

KENT R. VAN KAMPEN
1008 LAKE WINDS DRIVE
HOOVER, AL 35244,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§ STATE OF ALABAMA
DEPARTMENT OF REVENUE
§ ADMINISTRATIVE LAW DIVISION

§ DOCKET NO. INC. 09-560

§

§

FINAL ORDER

This appeal involves a denied refund of 2005 income tax requested by Kent R. Van Kampen ("Taxpayer"). The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(c)(5)a. A hearing was conducted on November 10, 2009. The Taxpayer attended the hearing. Assistant Counsel John Breckenridge represented the Department.

The Taxpayer testified at the November 10 hearing that his CPA in Utah electronically filed his 2005 Alabama return on April 13, 2006. The return claimed a refund of \$1,524. The Taxpayer submitted a receipt at the hearing showing that the return was electronically transmitted on the above date, with an acknowledged receipt date of April 14, 2006.

When the Taxpayer failed to receive the refund in due course, he inquired three times online with the Department in 2006. He was informed each time that the return was probably being processed. When he telephoned the Department in late 2006, he was told to be patient and that the refund would be issued in due course.

The Taxpayer still had not received his refund in mid-2007, so both he and his CPA submitted a paper copy of the return to the Department in August 2007. The Taxpayer submitted a receipt at the hearing verifying that he had mailed a document to the

Department by certified mail on August 29, 2007. He testified that the document was a copy of his 2005 Alabama return.

The Taxpayer still had not received his 2005 refund in late 2008, when he received a copy of an examination change form from the Department showing that he owed 2005 tax, penalties, and interest of \$4,058.76.¹

After receiving the examination changes, the Taxpayer's CPA sent the Department another copy of the Taxpayer's 2005 return in late December 2008. The Department notified the Taxpayer on January 12, 2009 that the overpayment of \$1,524 claimed on the return had been applied to the 2005 amount due per the audit. There is no evidence that the Department has entered a preliminary assessment against the Taxpayer for any additional amount due for 2005.

Alabama law requires that if income tax is overpaid by withholding or estimated payments, as in this case, the taxpayer must file a return and petition for a refund of the amount overpaid within two years from the original due date of the return. *State v. Pettaway*, 794 So.2d 1153 (Ala. Civ. App. 2001). The Taxpayer's 2005 return was due on April 15, 2006. He thus had until April 15, 2008 to file his 2005 return and request a refund. As discussed above, there is substantial circumstantial evidence establishing that the Taxpayer (and his CPA) timely filed the 2005 return within the two year statute.

In any case, the Department reviewed the return and in effect granted the \$1,524 refund claimed on the return, but applied it as a credit to reduce the additional 2005

¹ The examination change form indicated that the changes were made "per audit." The Department's data base shows, however, that the changes were based on IRS information.

amount due per the Department's audit changes. "In accordance with §40-18-79, Code of Alabama 1975, where there has been an overpayment of any tax imposed under §40-18-71 or 40-18-72, the amount of such overpayment may be credited by the Department against any outstanding (income) tax liabilities owed by the taxpayer." Department's January 12, 2009 letter to Taxpayer.

The Department is allowed to apply a refund due a taxpayer "against any outstanding final tax liability due and owing by the taxpayer to the department, . . ." Code of Ala. 1975, §40-2A-7(c)(4). The 2005 billing letter issued by the Department to the Taxpayer on November 24, 2008 was just that, a billing letter. It was not and did not represent an outstanding final tax liability due the Department. There also is no evidence that the Department has entered a 2005 final assessment against the Taxpayer. Consequently, the Department was not authorized to apply the \$1,524 refund to the Taxpayer's contingent 2005 liability.²

Because the Department was not authorized to apply the 2005 refund to the Taxpayer's contingent liability for that year, it should, instead of allowing the Taxpayer a credit, issue the Taxpayer a refund of \$1,524 in due course, plus applicable interest. The Department may, of course, assess the Taxpayer for any additional 2005 tax that it deems appropriate, as long as it does so within the applicable statute of limitations.

² Section 40-18-79 also allows the Department to apply any overpayment of income tax paid by withholding or estimate payment against "any income tax . . . then due from the taxpayer." Reading §40-18-79 in para materia with §40-2A-7(c)(4), the above language in §40-18-79 must be construed to apply only to any outstanding final income tax liability then due the State. Consequently, as with §40-2A-7(c)(4), the Department cannot apply an income tax overpayment to satisfy a contingent liability.

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

Entered January 21, 2010.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Keith Maddox, Esq.
Kent R. Van Kampen
Kim Peterson