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§ STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. S. 06-1079

§

v.

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

### **THIRD PRELIMINARY ORDER CONCERNING TAXPAYER'S APPLICATION FOR REHEARING**

The Department has responded to the Second Preliminary Order entered in this case on May 2, 2007. A copy of the response is enclosed with the Taxpayer's copy of this Order. The response (1) renews the Department's motion to dismiss the Taxpayer's appeal as untimely, and (2) states the Department's position concerning the substantive issue in dispute.

Concerning the motion to dismiss, the Department claims that the Administrative Law Division erroneously applied the doctrine of equitable estoppel against the Department based on the holdings in *Ex parte Tanner*, 553 So.2d 598 (Ala. 1998), and *Ex parte Four Seasons*, 450 So.2d 110 (Ala. 1984). The Department argues instead that the Alabama Supreme Court's holding in *Ex parte State of Alabama (In re: James Craig Boutwell v. State of Alabama)*, 2006 Ala. LEXIS 246, applies, and that because the Taxpayer was misinformed concerning a question of law, and not a question of fact, as in *Tanner*, equitable estoppel does not apply. I disagree.

In *Tanner* and *Ex parte Four Seasons*, a government official erroneously informed the individuals concerning when a certain event occurred. That is, the government made a mistake of fact as to when an event occurred that began the running of an appeal period.

The Supreme Court held that equitable estoppel applied in those cases.

In *Ex parte State of Alabama*, the government official involved, a probate judge, did not give incorrect information concerning when an order of condemnation was signed, which would have been a mistake of fact, as in *Tanner* and *Ex parte Four Seasons*. Rather, the probate judge misinformed the individual, Boutwell, as to when the applicable appeal period expired, which was a mistake of law. The Supreme Court distinguished *Tanner* (and by implication *Ex parte Four Seasons*), and held that equitable estoppel did not apply.

Unlike *Tanner*, which involved a misrepresentation of fact (the date of the making of the order), this case involves an incorrect statement of law (the timeliness of an appeal). “Equitable estoppel . . . must be predicated upon the conduct, language, or the silence of the party against whom it is sought to be invoked. Said conduct, language, or silence must amount to the representation or concealment of a material fact or facts. *The representation must be as to the facts and not as to the law . . .*” *State Highway Dep’t v. Headrick Outdoor Adver., Inc.*, 594 So.2d 1202, 1204-05 (Ala. 1992) (quoting *First Nat’l Bank of Montgomery v. United States*, 176 F.Supp. 768, 772 (M.D. Ala. 1959)). Although we are sympathetic to Boutwell’s position, the doctrine of equitable estoppel cannot operate to excuse his failure to file a timely appeal.

*Ex parte State of Alabama*, 2006 Ala. LEXIS 246 at 8.

In this case, the Taxpayer’s refund was deemed denied by operation of law on April 20, 2004 because the Department failed to either grant or deny the Taxpayer’s refund petition within six months, as required by Code of Ala. 1975, §40-2A-7(b)(3). However, the Department continued to correspond with the Taxpayer after the six month period expired, and requested more information concerning the refund claim. Finally, on October 18, 2004, the Department notified the Taxpayer by letter that “we have no alternative but to deny your refund request.” The Department thus notified the Taxpayer that its refund petition had

been denied on October 18, 2004. That notice constituted a misrepresentation of a material fact, i.e., when the refund petition was denied. Consequently, as in *Tanner* and *Ex parte Four Seasons*, equitable estoppel applies. The Taxpayer's application for rehearing was thus correctly granted.

A hearing is scheduled for **3:00 p.m., August 9, 2007** in the Business Center of Alabama Building, 2 North Jackson Street, Suite 301, Montgomery, Alabama.

To save the time and expense of a hearing, the parties should confer and notify the Administrative Law Division by July 27, 2007 if the matter can be submitted on a joint stipulation of facts. If so, the August 9 hearing will be canceled, and a schedule for the submission of a joint stipulation and briefs will be issued.

Entered July 2, 2007.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: J. Wade Hope, Esq.  
David Smith (w/enc.)  
Joe Cowen  
John Rhodes