

STATE OF ALABAMA  
DEPARTMENT OF REVENUE,

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DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. INC. 89-245

WILLIAM H. & SHIRLEY T. SHEARMAN  
P.O. Box 2893  
Lake Charles, LA 70602,

§

Taxpayers. §

FINAL ORDER

The Revenue Department denied refunds of income tax claimed by William H. and Shirley T. Shearman (Taxpayers) for the years 1982 and 1983. The Taxpayers appealed to the Administrative Law Division and a hearing was scheduled for October 16, 1991. The Taxpayers' representative, CPA Judson J. McCann, was notified of the hearing by certified mail but failed to appear. Assistant counsel Gwendolyn B. Garner appeared for the Department. Based on the evidence submitted by the Department, the following findings of fact and conclusions of law are hereby entered.

FINDINGS OF FACT

This case involves the statute of limitations for claiming a net operating loss (NOL) carryback to a prior year. Specifically, how long does a taxpayer have after a loss year to claim a loss carryback for a refund in a prior year. The relevant facts are undisputed.

The Taxpayers filed their 1982 Alabama income tax return on October 3, 1983 and their 1983 Alabama return on August 31, 1984.

The tax due was paid with the returns.

The Taxpayers claimed a loss on their 1985 Alabama return. The return was timely filed with the Department on October 18, 1986.

The Taxpayers attempted to carry the 1985 loss back for refunds in 1982 and 1983 by filing amended 1982 and 1983 returns on June 30, 1989. The Department denied the refunds as untimely claimed.

The Taxpayers claim that they timely filed the amended 1982 and 1983 returns as required by the Department's 1985 instructions for claiming a NOL carryback. Those instructions stated that a NOL could be claimed "within three years of the due date, including extensions, for filing the return for the loss year".

The Department contends that the 1985 instructions were wrong. Rather, the Department relies on Reg. 810-3-15-.22, as amended effective June 15, 1989, which provided that "a claim for a refund of taxes resulting from a net operating loss carryback must be filed within three (3) years of the date of payment of the taxes sought to be refunded. See §40-18-43 and related regulations.<sup>1</sup> Consequently, the Department's position is that the amended 1982

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<sup>1</sup>Reg. 810-3-15-.22 provided during 1985 that a loss carryback must be claimed within three years from the last day of the loss year. As noted, the regulation was amended effective 6/15/89 to require a refund within three years from payment of the tax sought to be refunded. The regulation was again amended by emergency rule on December 22, 1989 to again require that a carryback must be claimed within three years from the last day of the loss year. There is no statutory authority for this particular statute of limitations and the federal statute of limitations should apply in the absence of any specific statute to the contrary in Alabama.

and 1983 returns were not timely filed within three years from when the tax for those years was paid (October 3, 1983 and August 31, 1984, respectively).

#### CONCLUSIONS OF LAW

Code of Ala. 1975, §40-18-15(a)(16) provides that a net operating loss can be carried back three years and/or forward fifteen years from the loss year. The statute is modeled after the federal NOL statute, 26 U.S.C. §172. Under federal law a refund based on an NOL carryback can be claimed at any time within three years, including extensions, from the due date of the loss year return. See, 26 U.S.C. §6511. Alabama does not have a statute similar to 26 U.S.C. 6511, however, implicit in Alabama's NOL statutes is a three year statute of limitations for carryback of an NOL loss.

The statute of limitations on an NOL carryback cannot begin to run until the loss is realized. Therefore, the loss year return should trigger the running of the statute of limitations for filing an NOL carryback refund petition.

The Taxpayers in this case should therefore, be allowed to carry their 1985 loss back to the year 1982 and 1983 by filing an amended return within three years from the due date of the 1985 return. As the 1985 return was not due until October 1986, the petitions for

refunds which were filed in June 1989 were timely filed.

The above considered, the refunds should be issued accordingly. This Order shall constitute the Final Order for purposes of judicial review according to the provisions of Code of Ala. 1975, §41-22-20.

ENTERED this 11th day of December, 1991.

JAMES M. SIZEMORE, Commissioner