PHILIP MICHAEL DAVIDSON c/o Joe Ezelle 1435 Woodland Ridge Road Odenville, AL 35120,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. P. 03-232
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER DISMISSING APPEAL

This case involves a final assessment of a 100 percent penalty entered by the Department against Philip Michael Davidson ("Taxpayer"), as a person responsible for paying the withholding tax liability of Optimize, Inc., for April 1999 through March 2000. The Department has filed a motion to dismiss the appeal, arguing that the Taxpayer failed to timely appeal the final assessment within 30 days, as required by Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted concerning the Department's motion on June 11, 2003. The Taxpayer and his representative, Joe Ezell, attended the hearing. Assistant Counsel J.R. Gaines represented the Department.

The Department entered the final assessment in issue on September 30, 2002. The Taxpayer appealed on March 5, 2003. The Taxpayer does not dispute that he did not appeal within the 30 day period. He claims, however, that if his appeal is dismissed he would be denied due process because the Department failed to properly mail the final assessment to his last known address, as required by Code of Ala. 1975, §40-2A-7(b)(4)c.

Optimize, Inc. failed to pay its State withholding tax liabilities for April 1999 through March 2000. The Department determined that the Taxpayer was personally liable for the corporation's taxes pursuant to Alabama's 100 percent penalty statute, Code of Ala. 1975,

§40-29-72. It mailed the Taxpayer a notice and demand for the tax due by regular mail on April 8, 2002. The notice and demand was mailed to P.O. Box 59529, Birmingham, Alabama, 35259. That was the address shown on the Taxpayer's 1998 individual Alabama income tax return, which is the last return the Taxpayer has filed with the Department. The notice and demand was not returned by the U.S. Postal Service.

Pursuant to normal procedures, the Department inquired with the Postal Service on July 16, 2002 as to whether the above post office box was an address "at which mail for (the Taxpayer) is currently being delivered." The Postal Service notified the Department on July 25, 2002 that the Taxpayer was still receiving mail at that address.

On July 24, 2002, the Department entered a preliminary assessment against the Taxpayer for the tax due and mailed it to the above post office box. The Postal Service returned the envelope marked "unclaimed." The Department remailed the preliminary assessment to the same address by first class U.S. mail. It was not returned.

On September 30, 2002, the Department entered a final assessment for the tax due and mailed it to the post office box indicated above. That envelope was also returned as "unclaimed." The Department remailed the final assessment by first class U.S. mail to the same address. It was not returned.

On January 23, 2003, the Department issued a "Final Notice Before Seizure" and mailed it to the Taxpayer at 1017 Grandview Parkway, Birmingham, Alabama, 35243, which is the Taxpayer's current home address.[1] The Taxpayer subsequently appealed to the Administrative Law Division on March 5, 2003.

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[1] There is no evidence indicating when or how the Department discovered the Taxpayer's correct home address. Presumably, the Department's Collection Services

The issue of whether a final assessment was correctly mailed by the Department to a taxpayer's last known address was discussed in *Island Interiors, Inc. v. State of Alabama*, S. 01-317 (Admin. Law Div. Preliminary Order Dismissing Department's Motion to Dismiss 8/23/01), as follows:

> The Department is required to mail a final assessment over $500 by certified mail to the taxpayer's last known address. Section 40-2A-7(b)(4)c. The requirement that a final assessment must be mailed to a taxpayer's last known address is modeled after the federal requirement that a notice of deficiency must be mailed to a taxpayer's last known address. 26 U.S.C. §6212(b)(1). Consequently, federal authority should be followed in determining if the Department properly mailed a final assessment to a taxpayer's last known address. *Best v. State, Dept. of Revenue*, 417 So.2d 197 (Ala.Civ.App. 1981) (when an Alabama statute is modeled after a federal statute, federal authority should be followed in interpreting the Alabama statute).
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> If a final assessment is timely mailed to a taxpayer's last known address, actual receipt by the taxpayer is not required. Consequently, a taxpayer cannot refuse to claim a final assessment served by certified mail, and thereby avoid the 30 day appeal deadline. *Williams v. State, Dept. of Revenue*, 578 So.2d 1345 (Ala.Civ.App. 1991); see also, *Robert A. Beach v. State of Alabama*, Inc. 00-615 (Admin. Law Div. ODA 11/28/00). For federal cases on point, see, *Erhard v. C.I.R.*, 87 F.3d 273 (1996); *Patman and Young Professional Corp. v. C.I.R.*, 55 F.3d 216 (1995).
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> The Department must, however, exercise reasonable diligence in determining a taxpayer's last known address. In deciding if the Department has used reasonable diligence, the focus is not on whether the taxpayer notified the Department of a new or different address, but rather, on the most current information which the Department possesses. *U.S. v. Bell*, 183 B.R. 650 (S.D. FL 1995).

Island Interiors, S. 01-316 at 4-5.

