JERRY & BONNIE L. HOUSE 4774 HIGHWAY 22 MONTEVALLO, AL 35115,	§ §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayers,	§	DOCKET NO. INC. 05-500
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER ON REHEARING AFFIRMING
FINAL ORDER DISMISSING APPEAL

This appeal involves a final assessment of 2001 Alabama income tax entered against the above Taxpayers on March 8, 2005. The Taxpayers' notice of appeal was postmarked on April 8, 2005, and was received by the Administrative Law Division on April 13, 2005.

The Department moved to have the appeal dismissed because it was not filed within 30 days, as required by Code of Ala.1975, §40-2A-7(b)(5)a. The motion was granted, and a Final Order Dismissing Appeal was entered on April 26, 2005. The Taxpayers timely applied for a rehearing. The request was granted, and a hearing was conducted on June 13, 2005. Jerry House represented the Taxpayers. Assistant Counsel Jeff Patterson represented the Department.

The Taxpayers argue on rehearing that (1) they filed a petition for review and requested a conference with the Department, but a conference was never conducted, and (2) an unidentified Department employee told Mr. House that he had until April 8, 2005, or the 31st day after the final assessment was entered, to file his notice of appeal. As indicated, the appeal was postmarked, and thus filed pursuant to Code of Ala. 1975, §40-1-45, on that date.

If a taxpayer disagrees with a preliminary assessment entered by the Department, the taxpayer may file a petition for review within 30 days from the date the preliminary assessment was entered. Code of Ala. 1975, §40-2A-7(b)(4)a. That section further provides that if a petition is timely filed, "the department shall schedule a conference with the taxpayer for the purpose of allowing the taxpayer and the department to present their respective positions, . . ."

The Department entered the preliminary assessment against the Taxpayers on October 8, 2004. The Taxpayers' petition for review is dated October 10, 2004, and requested a conference with the Department. As discussed, however, the Department never scheduled a conference, and instead entered the final assessment in issue on March 8, 2005.

What is the effect of the Department not conducting a conference on the Taxpayers' petition for review? First, there is some question whether the Taxpayers mailed the petition to the correct address. In their appeal letter, the Taxpayers state that they were informed by the Department that the petition "had been sent to the wrong Department." But even if the Taxpayers had correctly submitted the petition, the Department's failure to hold a conference on the petition is not grounds for dismissing the final assessment because the Taxpayers had an opportunity to appeal the final assessment to either the Administrative Law Division or circuit court.

In *Lambert v. State of Alabama*, 414 So.2d 983 (Ala. Civ. App. 1982), the Revenue Department failed to notify a taxpayer of his right to appear and protest a preliminary assessment of sales tax entered by the Department. Under the law at that time, taxpayers

could not appeal a sales tax final assessment to circuit court if they had failed to protest the preliminary assessment. See, Code of Ala. 1975, §§40-23-17 and 40-23-18, repealed by Act 92-186, effective October 1, 1992. The Court of Civil Appeals held that because the Department failed to notify the taxpayer of his right to appear and protest, "the requirement is ineffective that a taxpayer must appear and protest an assessment as a condition precedent to his taking an appeal." *Lambert*, 414 So.2d at 985. The Court then held, however, that the Department's failure to give the taxpayer notice was not a denial of due process or otherwise did not constitute grounds to dismiss the final assessment because the taxpayer could have appealed the final assessment to circuit court:

> In this case the taxpayers had a reasonable opportunity to raise the issue of lack of notice of the administrative hearing by a proper appeal. They received proper notice of the final assessment in due time but failed to duly perfect their appeal. Here, the taxpayers actually received the final assessment notice within the same time frame and in the same manner as any other taxpayer could normally expect to be so notified. Had their appeal been timely, their contention regarding lack of notice as to the administrative hearing could have been properly raised and decided on appeal. An appeal was their remedy but it was not taken in compliance with the statute and was properly dismissed.

Lambert, 414 So.2d at 986.

In this case, the Taxpayers had an opportunity to appeal the final assessment in issue to the Administrative Law Division or to circuit court. If they had timely appealed to the Administrative Law Division, the matter could have been remanded back to the Department for an informal conference; or, if the appeal had been to circuit court, that court could have addressed the issue as it deemed appropriate. In either case, the fact that the Taxpayers had an opportunity to be heard pursuant to an appeal satisfied due process. "Due process merely requires an opportunity for a hearing appropriate to the nature of the

case . . . granted at a meaningful time and in a meaningful manner." *Ballard v. Blount*, 581 F.Supp. 160, 165 (D.C. Ga. 1983).

Mr. House also argues that he visited the Revenue Department's offices in Montgomery and was told by a Department employee that he had until April 8, 2005 to appeal. He did so. However, because March has 31 days, April 8 is 31 days after March 8. The Taxpayers' appeal was thus untimely.

As a general rule, the Department cannot be estopped from assessing and collecting the correct tax due. *State v. Maddox Tractor and Equipment Co.*, 69 So.2d 426 (1953). The Alabama Supreme Court has held, however, that the government can be estopped from preventing a taxpayer from appealing where the taxpayer failed to timely appeal due to an erroneous notice or advice by the government. *Ex parte Tanner*, 553 So.2d 598 (Ala. 1989); *Ex parte Four Seasons, Ltd.*, 450 So.2d 110 (Ala. 1984).

In both of the above cases, the erroneous information was provided pursuant to a formal written notice by the government agencies involved, i.e., the probate judge in *Tanner* and the tax assessor in *Four Seasons*. In this case, the erroneous information, assuming it was given, was provided by an unidentified Department employee without formal authority to officially speak for the Department. Mr. House thus relied on the employee's advice at his own risk. Further, the Department had officially notified the Taxpayers in writing that they had 30 days from the March 8, 2005 final assessment in which to appeal. Thus, unlike the facts in *Tanner* and *Four Seasons*, in this case the Department correctly notified the Taxpayers of their appeal rights. Consequently, the Department should not be equitably estopped from moving to dismiss the Taxpayers' appeal as untimely.

Because the Taxpayers failed to timely appeal the final assessment in issue, their appeal must be dismissed. The April 26, 2005 Final Order Dismissing Appeal is affirmed.

The Taxpayers may still pay the final assessment in full and petition the Department for a refund. If the refund is denied, the Taxpayers may then appeal to the Administrative Law Division or the circuit court pursuant to Code of Ala. 1975, §40-2A-7(c)(5). The Taxpayers may also contact the Department's Taxpayer Advocate at 334-242-1055 if they have any questions or need further assistance.

Entered June 23, 2005.

_____
BILL THOMPSON
Chief Administrative Law Judge