

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. INC. 90-187

HENRY S. & ROSE D. MARSH §
3000 Island Blvd., Suite 906
North Miami Beach, FL 33160, §

Taxpayers. §

FINAL ORDER

The Revenue Department assessed income tax against Henry S. & Rose D. Marsh (Taxpayers) for the years 1985, 1986 and 1987. The Taxpayers appealed to the Administrative Law Division and a hearing was conducted on August 23, 1990. Mr. Randy Blackwell appeared for the Taxpayers. Assistant counsel Dan Schmaeling represented the Department. This Final Order is based on the evidence and arguments presented by the parties.

FINDINGS OF FACT

The issue in this case is whether the Department timely assessed income tax against the Taxpayers for 1985 and 1986 within the three year statute of limitation set out at Code of Ala. 1975, §40-18-45. The Taxpayers do not contest the 1987 assessment.

The Taxpayers lived in Florida. during 1985 and 1986 but earned income in Alabama and thus filed Alabama. nonresident income tax returns for those years. The 1985 return was filed in April, 1986 and the 1986 return was filed in April, 1987.

The Department audited the Taxpayers and determined that additional tax was due for 1985, 1986, and 1987. Preliminary

assessments were entered for those years on May 2, 1990.

The Taxpayers argue that the 1985 and 1986 assessments were not timely entered within three years from the date the returns were filed as required by §40-18-45.

The Department agrees that the assessments were not entered within three years, but nonetheless contends that the assessments were timely because Department Reg. 810-3-45-.01(1)(g) provides that the statute of limitations for making assessments shall be suspended when the taxpayer is absent from the State.

CONCLUSIONS OF LAW

Code of Ala. 1975, §40-18-45(a) sets out the general rule that income tax must be assessed within three years after a return is filed. The statute is extended to five years if a taxpayer omits more than 25 percent of gross income from his return. Code of Ala. 1975, §40-18-46 also provides that the statute can be suspended by waiver and that tax can be assessed at any time if the taxpayer has filed a fraudulent return.

The Department argues that Reg. 810-3-45-.01(1)(g) provides another exception to the general rule in that it suspends the statute during such period or periods as a taxpayer is absent from the State. However, there is no statutory or other authority for the regulation.

The Department is authorized to promulgate reasonable procedures and methods for income tax regulations governing

procedures and methods for computing gains and income, see Code of Ala. 1975, §40-18-57. However, a Department regulation must conform to the statute it seeks to interpret and cannot limit or alter the scope of the statute. Hamm v. State ex rel. Martin, 33 So.2d 358; East Brewton Materials, Inc. v. State, 223 So.2d 751; Jefferson County Board of Education v. Alabama Board of Cosmetology, 380 So.2d 913.

Department Reg. 810-3-45-.01(1)(g) substantially alters §40-18-45 and creates another exception to the general rule not allowed by statute. The regulation clearly goes beyond the Department's rulemaking authority and cannot be upheld.

Ex parte White, 477 So.2d 422, is not on point because that case involved a "bookkeeping" regulation that did not attempt to alter or limit the scope of a statute, as does the regulation in the present case.

The above considered, the Department is directed to reduce and make final the 1985 and 1986 assessments showing no additional tax due. As agreed by the parties, the 1987 preliminary assessment should be made final as entered, plus appropriate interest.

Entered this 27th day of August, 1990.

BILL THOMPSON
Chief Administrative Law Judge