

JOE H. PILCHER
192 PAULSON DRIVE
NEWTON, AL 36352-8100,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. INC. 06-1047

FINAL ORDER

The Revenue Department assessed Joe H. Pilcher (“Taxpayer”) for 2001 income tax. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on February 13, 2007. David Johnston represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

The Taxpayer has owned and operated Dothan Ambulance Service, Inc., d/b/a Pilcher Ambulance Service, in Dothan, Alabama since 1977. His father had previously operated the business since the mid-1960’s. Because the business is an S corporation, the business’ profits and losses pass through to the Taxpayer, individually.

The IRS began investigating the Taxpayer and his business in the early 1990’s concerning its failure to withhold and remit withholding tax for its employees. The Taxpayer entered into a plea agreement with the federal government in 1999 concerning his failure to pay withholding taxes. He subsequently served almost a year in federal prison, beginning in early 2001.

After being released in early 2002, the Taxpayer and his accountant discovered that a trusted employee had embezzled money from the business. The employee was eventually fired.

The Taxpayer's attorney and CPA subsequently had lengthy dealings with the IRS concerning the embezzled funds, and specifically, when and how the Taxpayer should report the income and the theft of the income on his individual returns. After several years, the IRS directed the Taxpayer to report the income in the year it was received (2001), and then claim a theft loss in the later year the theft was discovered.

The Taxpayer's attorney had advised him not to file his Alabama income tax returns until the IRS finally decided how the embezzled funds should be treated. The Taxpayer consequently did not file his 2001 Alabama return until May 2006. He paid the reported tax due, plus interest, at that time.¹ The Department subsequently assessed the Taxpayer for the late penalties in issue.

The penalty issue was submitted to the Department's Taxpayer Advocate, who responded that the penalties should not be waived because the Taxpayer had also failed to timely file returns for other years. The Taxpayer's attorney explained at the February 13 hearing, however, that he had advised the Taxpayer not to file returns for some years before 2001 because of the on-going IRS investigation concerning the business' unpaid withholding tax. As indicated, the attorney also advised the Taxpayer not to file his 2001 Alabama return until it was finally determined how the embezzled income should be treated. As soon as that issue was resolved with the IRS, the Taxpayer filed the 2001 return and paid the tax and interest due.

¹ The Taxpayer subsequently filed an amended 2001 return in which he claimed a refund of most of the amount paid with the original return. The Department has not yet acted on that refund petition.

A penalty may be waived for reasonable cause. Code of Ala. 1975, §40-2A-11(h). Reasonable cause includes, but is not limited to, instances in which the taxpayer has acted in good faith. Rev. Proc. 97-003 also specifies various circumstances that constitute reasonable cause, including the good faith reliance on a tax advisor.

The evidence shows that the Taxpayer failed to timely file and pay his 2001 Alabama taxes based on the advice of his attorney and CPA because they were unsure how to report the embezzled income. The attorney had also advised the Taxpayer not to file for prior years because of the on-going IRS investigation. Under those circumstances, the penalties should be waived for cause. The final assessment is voided. Judgment is entered accordingly.

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

Entered February 21, 2007.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Margaret Johnson McNeill, Esq.
G. David Johnston, Esq.
Kim Peterson