

RONALD M. FULMER
6429 W. OLD HAYNEVILLE ROAD
HOPE HULL, AL 36043-5147,

§
§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. INC. 06-843

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

**PRELIMINARY ORDER
DENYING DEPARTMENT'S MOTION TO DISMISS
AND FOR ASSESSMENT OF FRIVOLOUS APPEAL PENALTY**

This appeal involves a denied refund of 2002 income tax requested by the above Taxpayer. The Department has filed a Motion to Dismiss and for the Assessment of the Frivolous Appeal Penalty, a copy of which is enclosed with the Taxpayer's copy of this Order. The motion is denied.

The Taxpayer filed his 2002 Alabama return on April 11, 2006. The return showed a refund due for the subject year. The Department denied the refund because it was not claimed within two years from the due date of the 2002 return, as required by Code of Ala. 1975, §40-2A-7(c)(2). The Taxpayer appealed.

The Department's motion specifies that the Taxpayer cannot be allowed a refund because it was not claimed within two years, citing §40-2A-7(c)(2)a, and *State v. Pettaway*, 794 So.2d 1153 (Ala. Civ. App. 2001). The Department contends that there are no exceptions to the two year statute, citing numerous Administrative Law Division cases. The Department also claims that the frivolous appeal penalty levied at Code of Ala. 1975, §40-2A-11(f) should be assessed because the Taxpayer's appeal "is frivolous and interposed merely for the purpose of vexation." The Department may be correct concerning the two year statute, but the frivolous appeal penalty is not appropriate in this case.

The frivolous appeal penalty applies if an appeal is “determined to be frivolous or primarily for the purpose of delay or to impede collection of any tax, . . .” Section 40-2A-11(f).

The Taxpayer overpaid his tax in 2002. His refund was denied only because it was not timely claimed. He appealed because he was going through a divorce and did not have ready access to the records he needed to timely file the return. He also filed his federal return when he filed his Alabama return, and the IRS issued him a refund. Under the circumstances, it is understandable that the Taxpayer would appeal the denied refund.

The Taxpayer is not an attorney, and there is no evidence he was otherwise aware of the two year statute, or that there are no exceptions to the two year statute. It cannot be presumed that a taxpayer, especially a layperson, knows the applicable Alabama law relating to a disputed issue on appeal. Otherwise, anytime a taxpayer appealed and lost, the appeal could be deemed frivolous because the taxpayer should have known that he would lose, yet still appealed.

The Taxpayer’s appeal may not succeed, but it is not frivolous, and certainly was not for the purpose of delay or to impede collection of a tax. A refund is involved, not a claim for additional tax. The frivolous appeal penalty clearly is not appropriate.

The Department also argues that the Taxpayer’s appeal should be immediately dismissed. Code of Ala. 1975, §40-2A-9(d) requires, however, that unless otherwise agreed by the parties, a hearing shall be conducted by the Administrative Law Division. The only exceptions are (1) if the Administrative Law Division does not have jurisdiction, in which case the appeal must be dismissed without a hearing, or (2) if the taxpayer or the Department fail to comply with a preliminary order, in which case the Administrative Law

Division may dismiss the appeal, grant all or part of the relief sought by the taxpayer, or take other appropriate action under the circumstances. See, Dept. Reg. 810-14-1-.24(3).

The Department's motion will be treated as its Answer in the case because it clearly states the Department's position on the issue in dispute. The Taxpayer should notify the Administrative Law Division by October 20, 2006 if he disagrees with the Department's position. If so, the case will be set for hearing. If the Taxpayer fails to respond by the above date, the denial of the refund will be affirmed. If the Taxpayer has any questions, he should contact the Administrative Law Division at 334-954-7195.

Entered September 27, 2006.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: David E. Avery, III, Esq.
Ronald M. Fulmer (w/enc.)
Kim Peterson