

ALABAMA TAX TRIBUNAL

DH DISTRIBUTING LLC,	§	
Taxpayer,	§	
v.	§	DOCKET NOS. S. 16-1213-CE S. 17-685-CE
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

FINAL ORDER

The Revenue Department assessed DH Distributing, LLC (“Taxpayer”) for State cigarette tax for the periods of January 2016, February 2016, and April 2016. The Taxpayer appealed the final assessments to the Tax Tribunal pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. The appeal was docketed as MISC. 16-1213.

The Department assessed the Taxpayer for State tobacco products tax for the periods of July 2015 through August 2016, and State cigarette tax for the periods of July 2015 through September 2015, October 2015 through August 2016, and August 2016. The Taxpayer appealed the final assessments to the Tax Tribunal pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. The appeal was docketed as S. 17-685.

The appeals were consolidated for hearing and entry of a final order, and a hearing was conducted on August 16, 2017. Assistant Attorney General Keith Maddox represented the Department. Attorney Beverly Howard represented the Taxpayer.

The Taxpayer is a wholesaler of cigarettes and other tobacco products located in Montgomery, Alabama.

Relevant to S. 17-685, the Department audited the Taxpayer to determine compliance with State tobacco products tax and State cigarette tax. With respect to tobacco products tax, the audit identified purchases that were not reported and purchases

that were reported using incorrect tax rates. With respect to State cigarette tax, the audit revealed that the Taxpayer was understamped. In addition to an understamping liability, the audit also revealed that the Taxpayer did not account for an increase in cigarette tax rates and a reduction in the rate of discount available to wholesalers for handling the stamping of tobacco products. A penalty was assessed for the period of August 2016 because the Taxpayer failed to timely file its monthly return. The Taxpayer appealed, asserting that it did not owe additional tax. The Taxpayer did not state the reasons for its claim that the assessment was incorrect.

Relevant to MISC. 16-1213, the Taxpayer ordered a roll of 30K cigarette revenue tax stamps in January 2016 and February 2016, and two rolls in April 2016. The Taxpayer remitted electronic payments for the stamps, less the discount, at the time of the purchases, but the payments were later dishonored by the Taxpayer's bank for insufficient funds. The Department consequently dishonored the discount, and assessed the Taxpayer for the discount, interest and penalties. The Taxpayer appealed concerning the disallowed discount and penalties.

A final assessment is prima facie correct. The burden of proof is on a taxpayer to prove that the assessment is incorrect. Code of Ala. 1975, §40-2A-7(b)(5)c. To date, the Taxpayer has failed to prove that the audit liability assessed for State tobacco products tax for the periods of July 2015 through August 2016, and State cigarette tax for the periods of July 2015 through September 2015, October 2015 through August 2016, and August 2016 is incorrect.

Turning now to the issues presented in MISC. 16-1213, tobacco wholesalers are required to purchase tax stamps from the Department and to affix the stamps to tobacco

products purchased from manufacturers as evidence that the tobacco tax has been remitted to the State. Code of Ala. 1975, §40-25-4.1. Tobacco wholesalers are entitled to a discount for handling and affixing tobacco stamps. Code of Ala. 1975, §40-25-5 (when qualified wholesalers “desire to purchase stamps . . . for use on taxable tobaccos sold and delivered by them, the [Department] shall allow on such sales . . . a discount of 4.75% on the entire amount of the sale.”).

Section 40-25-5 also authorizes the Department to consign tobacco stamps to wholesalers who are entitled to purchase stamps at a discount, provided the wholesaler has given the Department a sufficient bond conditioned to secure payment for the consigned stamps when and as they are used by the wholesaler. Every wholesaler purchasing stamps on consignment is required to account for and remit payment for such stamps on or before the twentieth of each month for all stamps used on taxable tobaccos during the preceding month. Section 40-25-5 further provides that “every wholesaler or jobber refusing or failing to comply with this section shall forfeit the commission or discount on stamps used *which he failed or refused to account or remit for in the time allowed*, and in addition shall be charged interest on such delinquent amount for each day delinquent at the rate of eight percent per annum.”

The timing of the orders and the payments at issue are as follows. On January 19, 2016, the Taxpayer ordered a roll of 30K cigarette revenue tax stamps. The net amount due after the discount was \$19,288.12, and the Taxpayer made an electronic payment in that amount on the same day. The payment was dishonored by the Taxpayer’s bank on January 25, 2016. The Taxpayer was notified that same day that the payment was dishonored, and on January 29, 2016, the Taxpayer made another payment in the amount

of \$19,288.12. That payment was honored by the Taxpayer's bank.

On February 2, 2016, the Taxpayer ordered a roll of 30K cigarette revenue tax stamps. The net amount due after the discount was \$19,288.12, and the Taxpayer made an electronic payment in that amount on the same day. The payment was dishonored by the Taxpayer's bank on February 3, 2016. The Taxpayer was notified that same day that the payment was dishonored, and on February 5, 2016, the Taxpayer made another payment in the amount of \$19,288.12. That payment was honored by the Taxpayer's bank.

