

JOEL E. DILLARD
3702 MONTROSE ROAD
BIRMINGHAM, AL 35213-3828,

§
§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer, §

DOCKET NO. INC. 10-514

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Joel E. Dillard (“Taxpayer”) for 2008 income tax. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on August 26, 2010. The Taxpayer attended the hearing. Assistant Counsel Lionel Williams represented the Department.

The Taxpayer’s employer submitted twelve \$715 checks to the Department in 2008 on behalf of the Taxpayer. The issue in this case is whether the checks were advance or estimated tax payments by the Taxpayer for 2008, as argued by the Taxpayer, or payments pursuant to a previously issued Department writ of garnishment for income tax owed by the Taxpayer for prior years, as argued by the Department.

The Department entered 1993, 1994, 1996, 1997, 1998, and 1999 income tax final assessments against the Taxpayer on March 28, 1995, June 26, 1996, March 27, 2001, March 23, 2001, May 29, 2001, and May 29, 2001, respectively. The assessments collectively totaled \$76,711.38.

The Department issued a writ of garnishment to the Taxpayer’s employer, the law firm of Baxley, Dillard, Dauphin, and McKnight, on November 25, 2002 in the amount of the above final assessments, plus accrued interest.

The Taxpayer's employer remitted twelve \$715 checks to the Department in 2008 on behalf of the Taxpayer. The first eleven checks had "25% GR" noted on them. The last check dated December 2, 2008 included the notation "Advance Payment Joel E. Dillard." The Department applied the first eight checks to the Taxpayer's 1993 liability, the next three to the Taxpayer's 1997 liability, and the last to the Taxpayer's 1996 liability.

The Taxpayer filed his 2008 Alabama income tax return in October 2009. The return reported a tax liability of \$9,114. It also claimed 2008 estimated tax payments of \$10,678, which consisted of the twelve checks discussed above for \$8,580, and a claimed refund carryover of \$2,098 from 2007.

The Department disallowed the claimed estimate payments because, as indicated, it had previously applied the twelve checks to the Taxpayer's prior liabilities, and there also was no refund carryover available from 2007. It did, however, apply a \$2,000 check received from the Taxpayer in October 2009 to the 2008 liability, even though the check specified that it was an advance payment on the Taxpayer's 2009 income tax.

The Taxpayer argues that Alabama law clearly allows advance payments, and that he properly designated the twelve checks for \$715 each in 2008 as such when he claimed the amounts as estimated tax on his 2008 Alabama return. He also contends that the payments were incorrectly applied to liabilities that were more than ten years old, which, according to the Taxpayer, is prohibited by Code of Ala. 1975, §40-29-51.

The Administrative Law Division previously decided an appeal of a 2005 final assessment entered against the Taxpayer that involved substantially similar facts and issues of law. In *Dillard v. State of Alabama*, Docket No. Inc. 07-1029 (Admin. Law Div. 10/21/2008), the issue was whether twelve checks for \$715 each submitted to the

Department by the Taxpayer's employer in 2005 constituted advance payments on the Taxpayer's 2005 Alabama liability. As in this case, the Department had treated the checks as garnishment remittances relating to its 2002 writ of garnishment, and had thus applied the payments to prior outstanding liabilities owed by the Taxpayer. The Administrative Law Division held that the payments were not advance or estimate payments, and consequently affirmed the 2005 final assessment in issue. The Final Order reads in substantive part as follows:

The Taxpayer's employer, the law firm of Baxley, Dillard, Dauphin & McKnight, submitted twelve \$715 checks to the Department during 2005 on behalf of the Taxpayer. The Taxpayer subsequently claimed on his 2005 Alabama return that he had paid \$8,580 (\$715 x 12) in estimated Alabama tax during 2005. The Department disallowed the credit because it had applied the \$8,580 to the Taxpayer's outstanding liabilities for 1993 and 1994. It consequently entered the 2005 final assessment in issue.

The Taxpayer argues that the twelve payments made on his behalf in 2005 were voluntary advance payments on his 2005 liability. I disagree.

Code of Ala. 1975, §40-18-42(d) does allow a taxpayer to elect to make voluntary advance payments prior to the due date of a tax liability. See also, Dept. Reg. 810-3-42-.01(6). But the payments in issue were not voluntary, nor were they designated by either the Taxpayer or the Taxpayer's employer at the time they were made as being advance payments toward the Taxpayer's 2005 liability.

