

ALABAMA TAX TRIBUNAL

DONALD V. WATKINS,	§	
Taxpayer,	§	DOCKET NO. INC. 21-1365-JP
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

FINAL ORDER

The Taxpayer’s appeal to the Alabama Tax Tribunal involves final assessments of 2007 through 2013 Alabama individual income tax that were entered by the Alabama Department of Revenue. (The Alabama Tax Tribunal is a separate state agency from the Alabama Department of Revenue.) The assessments were based on the Revenue Department’s assertion of fraud, which the Revenue Department learned of from news articles about a federal criminal prosecution involving the Taxpayer.

In his Notice of Appeal, the Taxpayer argued that there had been no proof presented by the Revenue Department that he had committed tax fraud. The Taxpayer also argued that the underlying preliminary assessments (and, thus, the final assessments) were barred by the general 3-year statute of limitations, among other things.

The Revenue Department filed an Answer and Motion to Dismiss. In its filing, the Revenue Department correctly noted that a specific exception to the 3-year statute of limitations for entering a tax assessment exists, such that “[a] preliminary assessment may be entered at any time ... if a false or fraudulent return is filed with

the intent to evade tax.” See Ala. Code § 40-2A-7(b)(2)a.

However, the Revenue Department also acknowledged the reliance on Ala. Code § 6-2-3 of the majority opinion in *New Joy Young Restaurant, Inc. v. State Dep’t of Revenue*, 667 So.2d 1384 (Ala.Civ.App. 1995), *cert. denied* 667 So.2d 1391 (Ala. 1995). In that case, the Alabama Court of Civil Appeals decided, as a matter of first impression, that the 2-year statute of limitations in the general fraud statute (Ala. Code § 6-2-3) limited the time within which an assessment based on fraud must be entered, despite the tax-specific provision in the predecessor to § 40-2A-7(b)(2)a. which allows the entry of an assessment based on fraud “at any time ...” The appellate court stated:

We are obliged to construe the provisions of § 40-23-18(b) and § 6-2-3 in favor of each other to form one harmonious statute of limitations by which the Department may operate. Opinion of the Justices, *supra*. In construing § 40-23-18(b) and § 6-2-3 in *pari materia*, we find that § 6-2-3 applies in sales tax cases involving a false or fraudulent return. We, therefore, hold that in the case of a false or fraudulent return with intent to evade payment of taxes, the tax may be assessed or a proceeding in court may be begun at any time; however, if the tax is assessed or a proceeding is begun outside the three-year limitation imposed by § 40-23-18(b), that action must be begun within two years from the time the fraud is deemed to have been discovered.

New Joy Young Restaurant, 667 So.2d at 1387-88 (citations omitted). Therefore, the Revenue Department has moved to have the final assessments voided.

First, it is the opinion of the Tax Tribunal that the correct interpretation of the law at issue in this present appeal was stated by Judge Thigpen in his dissent in *New Joy Young Restaurant*, as follows:

The majority relies on Ala. Code 1975, section 6-2-3, a general statute regarding civil fraud, to impose a two-year statute of limitations in this case. The result of that analysis allows taxpayers who commit a wilful and deliberate fraud on the State to be legally advantaged over nonfraudulent taxpayers who mistakenly understate their sales; i.e., the period of tax liability for those who intentionally defraud the State is one year shorter than that for those taxpayers who accidentally miscalculate their sales. See *Badaracco v. Commissioner of Internal Revenue*.

“It is presumed that the legislature does not enact meaningless, vain or futile statutes.” *Druid City Hospital Board v. Epperson*. It is a rule of statutory construction that an act which concerns a specific subject, such as section 40-23-18(b), takes precedence over an act which concerns a general subject, such as section 6-2-3. *Murphy v. City of Mobile*; *Baldwin County v. Jenkins*; see also *In re Opinion of the Clerk*; *Powers v. State*. The plain and unambiguous language of § 40-23-18(b), provides the Department with a three-year limitation for initiating actions to collect sales tax, except in the case of fraud, which may be initiated “at any time.” An appellate court cannot evade the plain terms of a statute. *Jones v. Conway*. In interpreting a statute, this court's duty is to ascertain and to give effect to legislative intent as expressed in the words of the statute. *Batey v. Jefferson County Board of Health*; *Winstead v. State*. We simply have no authority to redraft law. *Harris v. Weatherford*. See also *House v. Cullman County*.

The United States Supreme Court addressed the matter of determining the proper construction of a federal statute of limitations for income tax assessments which contained language similar to § 40-23-18(b); i.e., the general income tax statute, which provides that in the case of fraud, the tax may be assessed “at any time.” See *Badaracco v. Commissioner of Internal Revenue*. The language “at any time” in that statute served as an indefinite extension of the period of limitations for assessment of income taxes. In reaching that determination, The United States Supreme Court began its analysis as follows:

“This court long ago pronounced the standard: 'Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government.' [Citations omitted.] More recently, Judge Roney, in speaking for the former Fifth Circuit, has observed that 'limitations

statutes barring the collection of taxes otherwise due and unpaid are strictly construed in favor of the Government.' *Lucia v. United States.*"

Badaracco.

The United States Supreme Court determined that "fraud cases ordinarily are more difficult to investigate" due in part to "a distinct possibility that the taxpayer's underlying records will have been falsified or even destroyed." Badaracco. Further, the Court concluded that the unlimited assessment period specified by statute for cases involving fraud was necessary because the Commissioner had the burden of proof on the issue of fraud, and that the difficulties attending a civil fraud investigation could be compounded when the initial finding caused the case to be referred for criminal prosecution, forcing the civil audit to be placed in abeyance. Badaracco.

In spite of the differences in the laws and practices involving federal income taxes and state sales taxes, the arguments and analysis of the Badaracco case closely parallel those in the instant case. I am not unsympathetic with the argument that the Department's delay in this case seems grossly unfair; however, in view of the foregoing, it is my opinion that if any limitation applies, it is the three-year limitation of § 40-23-18(b), which was indefinitely suspended when the Department proved by clear and convincing evidence that the taxpayer fraudulently intended to evade its tax liability. Therefore, I must respectfully dissent.

New Joy Young Restaurant, 667 So.2d at 1390-91 (citations omitted).

Nevertheless, the Alabama Tax Tribunal's interpretation and application of taxing statutes such as the statute of limitations at issue here must not conflict with that of an appellate court. *See* Ala. Code § 40-2B-2(d)(7). Thus, if the interpretation by the majority of the court in *New Joy Young Restaurant* is to be reconsidered, it must be done by the appellate courts and not by the Tax Tribunal.

Therefore, the Revenue Department's motion to void the final assessments is granted. The 2007 through 2013 final assessments entered against the Taxpayer are

voided. Judgment is entered accordingly.

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

Entered July 15, 2022.

/s/ Jeff Patterson

JEFF PATTERSON

Chief Judge

Alabama Tax Tribunal

jp:ja

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