The Taxpayer argues that the Department was required by IRS guidelines to exercise "reasonable care and diligence" in ascertaining his correct address. He contends that if the Department had reasonably attempted to ascertain his correct address, it could

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Division found the address during its collection efforts.

have done so because his outstanding Alabama drivers license issued on September 9, 2002 had his correct Birmingham address; his latest automobile registration showed the same address; an extension to file his 2001 Alabama income tax return filed with the Department on August 15, 2002 showed another address; and two documents filed with the Alabama Secretary of State's Office showed yet another address.

A mailing "is sufficient if it is mailed to the address where the Commissioner reasonably believes the taxpayer wished to be reached." *Green v. United States*, 437 F.Supp. 334, 337 (1977). As stated above, the focus is "on the most current information which the Department possesses." *U.S. v. Bell*, 183 B.R. 650 (SD Fla. 1995). "The controlling test . . . is whether, in light of all the pertinent circumstances, the IRS acted reasonably in mailing the deficiency notice" to the address in question. *Crum v. C.I.R.*, 635 F.2d 895, 899 (1980).

The most current address the Department had on file when it mailed the final assessment to the Taxpayer was the post office box address on his 1998 Alabama income tax return. The Postal Service also confirmed that the Taxpayer was still receiving mail at that address. The Department had no reason to believe otherwise. Consequently, the final assessment was properly mailed to that last known address.

The IRS manual does require that the government must exercise reasonable care and diligence in ascertaining a taxpayer's correct address. That applies, however, only if the notice is "undeliverable," or the Department otherwise has reason to believe that the taxpayer's address has changed. "Once (the IRS Commissioner) becomes aware of a change in address, he must exercise reasonable care and diligence in ascertaining and mailing the notice of deficiency to the correct address. However, this obligation arises only

if (the IRS Commissioner) becomes aware of an address change prior to mailing the notice of deficiency to the taxpayer's last known address. *Monge v. Commissioner*, 93 T.C. (July 12, 1989) (slip opinion at p.17)." *King v. Commissioner*, T.C. Memo 1989-453, 57 T.C.M. 1391.

The final assessment was not undeliverable at the address used by the Department. Rather, it was returned as "unclaimed." When remailed by first class mail to the same address, it was not returned. The Department thus had no reason to believe that the post office box, which the Postal Service had confirmed was a good address for the Taxpayer, was not still a valid address for the Taxpayer.

The Taxpayer claims that the Department should have been on notice that he had changed addresses because his 2001 extension request filed on August 15, 2002 showed another address. The Department's policy, however, is that it will not update a taxpayer's last known address based on an extension to file a return. Rather, it will do so only after the corresponding return is filed.[2] This is consistent with IRS practice and procedures, and federal case law. "However, in *Monge v. Commissioner*, 93 T.C. (July 12, 1989), we held that the mere filing of (an extension request) without more, does not constitute a clear and concise notification of a new address." *Smith v. Commissioner*, T.C. Memo 1989-410, 57 T.C.M. 1220; see also, *King*, *supra*.

[2] The Taxpayer never filed a 2001 return, nor any other return after the 1998 return on which he gave the post office box in issue as his correct address.

The Department also argues that even if the post office box was not the Taxpayer's last known address, his appeal should still be dismissed because he failed to appeal within 30 days of actual notice of the final assessment. The Department claims that it issued the Taxpayer a Final Notice Before Seizure on January 23, 2003, and that the Taxpayer did not appeal until March 5, 2003, or 41 days after the Notice was issued.

The Department's obligation to notify a taxpayer of a final assessment is satisfied if the taxpayer receives actual notice in sufficient time to appeal. "Even if the Department fails to mail a final assessment to a taxpayer's last known address, the Department's obligation to timely notify a taxpayer of a final assessment is still satisfied if the taxpayer receives actual notice of the assessment." *Island Interiors*, S. 01-316 at 6, citing *McKay v. C.I.R.*, 886 F.2d 1237 (1989) and *Patman and Young Professional Corp.*, 55 F.3d 216 (1995).

In this case, however, the Taxpayer received only indirect notice of the final assessment through the Final Notice Before Seizure. That Notice also did not inform the Taxpayer that he had 30 days to appeal. And while the Notice was issued on January 23, 2003, it is unclear when the Notice was mailed by the Department or actually received by the Taxpayer. Consequently, it is problematic whether the Notice constituted actual notice to the Taxpayer sufficient to satisfy due process. That question is moot, however, because as discussed above, the Department correctly mailed the final assessment to the Taxpayer's last known address.

The Taxpayer's appeal of the final assessment is dismissed for lack of jurisdiction. *Dansby v. State, Dept. of Revenue*, 560 So.2d 1066 (Ala.Civ.App. 1990).

The Taxpayer and his representative are clearly frustrated that the Department

chose to assess the Taxpayer personally for the corporation's unpaid withholding taxes. The Taxpayer may, however, still contest the issue by paying the final assessment in full and then petitioning for a refund. Code of Ala. 1975, §40-2A-7(c)(1). If the petition is denied, the Taxpayer may appeal to the Administrative Law Division on the merits of his claim that he was not a person responsible for the unpaid withholding taxes of Optimize, Inc.

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

Entered August 5, 2003.