay its withholding tax. The notices were sent to the representative's last known address on file with the Department. Unfortunately, the representative had previously changed his address, and thus did not receive the notices.¹

The fact that the Taxpayer's representative did not receive the above notices is irrelevant, however, because the Taxpayer otherwise knew, or should reasonably have known, that it was required to file and pay electronically during the periods in issue. As discussed, the Department submitted into evidence in the Taxpayer's prior appeal a notice informing the Taxpayer that it was required to file and pay electronically. The Department also stated in its Answer in the prior appeal that the Taxpayer was required to file and pay electronically. Importantly, the Taxpayer actually filed and paid electronically for four months in 2011, which shows that the Taxpayer had the ability and the information necessary to file and pay electronically in subsequent months.

Code of Ala. 1975, §40-1-21 provides that if a taxpayer that is required to file and pay electronically fails to do so, the taxpayer shall be subject to the penalties "as provided by state law for delinquent or deficient tax . . . payments." The failure to file and pay penalties in Code of Ala. 1975, §40-2A-11 thus apply if a taxpayer is required to but fails to file and pay electronically. The penalties assessed for the Taxpayer's failure to file and pay electronically are accordingly affirmed.

The Department also assessed the Taxpayer for the negligence penalty at Code of Ala. 1975, §40-2A-11(c). It is, however, unclear if the negligence penalty applies when a taxpayer fails to file and pay electronically.

¹ The representative admittedly failed to notify the Department of his change of address.

To begin, the penalty statute applicable to a taxpayer's failure to file and pay electronically, §41-1-21, only subjects the taxpayer to the penalties in §40-2A-11 "for delinquent or deficient tax . . . payments." It is thus not clear that the Alabama Legislature intended for the negligence penalty at §40-2A-11(c) to apply when a taxpayer failed to file and pay electronically.

And even assuming that the negligence penalty may apply, it can only apply "[i]f any part of any underpayment of tax is due to negligence or disregard of rules and regulations. . . ." There was no underpayment in this case because the Taxpayer timely and fully paid the withholding tax due for the periods in issue. Without an underpayment due to negligence, the negligence penalty cannot apply.

Section 40-2A-11(c) also defines "negligence" as "any failure to make a reasonable attempt to comply with Title 40, . . ." Title 40 required the Taxpayer to report and pay the withholding tax due by the due date. As indicated, the Taxpayer did so. It did fail to file and pay electronically, but that requirement is in Title 41, not Title 40, and thus outside of the scope of the negligence penalty.

Based on the above, the negligence penalties are deleted from the final assessments in issue.

The final assessments, as reduced, are affirmed in the amounts of \$200 for the quarters ending March 31 and June 30, 2014, and the months of April and May 2014, and \$100 for the months of January and February 2014. Judgment is entered accordingly. Additional interest is also due from the date the final assessments were entered, December 1, 2014.

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

Entered August 20, 2015.

BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr

cc: Kelley A. Gillikin, Esq.
Stephen H. Schniper