

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BARNETT BANKS, INC.,)
as successor by merger to)
First Florida Banks, Inc.,)
)
Petitioner,)
)
vs.) Case No. 98-0040
)
DEPARTMENT OF REVENUE,)
)
Respondent.)
)

BARNETT BANKS, INC.,)
)
Petitioner,)
)
vs.) Case No. 98-0212
)
DEPARTMENT OF REVENUE,)
)
Respondent.)

RECOMMENDED ORDER

Pursuant to notice, Don W. Davis, an Administrative Law Judge of the Division of Administrative Hearings, held a formal hearing in the above-styled case on April 16, 1998, in Jacksonville, Florida.

APPEARANCES

For Petitioner: David M. Wells, Esquire
Eric Bilik, Esquire
McGuire, Woods, & Criser
50 North Laura Street, Suite 3300
Jacksonville, Florida 32202

For Respondent: Jeffrey M. Dikman, Esquire
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue for determination is whether interest is due upon additional tax paid by Petitioners from the date of amended returns or whether interest should accrue from the date of Petitioners' original returns.

PRELIMINARY STATEMENT

A federal audit concluded that Petitioner Barnett Banks, Inc., as successor to First Florida Banks, Inc. (First Florida) had not fully reported "federal taxable income" on federal and Florida corporate income tax returns for tax years 1986 through 1990. Additionally, it was determined that Petitioner Barnett Banks, Inc., (Barnett) had not fully reported federal taxable income for tax years 1988 through 1991.

Petitioners paid the additional taxes due to the state and federal governments, but maintain they are entitled to a refund of assessed interest, paid under protest, to the state because the additional tax amount due was timely remitted within 60 days after the federal audit was concluded in 1995.

Petitioners requested formal administrative proceedings to resolve the issue of when the applicable tax payment "due date" occurred, a determination that governs the accrual of interest. Subsequently, both cases were transferred to the Division of Administrative Hearings for conduct of a formal hearing pursuant

to Section 120.57(1), Florida Statutes. The cases were consolidated by order dated March 4, 1998.

At the final hearing, Petitioners presented the testimony of two witnesses and offered three exhibits. Respondent presented the testimony of two witnesses and five exhibits.

The transcript of the final hearing was filed with the Division Of Administrative Hearings on April 28, 1998. At the conclusion of the hearing, the parties were granted leave to file proposed recommended orders more than 10 days from the filing of the transcript. Those post-hearing submissions have been reviewed in the course of preparation of this recommended order.

FINDINGS OF FACT

1. First Florida timely filed consolidated federal corporate income tax returns and consolidated Florida Chapter 220 tax returns for the tax years ending 12/31/86, 12/31/87, 12/31/88, 12/31/89, and 12/31/90.

2. Barnett timely filed consolidated federal corporate income tax returns and consolidated Florida Chapter 220 tax returns for 12/31/88, 12/31/89, 12/31/90, and 12/31/91.

3. Barnett acquired First Florida on December 7, 1992. At the time of the merger, First Florida was being audited by the Internal Revenue Service (IRS) for the tax years 1986, 1987, 1988, 1989, and 1990. Barnett subsequently agreed with the IRS to federal tax adjustments for each of the respective tax years with regard to First Florida and itself.

4. Alternatively, it may be stated that Petitioners under-reported "federal taxable income," on line 30 of their original federal corporate income tax returns ("original federal returns"), and correspondingly, on line 1 of their original Florida corporate income tax returns ("original Florida returns"), for the tax years at issue.

5. As a result of an audit by the Internal Revenue Service, various adjustments were made to "federal taxable income." These adjustments became final and were agreed upon by the Petitioners and the Internal Revenue Service. The effect of these adjustments was to increase "federal taxable income" beyond that which had been previously reported by Petitioners on line 30 of their original federal returns, and, therefore, to increase Petitioners' federal and Florida tax liability.

6. After the federal audit adjustments became final in 1995, Petitioners paid to the federal government the additional amount of tax determined by the Internal Revenue Service to be due.

