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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

DOCKET NO. CORP. 07-554

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

**ORDER DENYING TAXPAYER'S
MOTION TO DISMISS**

This case involves a final assessment of 2002 corporate income tax entered against the above Taxpayer. The Taxpayer has moved that the Administrative Law Division grant it the relief sought because the Department failed to file its Answer within 90 days, as required by Code of Ala. 1975, §40-2A-11(c). The motion is denied for the reasons explained below.

The Taxpayer appealed to the Administrative Law Division on May 29, 2007 (postmark date). The Administrative Law Division notified the Department's Legal Division of the appeal on June 6, 2007. The Legal Division received the notice on June 8, 2007.

The Legal Division timely requested an extension to file the Department's Answer. The Administrative Law Division granted the Department an additional 60 days by Order dated July 9, 2007. The Department filed its Answer on September 7, 2007.

The Taxpayer argues that the Department's Answer was untimely because it was filed 91 days after the Department's Legal Division received notice of the Taxpayer's appeal. In support of its position, the Taxpayer cites several cases in which the Administrative Law Division held that the Department's Answer was untimely because it was not received within 90 days from when the Legal Division received notice of the

appeal. See, for example, *Plantation Oaks of Alabama v. State of Alabama*, S. 03-1041 (Admin. Law Div. 3/23/2004); *Sellars v. State of Alabama, Inc.* 02-859 (Admin. Law Div. 2/21/2003).

The Department contends that its Answer was timely filed because the original 30 day period allowed for filing the Answer expired on June 8, 2007. Because that date was a Sunday, the Department had until the next business day, Monday June 9, 2007 to file its Answer. The Department claims that it had 60 days from that date, or until September 7, 2007, to file its Answer, which it did. The Department also asserts that filing an Answer within 90 days is not jurisdictional.

The Taxpayer is correct that the Administrative Law Division has stated that an Answer must be filed within 90 days from when the Department's Legal Division is notified of the appeal. However, the issue raised by the Department in this case has never been considered by the Administrative Law Division. That is, if the original 30 day Answer period falls on a weekend or holiday, and the Legal Division is granted a 60 day extension, does the Legal Division have 60 additional days from the weekend or holiday date on which the 30th day actually fell to file its Answer, as argued by the Taxpayer, or 60 days from the next business day, as argued by the Department. I agree with the Department.

Section 40-2A-11(c) gives the Legal Division 30 days to file the Department's Answer. Alabama law provides that if the 30th day falls on a weekend or holiday, the next business day is deemed to be the 30th day. See, Code of Ala. 1975, §1-1-4; *Willis v. State of Alabama, Inc.* 05-407 (Admin. Law Div. 5/17/2005). Consequently, the additional 60 day period would begin on that date.

In this case, the Administrative Law Division's Order granting the 60 day extension was actually entered on Monday, July 9, 2007, the 31st day after the Legal Division received notice of the appeal, but deemed to be the 30th day for purposes of filing the Answer. The Department thus had 60 additional days from that date, or until September 7, 2007, to file its Answer. It did so. Consequently, the Taxpayer's motion is denied.

I agree with the Department's claim that the timely filing of an Answer is not jurisdictional. However, Dept. Reg. 810-14-1-.24(3) provides that if the Department fails to comply with a statute or regulation concerning appeals to the Administrative Law Division "the administrative law judge shall have discretion to . . . grant all or part of the relief sought by the taxpayer. . . ." The Administrative Law Division is thus authorized by the Department's own regulation to grant a taxpayer relief if the Legal Division fails to timely file an Answer within the time specified in §40-2A-9(c).

The Administrative Law Division has also held that the 90 day Answer period is mandatory. On reconsideration, however, Reg. 810-14-1-.24 gives the Administrative Law Division discretion to grant a taxpayer the requested relief. Granting relief is thus discretionary, not mandatory. If there is reasonable cause or a plausible explanation why the Department did not timely file its Answer, then the Administrative Law Division, in its discretion, may not grant a taxpayer relief. If, however, there is no reasonable cause why the Department failed to comply with §40-2A-9(c), relief will be granted.

This case will continue to be held in abeyance pending a final decision in *G. Thomas Surtees v. VFJ Ventures, Inc. (f/k/a VF Jeanswear, Inc.)*, Alabama Court of Civil Appeals No. 2060478.

Entered December 3, 2007.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

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