

ALABAMA TAX TRIBUNAL

JOSEPH T. CLARK,	§	
Taxpayer,	§	DOCKET NO. INC. 17-996-JP
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

**ORDER GRANTING TAXPAYER’S
APPLICATION FOR REHEARING**

This appeal involves a final assessment of individual income tax entered by the Alabama Department of Revenue for the year 2012. The Revenue Department filed a Motion to Dismiss showing that it mailed the assessment in issue to the Taxpayer on June 19, 2017. Because the Taxpayer’s Notice of Appeal was not postmarked until August 18, 2017, which was well beyond the statutory 30-day appeal period, the Revenue Department asked that the Taxpayer’s appeal be dismissed. A Final Order Dismissing Appeal was entered on November 16, 2017. The Taxpayer timely applied for rehearing.

The Taxpayer argues that the Revenue Department’s initial mailing of the final assessment – on June 19, 2017 – was not to the Taxpayer’s “last known address,” as required by law. Instead, the Taxpayer states, the Revenue Department did not mail the assessment to the Taxpayer’s last known address until July 19, 2017. Thus, according to the Taxpayer, his Notice of Appeal (postmarked August 18, 2017) was filed within the required 30-day appeal period and was timely. The Taxpayer is correct.

By statute, the Department is required to mail a final assessment “to the taxpayer’s last known address,” or to deliver the assessment by personal service. Ala. Code § 40-2A-

7(b)(4)d. There is no statutory definition, however, of a taxpayer's "last known address." Instead, in 1993, the Department chose to define the phrase through the state's administrative rule-making process. In Ala. Admin. Code r. 810-14-1-.13(3), the Department stated the following:

(d) The taxpayer's "last known address" shall be deemed to be the last address provided to the Department by the taxpayer, unless the Department determines that such address has changed subsequent to the last return having been filed.

Here, the parties' timeline is as follows: According to the Department, the latest return it received from the Taxpayer was his 2010 income tax return, which the Department received in October 2011. That return listed a Birmingham, Alabama, address for the Taxpayer. In June 2015, the Department became aware of a Santa Fe, New Mexico, address for the Taxpayer, and a Rosemary Beach, Florida, address for the Taxpayer. The Department is unsure how it became aware of the New Mexico address, but it apparently was made aware of the Rosemary Beach address by the U.S. Postal Service.

The Taxpayer stated that, in March 2016, he and his wife filed their 2009 Alabama income tax return with the Department and listed Rosemary Beach as their address. The Taxpayer's wife testified to this fact by affidavit. The Department stated, however, that it had no record of receiving the 2009 return.

In June 2016, the Taxpayer's attorney in this appeal submitted a power-of-attorney form to the Revenue Department's Taxpayer Advocate. The form, which was signed by the Taxpayer and his wife, listed the Taxpayer's address as Rosemary Beach, Florida. The Revenue Department acknowledges receiving that form.

In January 2017, the Revenue Department found a Panama City Beach, Florida, address for the Taxpayer through a LexisNexis search. On June 16, 2017, the Department entered the final assessment against the Taxpayer and, on June 19, 2017, mailed the assessment to the Panama City Beach address. According to tracking information supplied by the Department, the envelope containing the assessment was returned to the Department on July 5, 2017.

The Department then mailed the final assessment to the Taxpayer by first-class mail on July 19, 2017, using the Rosemary Beach address. The Taxpayer's Notice of Appeal to the Tax Tribunal was postmarked August 18, 2017, which obviously was more than 30 days after the initial mailing date of June 19, 2017, but which was exactly 30 days from the July 19 date of mailing to the Rosemary Beach address.¹

Citing the Department's administrative rule, the Taxpayer argues that his 30-day appeal period did not begin until the Department mailed the assessment to the Rosemary Beach address, which was "the last address provided to the Department by the taxpayer." Ala. Admin. Code r. 810-14-1-.13(3)(d). Again, the Taxpayer states that he provided that address to the Department in his March 2016 filing of the 2009 tax return and in his June 2016 submission of a power-of-attorney form. (The Panama City Beach address, which the Department found in a 2017 search of LexisNexis records and to which the Department mailed the assessment, was not provided "by the taxpayer.")

¹ If a taxpayer chooses to file an appeal with the Tax Tribunal, the taxpayer must do so within 30 days from the date of the Department's mailing (or personal service) of a final assessment. See § 40-2A-7(b)(5)a. If the taxpayer's appeal is untimely, the Tribunal has no jurisdiction to hear the appeal. § 40-2A-7(b)(5)c.1. But, if a taxpayer's properly-addressed Notice of Appeal is postmarked on the 30th day and that appeal actually is delivered to the Tribunal, the date of the U.S. postmark is deemed to be the date of filing of

In the Department's two filings in this appeal – its Motion to Dismiss and its Response to Taxpayer's Application for Rehearing – the Department never cited or discussed Ala. Admin. Code r. 810-14-1-.13. Instead, the Department relies on the "last known address" definition found in a federal regulation and in a Revenue Procedure of the Internal Revenue Service which explains the application of that regulation.