On April 8, 2016, the Taxpayer ordered a roll of 30K cigarette revenue tax stamps. The net amount due after the discount was \$19,288.12, and the Taxpayer made an electronic payment in that amount on the same day. The payment was dishonored by the Taxpayer's bank on April 11, 2016. The Taxpayer was notified that the payment was dishonored, and on April 20, 2016, the Taxpayer made another payment in the amount of \$19,288.12. That payment was honored by the Taxpayer's bank.

On April 27, 2016, the Taxpayer ordered a roll of 30K cigarette revenue tax stamps. The net amount due after the discount was \$19,288.12, and the Taxpayer made an electronic payment in that amount on the same day. The payment was dishonored by the Taxpayer's bank on May 2, 2016. The Taxpayer was notified that the payment was dishonored, and on May 4, 2016, the Taxpayer made another payment in the amount of \$19,288.12. That payment was honored by the Taxpayer's bank.

A penalty may be waived for reasonable cause. Code of Ala. 1975, §40-2A-11(h). Reasonable cause includes a nonrecurring, first time mistake. The Department indicates that the Taxpayer has failed to remit payments on at least four different occasions.

Consequently, its failure to timely make its payments for the cigarette tax stamps for the months in issue was not a first-time mistake.

The Taxpayer's owner, Parag Kashiparekh, testified that he was essentially an absentia owner residing outside of Alabama and traveling out of the country during the time the payments were dishonored, and that he did not know that there was insufficient funds in the bank account to cover the stamp purchases. He also testified that he later learned that his employees were not trustworthy.

With respect to the Taxpayer's argument that the late payment penalties are harsh and should be waived for reasonable cause, I disagree. It is understandable that the first untimely payment was a mistake due to Kashiparekh's absence from the country and the day-to-day operations of his business. Therefore, reasonable cause exists to waive the late payment penalty assessed in the January 2016 period. However, Kashiparekh was on notice that there were problems in his business when the first payment failed to clear his bank account, and it was his responsibility to make sure that the State was paid for tobacco stamps in future purchases. Being an absentia owner is not reasonable cause for waiver of the remaining penalties.

The Taxpayer also argues that the Department should not have disallowed the discount. He argues that he remitted replacement payments as soon as he was notified that the previous payments were dishonored, and that denying him the discount is a harsh result. The Department argues in its Answer and in its response to the Tax Tribunal's February 12, 2018 Opinion and Preliminary Order that, pursuant to §40-25-5 and §41-1-21, the Taxpayer forfeited the discount when it did not remit payment at the time it purchased the stamps. I agree.

Section 40-25-5 provides that every wholesaler who fails *to account or remit for stamps in the time allowed* forfeits the discount. The only timing requirement in §40-25-5 relates to accounting for and remitting payment for stamps consigned by the Department to the wholesaler. However, §41-1-21 addressing electronic payments of tobacco wholesalers when purchasing stamps provides that “failure to make such payments or remittance in immediately available funds in a timely manner, or failure to provide such evidence of payment . . . in a timely manner, shall subject the affected taxpayer . . . to penalty, interest and *loss of applicable discount* . . .” (emphasis added.).

The Department argues that the discount assumes timely payment for both cash and consignment wholesalers and should be disallowed for late payment on either’s behalf. It argues that when reading §40-25-5 and §41-2-21 together, this intent is clear. Otherwise, consignment wholesalers would lose their discount for untimely payment whereas cash wholesalers would not. The Department’s argument is well-taken, and in my opinion, is the proper interpretation of the law.

Regarding S. 17-685: the final assessment entered May 15, 2017 for State tobacco products tax, penalty and interest for the period of July 2015 through August 2016 in the amount of \$1,410.10 is affirmed; the final assessment entered May 15, 2017 for State cigarette tax, penalty and interest for the period of July 2015 through September 2015 in the amount of \$1,596.98 is affirmed; the final assessment entered May 15, 2017 for State cigarette tax, penalty and interest for the period of October 2015 through August 2016 in the amount of \$37,672.76 is affirmed; and the final assessment entered on May 15, 2017 for a late file penalty in the amount of \$50.00 is affirmed. Additional interest is also due

from the date the final assessments were entered. Judgment is entered accordingly.

Regarding MISC. 16-1213: the final assessment, less the penalty, entered October 11, 2016 for State cigarette tax for the period of January 2016 is affirmed in the amount of \$1,004.30; the final assessment entered October 11, 2016 for State cigarette tax for the period of February 2016 in the amount of \$3,042.72 is affirmed; and the final assessment entered October 11, 2016 for State cigarette tax for the period of April 2016 in the amount of \$6,045.14 is affirmed. Additional interest is also due from the date the final assessments were entered. Judgment is entered accordingly.

This Final Order may be appealed to circuit court within 30 days, pursuant to Code of Ala. 1975, § 40-2B-2(m).

Entered August 28, 2018.

/s/ C. O. Edwards

CHRISTY O. EDWARDS
Associate Tax Tribunal Judge

cc: Keith Maddox, Esq.
Beverly Howard, Esq.