STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. INC. 87-204
PIKE RADIOLOGY, P.A. P.O. Box 408 Troy, AL 36081,	§	
Taxpayer.	§	

ORDER

The Revenue Department assessed withholding tax against Pike Radiology, P.A. ("Taxpayer") for the period April 1, 1984 through May 31, 1987. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on November 1, 1988. Mr. Lester Sanders and Jo Karen Parr, Esq. appeared for the Taxpayer. Assistant counsel Duncan Crow represented the Department. Based on the evidence submitted by the parties, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

The Taxpayer failed to withhold tax from the wages of Timothy L. Eakes, Jr. ("employee") as required by Code of Ala. 1975, §40-18-71. The Department subsequently assessed the tax due, plus interest and the 25% penalty levied at Code of Ala. 1975, §40-18-80.

The Department agrees that no additional tax or interest is owed by the Taxpayer. The only issue in dispute is whether the Taxpayer should be liable for the penalty included as part of the assessment.

The undisputed facts and the Taxpayer's position with regard to the penalty is set out at page 2 of the Taxpayer's post-hearing brief as follows:

> In the instant case, the employee who was also the sole shareholder of the Taxpayer consulted with his certified public accountant regularly regarding his personal income tax liability. The accountant prepared projections of the employee's individual income tax liability for each year. There was no Alabama income tax liability for 1984 and 1985. In 1986, estimated tax payments in the amount of $10,000.00 were made in lieu of withholding to satisfy his tax liability. An overpayment of $2,783.00 was left on deposit with the State of Alabama to be applied against any 1987 income tax liability, and when his accountant's projections reflected additional tax would be due, Alabama tax was withheld. Taxpayer-employee's good faith reliance on his accountant's projections regarding his liability of Alabama income tax when no tax was due or had otherwise been provided for is reasonable cause for abatement of the proposed penalty.

CONCLUSIONS OF LAW

Code of Ala. 1975, §40-18-80(b) provides as follows:

> (b) Any employer required under the provisions of section 40-18-71 to withhold taxes on wages and make quarterly returns and payment of amounts withheld to the department who fails to withhold such taxes or to make such returns, or who fails to remit the amounts collected to the department, shall be liable for the payment of the amount of taxes which should have been withheld and, in addition, shall be subject to a civil penalty equal to 25 percent of the amount of taxes that should have been properly withheld and paid over to the department for each such failure. Such tax and penalty shall be assessed and collected by the department and the assessment of such tax and penalty may be assessed in the manner provided in section 40-18-40. (Emphasis added)

The determinative question is whether the above penalty can be waived for good cause, and if so, waived in the present case.

The word "shall" when used in a construed to be imperative or

mandatory. United Mine Workers of America v. Scott, 315 S.W. 2nd 614, 621; Tascanco v. State, 363 So.2d 405; D'Agostino v. City of Baton Rouge, 504 So.2d 1082, 1084. See also Black's Law Dictionary, Revised Fourth Edition (1968), at page 1541.

However, the courts have held in at least two cases concerning the Revenue Department that "shall" or "must" may in some instances be construed as optional.

In Morgan v. State, 194 So.2d 820 (1967), the Alabama Supreme Court stated as follows:

> While the word 'shall', as used in statutes or otherwise, is generally said to be used in the imperative or mandatory sense, there is a very notable exception to this where from the circumstances it is obvious that the legislature intended otherwise and also where the validity of the statute itself is placed in jeopardy. The exception appears to recognize the fact that the man on the street, aside from the strict rules of grammar, often uses the words 'shall' and 'may' interchangeably and without regard to fineness of meaning. Thus, to carry out the real legislative intent, and as it has been said to prevent injustice being done by making justice the slave of grammar, courts have under similar circumstances as are here involved construed the word 'shall' as permissive and as equivalent to 'may'. See Black's Law Dictionary, Fourth Edition, 'May' and 'Shall' and the numerous authorities cited therein which support the use of said exception where the circumstances permit, and 82 C.J.S. [Statutes], Section 380, pp. 878, 881, and cases cited in the footnotes.

More specifically, the Court of Civil Appeals has decided that the "mandatory" penalty levied by Code of Ala. 1975, §40-12-10(e) could be waived or disallowed in certain instances. State v. Mack, 411 So.2d 797 (1982).

In Mack, the taxpayer paid license tax each year as instructed by the Revenue Department. The Court of Civil Appeals affirmed the trial court's waiver of the penalty, even though the statute required that "the same (license) shall be subject to a penalty of 15 percent . . . which penalty must be collected . . . ." As stated by the Court:

> It is clear that the penalty provision of §40-12-10(e)is mandatory. Such penalty, however, is for a breach of duty by the taxpayer. State v. Clarke, 240 Ala. 362, 199 So. 543 (1941); see 85 C.J.S. Taxation §1024 (1954). It would certainly be unfair to penalize a taxpayer for the errors of the Department. Also, the term "delinquent" in the statute connotes a breach of duty by the taxpayer. There is no evidence that Mack in any way breached his duty. As a result, we find that the trial court properly disallowed the penalty.

The Morgan and Mack cases were cited in a prior Administrative Law Division case, Misc. 84-138, Admin. Law Reports, Oct. 1984 and Jan. 1985, as authority for waiving the penalty found at §40-12-10(e). In that case, the taxpayer paid the motion picture license tax in the amount as advised by the Revenue Department. The Department later altered its position and assessed additional tax. The additional tax was upheld. However, the penalty assessed by the Department was waived because the taxpayer's failure to pay the proper amount was due to the Department's incorrect advice.

However, in the present case the Department in no way contributed to the Taxpayer's clear breach of duty to withhold from employee's wages. The purpose for the penalty is to enforce compliance with the withholding provisions. Without mandatory

application of the penalty, a taxpayer could elect not to withhold, use the money in the meantime, and subsequently pay only the tax due plus interest.

Also, the employee's good faith reliance on his accountant's advice that no tax would be owed for the year is not sufficient cause to abate the penalty.

Federal law allows an employee to adjust the amount withheld based on estimated itemized deductions (26 U.S.C. §3402(m)), or to file a withholding exemption certificate if no liability is expected for the tax year (26 U.S.C. §3402(n)). But Alabama law has no similar provisions. The amount set out in §40-18-71 must be withheld, and any overpayment can only be refunded pursuant to §40-18-79. That is, the employer must withhold even if the employee has reason to believe that he will owe no tax and in fact has no tax liability for the subject year.

Finally, the Taxpayer correctly points out that the §40-18-80 penalty was waived by the Department in an earlier case before the Administrative Law Division, Inc. 85-128 Admin. Law Reports, October 1985. However, that case concerned the proper computation of interest, and the waiver of the penalty was not in issue. In another case, the §40-18-80 penalty for failure to make estimated payments was upheld, see Inc. 84-162 Admin. Law Reports, Nov. 1984.

The above considered, the assessment in issue should be made

final based on the penalty as required by §40-18-80.

Entered this the 14th day of December, 1988.

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BILL THOMPSON
Chief Administrative Law Judge