

TERRANCE D. LACH
2500 COMANCHE DRIVE
BIRMINGHAM, AL 35244-3373,

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§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. INC. 09-813

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

FINAL ORDER DISMISSING APPEAL

The Department entered final assessments of 2000 and 2001 income tax against Terrance D. Lach ("Taxpayer") on September 8, 2004. The assessments were for \$12,327.73 and \$506,393.34, respectively, and were based on IRS information showing that the Taxpayer had substantial income from the sale of stocks in those years.

The Taxpayer timely appealed to the Administrative Law Division. A Final Order affirming the final assessments was entered on November 9, 2004 because the Taxpayer failed to comply with a Preliminary Order or otherwise contact the Administrative Law Division by the date specified in the Preliminary Order. The Taxpayer failed to timely apply for a rehearing, as provided at Code of Ala. 1975, §40-2A-9(f), or appeal the Final Order to circuit court, as provided at Code of Ala. 1975, §40-2A-7(b)(5)a.

On August 18, 2008, the IRS notified the Taxpayer that based on information he had provided, his federal liability for 2000 was being reduced to \$0. The IRS also notified the Taxpayer on December 1, 2008 that his 2001 federal liability was being reduced from \$4,423,445.82 to \$8,794.66.

The Taxpayer's accountant contacted the Department's Taxpayer Advocate sometime before August 6, 2009 concerning relief for the above years based on the

federal audit charges. By letter dated August 6, 2009, the Advocate's Office notified the accountant that it was unable to assist the Taxpayer "based on the fact that the Administrative Law Judge had affirmed the final assessments for those years."

On August 18, 2009, the Taxpayer's representatives filed a motion with the Administrative Law Division to reconsider the Final Order previously issued in Docket No. Inc. 04-808, and specifically concerning the 2000 and 2001 final assessments entered against the Taxpayer. The motion was based on Code of Ala. 1975, §40-2A-7(b)(2)g.2., which provides a special one year statute of limitations for a taxpayer to petition for a refund based on federal audit changes. The Administrative Law Division docketed the motion as a new appeal of the 2000 and 2001 final assessments.

The Department has moved to have the appeal dismissed because the Administrative Law Division lacks subject matter jurisdiction. The motion is granted. The Taxpayer had 15 days to apply for a rehearing with the Administrative Law Division, see §40-2A-9(f). He failed to do so. Consequently, the Administrative Law Division does not have the statutory authority to reopen or otherwise review the case. This appeal is accordingly dismissed from the Administrative Law Division docket.

As indicated, §40-2A-7(b)(2)g.2 provides for a special one year statute of limitations relating to any federal audit changes. The statute applies, however, only if the IRS change "results in an overpayment of taxes. . . ." The statute thus technically does not apply in this case because the Taxpayer has not paid the tax in issue, i.e., there is no overpayment of tax.

The Taxpayer could pay the 2001 final assessment in full, and then petition for a refund under §40-2A-7(b)(2)g.2 because the special one year statute has not expired

for that year. And as explained below, I believe the Department's Taxpayer Advocate also is not prohibited or statutorily barred from granting the Taxpayer relief pursuant to a taxpayer assistance order. Code of Ala. 1975, §§40-2A-4(b)(1)a., b., and c.

As indicated, the Advocate's Office refused to grant the Taxpayer relief because the Administrative Law Division had issued a Final Order affirming the final assessments. That is consistent with current Department policy, and is based on Code of Ala. 1975, §40-2A-9(e), which provides that a final order entered by the Administrative Law Judge shall have the same force and effect as a circuit court order.

But the statute that governs taxpayer assistance orders issued by the Taxpayer Advocate specifies that "[n]otwithstanding any statute of limitation or other provision in this title, a taxpayer assistance order may declare that any tax, including a final assessment, was erroneously assessed or reported and is not a liability due the state, . . ." (emphasis added) Section 40-2A-4(b)(1)b. Consequently, the Advocate can grant a taxpayer relief, notwithstanding that §40-2A-9(e) provides that a Final Order issued by the Administrative Law Division has the same force and effect as a circuit court judgment. That is, §40-2A-4(b)(1)b. controls, and the Advocate is not statutorily barred from granting the Taxpayer relief in this case.

The Taxpayer Advocate has the discretion to issue a taxpayer assistance order, subject to the approval of the commissioner or assistant commissioner. Code of Ala. 1975, §40-2A-4(b)(1), et seq. As a matter of policy, it is understandable that the Advocate may not grant a taxpayer relief if the Administrative Law Division has previously entered a Final Order affirming a final assessment, and the taxpayer is seeking relief based on information that was available to the taxpayer when the matter

was before the Administrative Law Division. In that situation, it could reasonably be argued that the taxpayer should have presented the information to the Administrative Law Division, and should not be allowed “two bites at the apple.”

In this case, however, the Taxpayer obviously did not have access to or knowledge of the IRS audit changes when his appeal was before the Administrative Law Division in 2004 because the IRS did not make the changes final until 2008. If the audit changes are considered, the Taxpayer will in actuality owe only a few thousand dollars, not the over \$500,000, plus interest, he would owe under the original assessments. Consequently, as a policy matter, the Taxpayer should in fairness be granted relief.

A copy of this Final Order is being sent to the appropriate parties to determine if the Department’s policy concerning taxpayer assistance orders should be modified as discussed above to allow substantial justice. See, Code of Ala. 1975, §40-2A-1(a). (“This chapter shall be liberally construed to allow substantial justice.”) The Taxpayer’s representatives should in due course resubmit their request for relief on behalf of the Taxpayer to the Taxpayer Advocate. I reiterate, however, that the Taxpayer Advocate has the sole discretion to issue a taxpayer assistance order.

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

Entered September 14, 2009.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Margaret Johnson McNeill, Esq.
William B. Sellers, Esq. (w/enc.)
Commissioner Tim Russell
Assistant Commissioner Cynthia Underwood
Deputy Commissioner Mike Mason
Ron Bowden, Esq.
Curtis Stewart
Voncile Catledge
Kim Peterson