LINDSAY GOLDBERG & BESSEMER NNAIV LP 630 FIFTH AVENUE, FLOOR 30 NEW YORK, NY 10111-0204,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. BIT. 13-736
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Lindsay Goldberg & Bessemer NNAIV LP ("Taxpayer") for 2010 business income tax. The Taxpayer appealed pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on January 16, 2014. Forrest Hunter represented the Taxpayer. Assistant Counsel David Avery represented the Department.

On April 15, 2008, the Taxpayer electronically petitioned for an extension to file its 2007 Alabama Form 65 Partnership/Limited Liability Return. The Taxpayer's representative claimed at the January 16 hearing that the Taxpayer also electronically remitted the tax due of $1,131,055 at that time.

The Taxpayer received a transaction receipt from the Department on April 15, 2008 which indicated that a six month extension to file the return had been submitted by the Taxpayer. The receipt also stated "[a]dditionally, a prepayment of $1,131,055 was submitted with this extension request." The receipt also stated at the bottom that "[s]ome accounts require you to provide the originating account information to successfully process transactions. If your bank requires an originating account, the number you will need to provide is '977571990.' Your account will be charged by Alabama Interactive."

The Taxpayer filed its 2007 Form 65 return before the extended due date and claimed a credit for the $1,131,055.

The Department notified the Taxpayer on December 1, 2008 that it had not received the $1,131,055, and consequently, that the Taxpayer owed that amount plus interest and penalty of $39,912.29 and $90,484.40, respectively.

The Taxpayer responded to the notice on January 5, 2009 by faxing a copy of the above-referenced transaction receipt to the Department's Pass Through Entity ("PTE") unit. The Taxpayer also discussed the matter by telephone with the PTE manager on January 6, 2009. According to the Taxpayer, the manager indicated at that time that the issue had been resolved, and that there was no balance due for 2007. In support of that claim, the Taxpayer submitted a fax cover letter in which an unidentified Taxpayer employee handwrote the following – "01/6/09 – spoke to Nancy. She confirmed this has been resolved and there is no balance due on the account." Taxpayer Exhibit C. The Department agrees that the PTE manager did tell the Taxpayer's representative that there was no balance due, but that the account in question was for a Taxpayer-related entity, not the Taxpayer.

The Department issued a preliminary assessment against the Taxpayer on February 9, 2009 for the unpaid tax due of $1,131,055, plus interest and penalty of $51,687.66 and $113,105.50, respectively. The Taxpayer responded again by submitting a copy of the April 15, 2008 extension request confirmation receipt. It also mailed the Department a check for the 2007 tax due of $1,131,055.

The Department applied the above payment first to the accrued interest, and then to the tax due. It then entered a 2007 final assessment against the Taxpayer on April 14, 2009 for $169,947.33, which consisted of tax of $55,096.32, interest of $643.59, and a late payment penalty of $114,207.42. The final assessment was not appealed.

The Taxpayer subsequently overpaid its 2010 liability by $327,825. The Department acknowledged the overpayment by letter dated February 1, 2012. It also notified the Taxpayer that it had offset the 2010 refund by $187,410.98 to satisfy the unpaid amount due for 2007. The Department refunded the balance of $140,414.12 to the Taxpayer.

The Taxpayer timely petitioned for a refund of the $187,410.98. The Department denied the petition. The Taxpayer timely appealed to the Administrative Law Division.

The Taxpayer now concedes that the tax due was not timely paid, but argues that it should be refunded that part of the $187,414.72 that represented penalty and interest on the tax due. It argues that it relied in good faith on the transaction receipt it received from the Department concerning its extension request, which, as indicated, stated that "a prepayment of $1,131,055 was submitted with this extension request." The receipt further indicated that "[y]our account will be charged by Alabama Interactive." The Taxpayer argues that based on those statements on the receipt, it reasonably believed that the tax had been paid.

The Department argues that the Taxpayer should have known that the tax was not paid because it should have known that the money was not taken from its account – "It's a million dollar payment. I think that any reasonable person would say that that was – that they would have known that (it) didn't come out of their account." (T. 9).

I agree that if an individual wrote a personal check to pay a large tax liability, and the funds were not taken from the individual's account after several months, the individual would most probably know that the liability had not been paid. But the Taxpayer in this case is a large business with numerous affiliated entities. It has a large, independent accounting department that writes thousands of checks a year. Consequently, it is not so obvious that someone in the Taxpayer's tax department would have known that an electronic payment had not been processed by the accounting department.

The Taxpayer's tax department had no reason to know that the electronic payment had not gone through, and thus no reason to check with the accounting department, until December 2008, when the Department first notified the Taxpayer that the tax had not been paid. The Taxpayer responded by sending the Department a copy of the confirmation receipt showing that the $1,131,005 had been submitted with the extension request. When the Department later entered a preliminary assessment against the Taxpayer in early 2009, the Taxpayer again sent the receipt, and also a check for the tax due.

The Taxpayer perhaps should have known that the electronic payment had not been processed. It is also reasonable, however, that the Taxpayer would rely on the Department's electronic transfer receipt showing that the payment of the $1,131,055 had been submitted with the extension request, and that its account would be charged by the Department's agent, Alabama Interactive. Under the circumstances, the penalty in issue is waived for cause. Interest is due by statute, however, and cannot be waived. Code of Ala. 1975, §40-1-44.

The Department should refund the penalty amount of $114,207.42 to the Taxpayer in due course, plus applicable interest. Judgment is entered accordingly.

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

Entered April 16, 2014.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: David E. Avery, III, Esq.
Forrest J. Hunter
Ronnie Bedsole