The Department entered a final assessment of 1993 income tax against the Taxpayer on March 28, 1995 in the amount of \$21,124.79. It later entered a final assessment of 1994 income tax against the Taxpayer on June 26, 1996 in the amount of \$11,986.55. The Department also entered income tax final assessments against the Taxpayer for numerous other years.

On November 25, 2002, the Department issued a writ of garnishment against the Taxpayer for \$101,198.88. The writ was directed to the Taxpayer's law firm, as garnishee. The law firm consequently began issuing monthly checks to the Department in December 2002. The first check was for \$329. The remaining checks issued through 2005, including the checks in issue, were for \$715. Eleven of the checks submitted in 2005 were applied to the Taxpayer's outstanding 1993 liability. The other was applied to the 1994

liability.

The twelve checks submitted in 2005 were not voluntarily paid because the Taxpayer's law firm, as garnishee, was required by Alabama law to remit the payments, see generally Code of Ala. 1975, §6-6-370, et seq. The law firm and the Taxpayer also did not submit an estimated tax coupon (Form 40-ES) with the payments, as required for the payments to be treated as estimated payments pursuant to Dept. Reg. 810-3-82.01. As indicated, the payments also were not otherwise designated as estimate or advance payments when they were made.

A taxpayer can designate for a payment to be applied to a specific liability. See generally, *Brabner v. State of Alabama, Inc.* 97-196 (Admin. Law Div. O.P.O. 10/29/1997). But the designation must be made at the time the payment is made. The payment must also be voluntary in the sense that it cannot be a required payment pursuant to a writ of garnishment relating to a specific liability or liabilities.

Dillard, Inc. 07-1029 at 1 – 2.

The above rationale also applies in this case, with one exception. The Taxpayer's law firm, as garnishee, was required by Alabama law to remit the payments pursuant to the 2002 writ of garnishment. The first eleven checks also were not designated as estimated or advance payments when made. And as in the prior appeal, those eleven payments were not voluntary. The eleven payments were thus properly applied to the Taxpayer's prior year liabilities.

The \$715 check submitted by the employer dated December 2, 2008 did bear the notation "Advance Payment Joel E. Dillard," whereas the previous eleven checks included the notation "25% GR."¹ There is no evidence explaining why the last check submitted in 2008 bore a different notation than the prior eleven, but the December 2, 2008

¹ It is assumed that the "25% GR" refers to the maximum amount of wages that can be garnished from an employee's wages pursuant to Code of Ala. 1975, §6-10-7.

check was clearly marked as an advance payment.² Consequently, that amount should be treated as a 2008 advance payment and applied to the Taxpayer's 2008 liability.

The \$2,000 check submitted by the Taxpayer in October 2009 as an advance payment toward his 2009 liability also was improperly applied to the Taxpayer's 2008 liability. That amount should be applied to the Taxpayer's 2009 liability, which would correspondingly increase his 2008 liability.³

The Department also was not prohibited by the ten year statute of limitations at §40-29-51 from applying the payments to the Taxpayer's 1993, 1996, and 1997 liabilities.

To begin, the 1996 and 1997 final assessments were entered on March 27 and March 21, 2001, respectively. The application of the 2008 payments to those liabilities was thus clearly within the ten year statute.

Those payments applied to the Taxpayer's 1993 liability also were not prohibited by the ten year statute. Section 40-29-51 provides that the Department may collect a final assessment amount only if the levy or proceeding for such collection is made within ten years from the final assessment date. The 1993 final assessment was entered on March 28, 1995. The proceeding or levy to collect the 1993 final assessment amount began when the Department issued its writ of garnishment in November 2002, within the ten year collection statute.

² The envelope in which the employer mailed at least the first nine checks in 2008 were addressed to the "Alabama Dept. of Revenue Collection Services Division," whereas the December 2, 2008 check was addressed to the "State of Alabama Department of Revenue." There is no evidence why the envelope for the December 2, 2008 check was not also addressed specifically to the Collection Services Division.

³ The Administrative Law Division is authorized to increase or decrease a final assessment on appeal to reflect the correct amount due. Code of Ala. 1975, §40-2A-7(b)(5)d.1.

The Department is directed to recompute the final assessment in issue by applying the December 2, 2008 advance payment of \$715 to the tax due, increasing the tax due by the \$2,000 check erroneously applied to the 2009 liability, and then recomputing the interest due on the outstanding balance. A Final Order will then be entered for the adjusted amount due.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered November 18, 2010.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Lionel C. Williams, Esq.
Joel E. Dillard, Esq.
Kim Peterson