

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. INC. 88-217

DOLLY P. RIVES
3620 Ridgeview Drive
Birmingham, AL 35224,

§

§

Taxpayer.

§

RECOMMENDED ORDER

The Revenue Department denied three petitions for refund of income tax filed by Dolly P. Rives (Taxpayer) concerning the years 1983, 1984, and 1985. The Taxpayer appealed to the Administrative Law Division and the matter was submitted on an agreed stipulation of facts and various affidavits and exhibits introduced by the Department. Mr. Louis A. Thacker represented the Taxpayer. Assistant counsel Duncan Crow represented the Department. The following Recommended Order is hereby entered based on the undisputed facts presented by the parties.

FINDINGS OF FACT

This matter was submitted for decision based on the following undisputed facts as set out by the Taxpayer's representative:

On June 1, 1986, the taxpayer sold all of her shares of Circle C Industries stock for a net capital loss in the amount of \$178,224.00. This transaction was reported on Schedule D of the taxpayer's 1986 Alabama income tax return. This return, reflecting a net taxable loss in the amount of \$158,931.88, was filed with the Department of Revenue in August, 1987.

In June, 1988, the taxpayer's accountant prepared amended returns for the years 1983, 1984 and 1985 to account for the 1986 loss. These amended returns reported net operating loss carrybacks and a carryforward to 1987.

The 1986 capital stock transaction loss was included in the calculation as a business loss pursuant to Department of Revenue Regulation 810-3-15-.22 (as amplified by the Commissioner's "Instructions for Computation of NOL CB-CFII). These amendments reflect claimed refunds and reduction of taxpayer's 1987 income tax liability in the following amounts:

1983	1984	1985	1987
\$2,791	\$1,620	\$2,238	\$ 625

In September, 1988, the Department notified taxpayer that her refund claims and the reduction of her 1987 tax liability was being denied based on your (Administrative Law Judge) decision in Docket No. 87-132.

The taxpayer and this firm are in agreement with the decision in the cited case. However, the firm is concerned with the retroapplication of the decision by the Department. We believe that Alabama taxpayers should be entitled to the benefits of the commissioner's stated position if a transaction is consummated prior to an announcement of a change in that position. On November 17, 1988, this firm submitted a request to Commissioner James E. Sizemore, Jr., seeking administrative relief from the retroactive application of your decision.

On March 9, 1989, the Commissioner denied our request for administrative relief. The Commissioner states that the "retroactive application is not involved" and that the decision "conforms" Alabama law with Federal law as to this issue. Federal law grants relief by allowing limited capital loss carryforwards.

Alabama's net operating loss law requires that certain modifications must be made in computing a loss carryback or carryforward, see §40-18-15(a)(16)f. One of the modifications is that non-business deductions shall be allowed only to the extent of non-business income, see subsection (16)f.3.

Prior to 1988, the Department treated any gain or loss from the sale of stock as a business transaction and thus not subject to

the above modification. However, in Docket No. Inc. 87-132, referred to above, this Administrative Law Judge ruled against the Department by holding that a gain on the sale of stock from a personal portfolio constituted a non-business gain for purposes of computing the NOL. The decision was issued on August 9, 1988.

The Department accepted the decision and thereafter began uniformly treating all stock transactions as non-business in computing NOLs for all tax years ending after December 31, 1984, see affidavits of Mike Mason and John Burgess and revised Department Reg. 810-3-15-.22, published June 15, 1989. As a result, the Taxpayer's 1986 capital stock loss was treated as a non-business loss, which resulted in no allowable NOL carryback to the years in question. The refunds for those years were thus denied.

As stated, the Taxpayer agrees with the decision in Inc. 87-132 and concedes that her 1986 stock loss was a non-business transaction. The issue thus is whether the corrected position adopted by the Department in August, 1988 should be applied prospectively only to tax years after August, 1988, as argued by the Taxpayer, or retroactively to all periods still open to assessment and/or refund, as contended by the Department.

CONCLUSIONS OF LAW

If the Revenue Department is incorrectly interpreting or administering a tax law, it is obligated to correct the mistake, and the correct interpretation should be applied retroactively to

all taxpayers and to all tax periods still open to refund and assessment. See 26 U.S.C.A. 97805(b); Dickman v. C.I.R., 465 U.S. 330, 104 S.Ct. 1086; Anderson Clayton & Company v. U.S., 562 F.2d 972. The proper interpretation should be applied retroactively even if a taxpayer has relied to his detriment on the prior incorrect position taken by the Department. Dixon v. U.S., 381 U.S. 68, 85 S.Ct. 1301, see also State v. Maddox Tractor and Equipment Company, 69 So.2d 426.

The Department began treating personal stock losses and gains as non-business subsequent to the decision in Inc. 87-132 in August, 1988. That change has in practical effect conformed Alabama law to the federal law on the subject. Further, the Department has applied the change fairly and uniformly to all tax years ending after December 31, 1984, and has not selectively applied the change to the Taxpayer only. Consequently, the Department's treatment of the Taxpayer's 1986 loss as non-business is correct and should be upheld.

The above considered, the refunds in question should be denied. This a recommended order. The original has been forwarded to the Commissioner of Revenue for entry of a final order. The final order entered by the Department may be appealed pursuant to Code of Ala. 1975, §41-22-20.

Entered this 14th day of November, 1989.

BILL THOMPSON
Chief Administrative Law Judge