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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayers,

§

DOCKET NO. INC. 06-912

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 2003 income tax requested by the above Taxpayers. 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 Taxpayers' copy of this Order. The motion is denied.

The Taxpayers filed their 2003 Alabama return on June 28, 2006. The return showed an overpayment, and requested that the overpayment be carried forward to later years. The Department disallowed the carryover credit because it was not claimed within two years from the due date of the 2003 return, as required by Code of Ala. 1975, §40-2A-7(c)(2). The Taxpayers' CPA appealed.

The Department's motion specifies that the Taxpayers cannot be allowed a carryover credit 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 Taxpayers' 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 Department does not dispute that the Taxpayers overpaid their 2003 Alabama liability. Rather, the carryover of that overpayment was denied only because it was not timely claimed. The Taxpayers appealed because they claim that extenuating circumstances prevented them from filing their 2003 return within two years.

The Department may be correct that there are no exceptions to the two year statute. However, there is no indication that the Taxpayers or their CPA were aware of that fact, or of the numerous cases cited by the Department. It cannot be presumed that a taxpayer or a taxpayer’s representative 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 Taxpayers’ 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 credit is involved, not a claim for additional tax. The frivolous appeal penalty clearly is not appropriate.

The Department also argues that the Taxpayers’ 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 Taxpayers' representative should notify the Administrative Law Division by October 20, 2006 if she disagrees with the Department's position. If so, the case will be set for hearing. If the representative fails to respond by the above date, the denial of the carryover will be affirmed. If the representative has any questions, she 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.
Alicia H. Mooney, CPA (w/enc.)
Kim Peterson