

MARK D. DODD
5645 OHELO ROAD
KAPAA, HI 96746-9668,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. INC. 07-997

FINAL ORDER

The Revenue Department denied a refund of 2004 income tax requested by Mark D. Dodd ("Taxpayer"). The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(c)(5)a. Assistant Counsel Duncan Crow represented the Department. John Crowley represented the Taxpayer. The parties agreed to submit the case on the undisputed facts.

The Taxpayer filed his 2004 Alabama income tax return on June 21, 2007. The return claimed a refund of \$10,000 that the Taxpayer had paid as a quarterly estimate in 2004. The Department denied the refund because it was not timely claimed, as required by Code of Ala. 1975, §40-2A-7(c)(2)a.

Section 40-2A-7(c)(2)a. provides generally that a refund must be claimed within three years from the date the return was filed, or two years from payment of the tax, whichever is later. However, if no return was timely filed, as in this case, a taxpayer must claim a refund within two years from the date of payment of the tax. For purposes of the statute, tax paid through withholding or by estimated payment is deemed paid on the original due date of the return.

As indicated, the Taxpayer paid the tax in issue by estimated payment. He thus had two years from the original due date of the 2004 return, or until April 15, 2007, to file a 2000

return and claim a refund. He failed to do so.

The Taxpayer relies on a paragraph in Dept. Reg. 810-14-1-.19 in support of his claim that he timely requested the refund. That regulation is entitled “Time Limitation for Filing Petitions for Refund.” Paragraph (1) of the regulation quotes (most of) the applicable statute, §40-2A-7(c)(2)a., which, as discussed, provides that a petition for refund must be filed within three years from the date the return was filed or two years from when the tax was paid, whichever is later, or, if no return was timely filed, two years from when the tax was paid.¹

The Taxpayer cites paragraph (1)(a) of the regulation, which reads as follows:

Limit where petition filed within three-year period. If the petition for refund made on a return (or a subsequent amended return) is filed within the three-year period from the date the return is due, the amount of the refund shall not exceed the portion of the tax paid (or deemed paid) within that three-year period, plus that amount paid within the period of any extension of time for filing the return.

The Taxpayer argues that paragraph (1)(a) relates to the two year statute that applies in cases where a return is not timely filed, as in this case. The Taxpayer’s Response to Answer reads in pertinent part as follows:

The language of the *Code* referring to a shorter period of time where “no return was timely filed” is amplified and explained by a provision of the *Administrative Rules* which states that “if the petition for refund made on a return (or a subsequent amended return) is filed within the three-year period from the date the return is due, the amount of the refund shall not exceed the portion of the tax paid (or deemed paid) within that three-year period, plus the amount within the period of any extension of time for filing the return. *Rule §810-14-1-.19(1)(a)*.”

¹ Paragraph (1) omits the last sentence in §40-2A-7(c)(2)a., which specifies that tax paid by withholding or estimated payment shall be deemed paid on the original due date of the return. That provision is, however, set out in paragraph (3) of the regulation, concerning tax withheld, and paragraph (3)(a), concerning estimated payments.

In the instant case, the return was filed late, but within the three-year period. The tax was paid within the three-year period; therefore the Department's assertion that the petition for refund was not timely is contrary to *Rule §810-14-1-.19(1)(a)*.

Contrary to the Taxpayer's claim, paragraph (1)(a) does not apply to the alternative two year statute of limitation in cases where a return is not timely filed, as in this case. Rather, the paragraph only relates to the three year statute that applies if a return is timely filed.²

Paragraph (1)(a) of the regulation is an attempt by the Department to adopt the federal law on the subject. The federal statute of limitations for claiming a refund is found at 26 U.S.C. §6511. The Alabama statute, §40-2A-7(c)(2), tracks that federal statute. That is, federal and Alabama law both require that a refund must be claimed within three years from when a return was timely filed or two years from when the tax was paid, whichever is later, or, if no return was timely filed, two years from when the tax was paid.

Section 6511(b)(2)(A) then provides a "[l]imit where claim filed within 3-year period." Paragraph (1)(a) of the Alabama regulation has the almost identical introductory sentence – "Limit where petition filed within three-year period." Unfortunately, the regulation is not consistent with the federal and State statute. Section 6511(b)(2)(A) refers to "the 3-year period prescribed in subsection (a)," which is three years from when the return was filed. Section 40-2A-7(b)(2) contains that same "date that the return was filed" language. Paragraph (1)(a) of the regulation refers, however, to "the three-year period from the date

² Section 40-2A-7(c)(2) does not explicitly state that the three year statute applies only if a return is timely filed. That conclusion is, however, implicit in the statute. The two year statute applies in all cases in which a return is not timely filed – "if no return was timely filed, two years from payment of the tax." It follows that the three year statute otherwise applies if a return is timely filed.

the return is due. . .”, not the date the return was filed. That difference causes the regulation to be inconsistent with both the federal statute and also the controlling Alabama statute, §40-2A-7(c)(2). In such cases, the statute must control over the regulation. *Ex parte City of Florence*, 417 So.2d 191 (1982). In any case, paragraph (1)(a) does not apply in this case because the Taxpayer failed to timely file his 2004 return, and, as indicated, paragraph (1)(a) only applies if a return is timely filed.

In summary, the Taxpayer paid tax in 2004 by estimated payment. He then failed to timely file his 2004 return. Consequently, Alabama law is clear that he had two years from the original due date of the return, or on or about April 15, 2007, to file a claim for refund. *State v. Pettaway*, 794 So.2d 1153 (Ala. Civ. App. 2001). He failed to do so. Consequently, his late-filed petition must be denied.

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

Entered February 5, 2008.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Lionel C. Williams, Esq.
John J. Crowley, Esq.
Kim Peterson