

WELLBORN CABINET, INC. § STATE OF ALABAMA  
Rural Route 1 DEPARTMENT OF REVENUE  
Ashland, Alabama 36251-9801, § ADMINISTRATIVE LAW DIVISION  
Taxpayer, § DOCKET NO. INC. 95-363  
v. §  
STATE OF ALABAMA §  
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed a penalty against Wellborn Cabinet, Inc. ("Taxpayer") for failure to timely pay its Alabama withholding tax for May 1995. The Taxpayer appealed to the Administrative Law Division, and a hearing was conducted on January 8, 1996. Joe Husbands represented the Taxpayer. Assistant Counsel Gwen Garner represented the Department.

The issue in this case is whether the penalty in question can and should be waived for reasonable cause.

The Taxpayer is in the cabinet business in Ashland, Alabama.

The Taxpayer pays its monthly Alabama withholding tax liability by electronic funds transfer ("EFT"), as required by Code of Ala. 1975, §41-1-20 et seq. All funds paid by EFT must be available to the State on the due date of payment. See, §41-1-20(c)(2). Consequently, Department Reg. 810-13-1-.10 requires that a taxpayer must institute transmittal of the funds before 3:45 p.m. on the day before the due date. Otherwise, the funds will not be received by the Department on the due date.

Monthly Alabama withholding tax must be paid by the 15th day of the next month. The Taxpayer instituted transmittal of its

monthly withholding for May 1995 by EFT at approximately 11:00 a.m., June 15, 1995. The funds were not actually received by the Department until June 16, 1995. The tax was thus paid late. The Department accordingly assessed the Taxpayer for the 10% failure to timely pay penalty levied at Code of Ala. 1975, §40-2A-11(b). The penalty is \$5,404.19, plus interest of \$14.81, for a total final assessment of \$5,419.00.

The Taxpayer requested that the penalty be waived because it was unaware that the transmittal of funds had to be instigated on the day prior to the due date. The Income Tax Withholding Section refused to waive the penalty because a late payment penalty had previously been waived concerning the Taxpayer's October 1994 withholding liability. That payment was late through inadvertence.

The Withholding Section's unwritten policy concerning penalties is that it will waive only one penalty for a taxpayer in any 12 month period.

Prior to July 31, 1995, the Department had the sole discretion to waive a penalty pursuant to Code of Ala. 1975, §40-2A-11(h), not the Administrative Law Division or a circuit or appellate court.

However, §40-2A-11(h) was amended by Act 95-607, effective July 31, 1995, so that the Administrative Law Division and the courts are now authorized to review and waive a penalty for reasonable cause. For a specific analysis of Act 95-607 and why it gives the Administrative Law Division and the courts the authority to waive

penalties, see, Compaq Computer Corporation v. State, Admin. Law Docket F. 95-435, decided February 12, 1996.

Section 40-2A-11(h) provides that reasonable cause to waive a penalty "shall include, but not be limited to, those instances in which the taxpayer has acted in good faith". What constitutes good faith must be decided on the particular facts of each case.

In this case, the Taxpayer reasonably believed in good faith that it was timely paying its withholding liability by EFT by transmitting the funds on the due date of the tax. This is consistent with other tax payments which are considered timely paid if mailed on the due date. The evidence is undisputed that the Taxpayer was unaware that tax paid by EFT must be transmitted on or before 3:45 p.m. on the day prior to the due date. The Taxpayer's earlier late payment in October 1994 was due to inadvertence, not the Taxpayer's mistaken belief that transmittal on the 15th was timely. Consequently, the Taxpayer's good faith attempt to timely pay the tax constitutes reasonable cause to waive the penalty in question. The Taxpayer is now on notice, and any future penalty for failure to timely pay by EFT, absent other reasonable cause, should not be waived.

The penalty included in the final assessment is dismissed. Judgment is entered against the Taxpayer for the interest due of \$14.81.

This Final Order may be appealed to circuit court within 30

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days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered February 12, 1996.

BILL THOMPSON  
Chief Administrative Law Judge