7. Also in 1995, Petitioners timely reported the federal audit adjustments to the State of Florida, within sixty days after the federal audit changes became final, pursuant to Section 220.23, Florida Statutes. This was done by filing Form F-1120X notifications, in order to "amend" their original Florida return filings, for each of the pertinent tax years (hereinafter, "amendatory notifications").

8. The amendatory notifications filed by Petitioners increased and revised the amounts which were previously reported on line 1 of the original Florida returns, for each of the pertinent tax years. The purpose of filing amendatory notifications was to remit additional taxes determined to be due to the State of Florida, as a result of the federal audit adjustments. However, Petitioners did not remit any interest to the State of Florida at the time of filing the amendatory notifications.

9. After receipt of the amendatory notifications, Respondent issued Notices of Tax Action to Petitioner Barnett Banks, Inc., as successor in interest to First Florida Banks, Inc., informing Petitioner that additional interest was due in the following amounts: \$86,234.80 for 1986, \$70,901.18 for 1987, \$55,883.73 for 1988, \$27,620.11 for 1989, and \$15,115.37 for 1990.

10. Respondent also issued Notices of Tax Action to Petitioner Barnett Banks, Inc., and/or its subsidiaries informing Petitioner and/or its subsidiaries that additional interest was due in the following amounts: \$74,658.99 for 1988, \$21,463.16 for 1989, \$34,930.18 for 1990, and \$6,850.31 for 1991.

11. Respondent did not assess any penalties against Petitioners, because both the original returns and the subsequent amendatory notifications were timely filed and because no finding of willful or negligent under-reporting was made by Respondent.

12. Petitioners paid under protest the amounts of interest claimed to be due by Respondent and timely sought a refund, which was denied.

13. This action for formal administrative review challenges Respondent's assessment of liability for interest and related refund denial. No dispute exists concerning the mathematical computation of the assessed amount.

14. Prior to 1993, Respondent's policy, with regard to payment of interest under circumstances similar to those presented in these proceedings, did not require the payment of interest if the amendatory notifications were timely filed and additional tax timely paid. This finding is established by the testimony of Joan Eckert, formerly employed by Respondent during the years 1987-93 as a technical assistant and as a tax law specialist. In addition to routinely advising that interest was not payable where additional taxes were timely paid, Eckert participated in the drafting of a proposed rule that was subsequently published in 1993, further documenting and describing Respondent's policy at that time in such situations.

15. Published in Volume 19, No. 24, June 18, 1993, of the Florida Administrative Weekly, the proposed rule provided in pertinent part as follows:

If the amended return concedes the accuracy of a federal change or correction, any deficiency in Florida corporate income, franchise, or emergency excise tax is deemed assessed on the date of filing the amended return. Therefore, no penalty or interest will be assessed if the amended return is filed not later than 60 days after the date notification is required by s. 220.23(2)(a)2., F.S.

16. However, the proposed rule was never formerly adopted in the form and content as originally published. By May 17, 1994, Respondent's policy solidified in another direction and Florida Administrative Code Rule 12C-1.023(6), was enacted, which provides:

If the amended return concedes the accuracy of a federal change or correction, any deficiency in Florida corporate income, franchise, or emergency excise tax is deemed assessed on the date of filing the amended return. No penalty will be assessed if the amended return is filed not later than 60 days after the date notification is required by Section 220.23(2)(a)3., F.S. and subsection (5) of this rule. However, interest will be due on any deficiency from the original due date of the return through the date of payment.

17. In this proceeding, Respondent's representatives have deliberately elected to rely upon Respondent's statutory authority for the instant assessment, as opposed to a duly enacted rule on the basis that the formal rule was not in effect until 1994, and the assessment was for interest on taxes that predated the rule.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter. Section 120.57(1), Florida Statutes.

19. Section 214.43, Florida Statutes (1985), which has now been renumbered as Section 220.809, Florida Statutes (1997), provides when interest shall accrue as follows:

(1) If any amount of tax imposed by this chapter is not paid on or before the date, determined without regard to any extensions, prescribed for payment of such tax, interest shall be paid in accordance with the provisions of s. 220.807 on the unpaid amount from such date to the date of payment.
(emphasis supplied.)

