

JOHNNY F. & JEAN TURNER	§	STATE OF ALABAMA
480 COLD CREEK ROAD		DEPARTMENT OF REVENUE
DADEVILLE, AL 36853,	§	ADMINISTRATIVE LAW DIVISION
Taxpayers,	§	DOCKET NO. INC. 07-260
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

**FINAL ORDER**

The Revenue Department assessed Johnny F. and Jean Turner (together “Taxpayers”) for 2003 and 2004 income tax. The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on May 30, 2007. Carol Sellers represented the Taxpayers. Assistant Counsel Mark Griffin represented the Department. Jim Sizemore filed a post-hearing brief on behalf of the Taxpayers.

The Taxpayers reported a “loss on investment in Walnut Hill Grocery” on their 2002 Alabama return in the amount of \$256,197. The loss resulted in an excess net operating loss (“NOL”) of \$165,166. The Taxpayers carried the NOL over to 2003 and 2004, and consequently received refunds in those years.

The Department audited the Taxpayers’ 2002, 2003, and 2004 returns and determined that the 2002 loss was a non-business loss. Non-business losses can only be applied to off-set non-business income in the loss year, and cannot be carried forward or back to other years. Code of Ala. 1975, §40-18-15.2(5)c. The Department also determined that the Taxpayers had failed to substantiate or otherwise prove that they suffered a loss in 2002. It accordingly disallowed the NOL carryover to 2003 and 2004, and assessed the Taxpayers for the additional tax due. The Department did not assess the Taxpayers for

2002 because that year was barred by the statute of limitations for assessing tax at Code of Ala. 1975, §40-2A-7(b)(2).

Johnny Turner (individually “Taxpayer”) owned and operated Walnut Hill Grocery in 2002 and prior years. The Taxpayer’s representative claims that the Taxpayer obtained personal loans of over \$300,000 from the Bank of Dadeville that were deposited into the Walnut Hill Grocery account. The representative argues that the Taxpayer deposited the proceeds into the Grocery account to save his job with the business. The Taxpayer reported \$4,000 in wages from the Grocery in 2002.

The Department concedes that a substantial amount of money was deposited into the Walnut Hill account. It argues, however, that there is no evidence the money was from personal loans taken out by the Taxpayer. The Department points out that there are no promissory notes or other evidence showing that the Taxpayer loaned money to the Grocery, or that the Taxpayer ever defaulted on the bank loans. The Department asserts that “there is no evidence to document that (Taxpayer) suffered a loss by the foreclosure of his property or by repayment of the loans.” Department’s Br. at 2.

The Taxpayers’ representative argues that because the statute of limitations for assessing 2002 had expired before the Department entered the final assessments in issue, the Department cannot “reopen” the 2002 tax year and disallow the NOL claimed in that year. “Having allowed the statute of limitations to expire (concerning 2002), the Department cannot now complain of a lack of records.” Taxpayers’ Br. at 1.

Alabama law allows a taxpayer to carry a business-related loss back to prior years and over to later years. Code of Ala. 1975, §40-18-15.2. As previously stated, however, a

non-business loss cannot be carried back or forward, and can only be applied to offset non-business income in the loss year. Section 40-18-15.2(5)c. The burden is also on the taxpayer claiming a carryover loss to prove that the dominant motive for entering into the transaction that resulted in the loss was business-related. *United States v. Generes*, 92 S. Ct. 827 (1972).

An individual's job is the individual's trade or business. *Brickley v. State of Alabama*, Inc. 06-1203 (Admin. Law Div. 8/29/2007). Consequently, if an employee loans money to his or her employer for the dominant purpose of protecting his or her job, any resulting loss is business-related and can be used in computing an NOL carryover or carryback. *Generes, supra*; *B. B. Rider Corp. v. C.I.R.*, 725 F.2d 945 (1984). If, however, the employee also owns the business, and the loan was primarily intended to protect the employee's investment in the business, any subsequent loss is non-business or personal in nature, and cannot be carried to other years. *Brickley, supra*.

In this case, the Taxpayer owned and also worked at Walnut Hill Grocery. He reported \$4,000 in wages from the business in 2002. He claims that he deposited over \$300,000 into the business for the purpose of protecting his job. But a simple comparison of the small amount of wages received by the Taxpayer versus the large amount contributed to the business contradicts the Taxpayer's claim. As indicated, the Taxpayers also reported the loss as a "loss on investment in Walnut Hill Grocery" on their 2002 Alabama return. The Taxpayers have clearly failed to carry their burden of proving that the dominant motive in making the large cash contributions to the business was to protect the Taxpayer's job, i.e., wages, with the business. See generally, *Generes, supra*. Any

resulting loss was thus non-business in nature, and cannot be carried over to the years in issue.

Even if the loss was business-related, the Taxpayer was still required to provide records proving that he suffered a loss in 2002. The fact that the statute of limitations for assessing 2002 had expired does not bar the Department from reviewing the year to determine if the Taxpayer suffered a loss in the year. The Department can “reopen” a closed year if it is relevant to a taxpayer’s liability in an open year. “The Department is not prohibited from auditing a tax year barred by the statute of limitations for purposes of determining the taxpayer’s liability for a current year that is open to assessment.” *State of Alabama v. Turner, Inc.* 90-248 (Admin. Law Div. 2/29/1991). The Taxpayers’ failure to provide records showing that they incurred a loss in 2002 is thus a second reason the NOL carryover must be disallowed.

The 2002 and 2003 final assessments are affirmed. Judgment is entered against the Taxpayers for \$1,376.20 and \$8,330.91, respectively. Additional interest is also due from the date the final assessments were entered, January 24, 2007.

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

Entered January 29, 2008.

---

BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Mark Griffin, Esq.  
Carol L. Sellers, CPA  
James M. Sizemore, Esq.  
Tony Griggs