In focusing on a federal regulation instead of its own regulation, the Department relies on an opinion of its former Administrative Law Division (the predecessor to the Tax Tribunal), which states that federal authority should be followed when interpreting a state tax statute that is modeled after a federal statute. Then, the Department refers to the federal regulation and the IRS's internal procedure, both of which state, generally, that a taxpayer's last known address is the one that appears on that taxpayer's most recently filed and processed return. The Department acknowledges an exception to the general rule when the IRS "is given clear and concise notification of a different address." 26 CFR 301.6212-2(a). However, the Department notes that a power-of-attorney form does not constitute such "clear and concise notification," according to Rev. Proc. 2010-16, § 5.01(4).

Therefore, the Department argues that the power-of-attorney form submitted in June 2016 was insufficient to notify the Department that the Taxpayer's proper mailing address was the Rosemary Beach address. Instead, the Department opted to mail the final assessment, initially, to the Panama City Beach address which the Department found in a LexisNexis search. The Department's reliance is misplaced, however.

First, federal authority is persuasive when interpreting a state tax statute that is modeled after a federal statute, if there is a lack of state guidance concerning a particular

issue. Here, however, the Department itself provided the meaning of the phrase “last known address” in its own regulation; a regulation that has been effective – and unamended – for nearly a quarter of a century. And there is no question that the Department had the legal authority to do so, subject to the requirement that a regulation must be reasonable to be valid. Therefore, there was no reason to look to a federal regulation or an IRS procedure to understand the meaning of a phrase that has been defined by the Department.

Concerning the Department’s reliance on following federal authority, the Tax Tribunal is not aware of any case where a court was made aware of a Department regulation that specifically addressed a particular issue but nonetheless disregarded that regulation in favor of a federal regulation or procedure that differed from the Department’s official interpretation. Here, for example, the Tribunal’s research did not discover a single opinion from any court in Alabama (including the Administrative Law Division) in which Ala. Admin. Code r. 810-14-1-.13 has been cited, despite the fact that the question of a taxpayer’s “last known address” has been an issue in many cases.

Again, the Department’s own regulation applies to the question of the Taxpayer’s last known address in this case. Specifically, “the last address provided to the Department by the taxpayer” was the Rosemary Beach address listed on the power-of-attorney form which the Department acknowledged receiving in June 2016. Then, in June 2017, the Department mailed the assessment to an address other than the Rosemary Beach address.

As noted, the Department’s regulation includes an exception in subparagraph (3)(d) where “the Department determines that such address has changed subsequent to the last

return having been filed.” Here, though, the Department received multiple pieces of information since 2011 (when it received the Taxpayer’s 2010 return) concerning the Taxpayer’s different addresses, including notice from the U.S. Postal Service in June 2015 that the Taxpayer’s address was Rosemary Beach. But the Department’s use of LexisNexis in January 2017 does not seem to fit within the exception language in subparagraph (3)(d). Instead, the LexisNexis information seems to fit within subparagraph (3)(e), which allows the Department to rely on the “best information available,” including city and telephone directories and court and other government records, to determine where to send a notice. However, subparagraph (3)(e) applies when a “taxpayer has never furnished the Department with an address. . .” That is not the case here. Therefore, the address the Department should have used to mail the assessment to the Taxpayer was the Rosemary Beach address, because that was “the last address provided to the Department by the taxpayer. . .” Ala. Admin. Code r. 810-14-1-.13(3)(d). (The Department obviously knew of the Rosemary Beach address because that is the address the Department used to remail the assessment once it was returned by the Postal Service.)

The Department’s position is rejected for a second reason. In the Treasury regulation relied on by the Department, the general rule is preceded by an exception. Specifically, 26 CFR § 301.6212-2(a) states that, “[e]xcept as provided in paragraph (b)(2) of this section, a taxpayer’s last known address is the address that appears on the taxpayer’s most recently filed and properly processed Federal tax return. . .” Paragraph (b)(2)(i) provides, however, that the IRS will update a taxpayer’s address based upon information contained in the U.S. Postal Service’s database concerning changes of address. Here, the Department received information from the U.S. Postal Service in June

2015 that the Taxpayer's address was Rosemary Beach. That information came after the Department's receipt in 2011 of the Taxpayer's 2010 Alabama return, which the Department states is the latest return received from the Taxpayer. Thus, even if federal authority should have been used by the Department as guidance, the Department should have used the information from the Postal Service in determining where to mail the final assessment initially. It did not do so.²

Therefore, the Taxpayer's Application for Rehearing is granted and the Final Order Dismissing Appeal dated November 16, 2017, is rescinded. The Department is directed to file a position statement concerning the substantive issues in this appeal no later than **April 13, 2018**.

Entered March 13, 2018.

JEFF PATTERSON
Chief Judge
Alabama Tax Tribunal

jp:dr

cc: Bruce P. Ely, Esq.
William T. Thistle, II, Esq.
Craig A. Banks, Esq.

² Further, the Department's decision to not apply its own duly-adopted regulation could call into question whether the Department violated the Alabama Administrative Procedure Act, § 41-22-1, *et seq.*, by changing its official interpretation of "last known address" without going through the public rule-making process.