20. The date "prescribed for payment" is determined, as a result of Respondent's election to rely upon its statutory authority rather than policy codification in its rules, through analysis of Section 220.23, Florida Statutes, which reads as follows:

220.23 Federal returns.-

(1) Any taxpayer required to make a return for a taxable year under this code may, at any time that a deficiency could be assessed or a refund claimed under this code in respect of any item reported or properly reportable on such return or any amendment thereof, be required to furnish to the department a true and correct copy of any return which may pertain to such item and which was filed by such taxpayer under the provisions of the Internal Revenue Code.

(2) In the event the taxable income, any item of income or deduction, or the income tax liability reported in a federal income tax return of any taxpayer for any taxable year is adjusted by amendment of such return or as a result of any other recomputation or redetermination of federal taxable income or loss, if such adjustment would affect any item or items entering into the computation of such taxpayer's net income subject to tax for any taxable year under this code, the following special rules shall apply:

(a) The taxpayer shall notify the department of such adjustment by filing either an amended return or such other report as the department may by regulation prescribe, which return or report:

1. Shall show the taxpayer's name, address, and employer identification number; the adjustments; the taxpayer's revised net income subject to tax and revised tax liability under this code; and such other information as the department may by regulation prescribe;

2. Shall be signed by a person required to sign the original return or by a duly authorized representative; and

3. Shall be filed not later than 60 days after such adjustment has been agreed to or finally determined for federal income tax purposes, or after any federal income tax deficiency or refund, abatement, or credit resulting therefrom has been assessed, paid, or collected, whichever shall first occur.

(b) If the amended return or other report filed with the department concedes the accuracy of a federal change or correction, any deficiency in tax under this code resulting therefrom shall be deemed assessed on the date of filing such amended return or report, and such assessment shall be timely, notwithstanding any other provision contained in part VIII of this chapter.

(c) In any case where notification of an adjustment is required under paragraph (a), then notwithstanding any other provision contained in s. 95.091(3):

1. A notice of deficiency may be issued at any time within 5 years after the date such notification is given; or

2. If a taxpayer either fails to notify the department or fails to report a change or correction which is treated in the same manner as if it were a deficiency for federal income tax purposes, a notice of deficiency may be issued at any time;

3. In either case, the amount of any proposed assessment set forth in such notice shall be limited to the amount of any deficiency resulting under this code from recomputation of the taxpayer's income for the taxable year after giving effect only to the item or items reflected in the adjustment.

(d) In any case when notification of an adjustment is required by paragraph (a), a claim for refund may be filed within 2 years after the date on which such notification was

due, regardless of whether such notice was given, notwithstanding any other provision contained in s. 220.727. However, the amount recoverable pursuant to such a claim shall be limited to the amount of any overpayment resulting under this code from recomputation of the taxpayer's income for the taxable year after giving effect only to the item or items reflected in the adjustment required to be reported. (emphasis supplied).

21. As set forth above in the foregoing statutory section, "special rules" establish that additional taxes must be paid within 60 days of the amended return or report, the equivalent of Petitioners' amendatory notifications. Absent payment of the additional tax within that period, interest accrues from the conclusion of that 60-day period. Petitioners were timely in presentment of their amendatory notifications and payment of the additional required tax to Respondent. Accordingly no delinquency exists for which interest can be assessed.

RECOMMENDATION

Based on the foregoing, it is hereby RECOMMENDED that a Final Order be entered directing refunds to Petitioners of interest payments made to Respondent in these consolidated cases.

DONE AND ENTERED this 10th day of June, 1998, in Tallahassee, Leon County, Florida.

DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675

Fax Filing (850) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of June, 1998.

COPIES FURNISHED:

Jeffrey M. Dikman, Esquire
Department of Legal Affairs
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

David M. Wells, Esquire
Eric Bilik, Esquire
McGuire, Woods, and Criser
50 North Laura Street, Suite 3300
Jacksonville, Florida 32202

Linda Lettera, General Counsel
Department of Revenue
204 Carlton Building
Tallahassee, Florida 32399-0100

Larry Fuchs, Executive Director
Department of Revenue
104 Carlton Building
Tallahassee, Florida 32399-0100

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.