

M.O. CARROLL-NEWTON COMPANY  
Post Office Box 1929  
Ozark, Alabama 36361,

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

DOCKET NO. MISC. 97-201

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

### FINAL ORDER

The Revenue Department assessed tobacco tax against M.O. Carroll-Newton Company, Inc. ("Taxpayer") for November 1996. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, 40-2A-7(b)(5)a. A hearing was conducted on July 15, 1997. The Taxpayer's representative was notified of the hearing by certified mail, but failed to appear. Assistant Counsel Margaret McNeill represented the Department.

Tobacco wholesalers and jobbers are allowed a 7 percent discount on the purchase of tobacco stamps. Code of Ala. 1975, 40-25-5. The issue in this case is whether the Taxpayer should be allowed the 7 percent discount on its tobacco stamps purchased from the Department during November 1996.

The Taxpayer sells tobacco products and purchases tobacco stamps on consignment from the Revenue Department as allowed at 40-25-5. As stated, that section allows a 7 percent discount on the purchase of the stamps. The section also provides, however, that the 7 percent discount "shall be forfeited if the wholesaler or jobber fails to make a full and complete accounting and remittance on or before the 20th of each month for all stamps used on taxable tobacco during the preceding month."

The Taxpayer initiated payment for its stamps purchased in November 1996 via electronic funds transfer ("EFT") on December 19, 1996. The attempted payment was returned for insufficient funds on December 26, 1996. The Department notified the Taxpayer, and the Taxpayer immediately wired the tax due, less the 7 percent discount, on December 26, 1996.

The Department disallowed the claimed discount, and accordingly assessed the Taxpayer for the discount, plus interest. The Taxpayer appealed to the Administrative Law Division.

The Taxpayer claims that the discount should be allowed because "we feel that we have complied with both the spirit and the letter of the law, in trying to make sure that we had funds available in one of our bank accounts when the State EFT (Electronic Funds Transfer) Department attempted to debit our account for its monthly payment."

The Taxpayer moved its account from AmSouth Bank to Colonial Bank in November 1996. The Taxpayer notified the State EFT Department of the change, and was informed that the change would take 30 days for EFT purposes. The Taxpayer discussed the problem with both banks, which, according to the Taxpayer, agreed to a smooth transfer of money to pay all of the Taxpayer's outstanding checks and EFTs.

However, AmSouth subsequently failed to honor the EFT paying the Taxpayer's tobacco tax for November 1996. According to the Taxpayer's appeal letter:

On Monday, December 23, 1996, AmSouth unilaterally decided not to honor the EFT paying our Cigarette Tax for the month of November, 1996, supposedly because Colonial did not wire the money in time. But as you can

see from the list of Colonial wires to AmSouth, the money was wired at virtually the same time as several other large wires. In other words, the money was in the bank, but AmSouth decided on its own to not put it there.

The evidence shows that the Taxpayer reasonably believed that its EFT payment to the Department would be honored by the banks. Unfortunately for the Taxpayer, the discount provision does not include a reasonable cause waiver exception, as does the uniform penalty provision at Code of Ala. 1975, 40-2A-11(h). The forfeiture is mandatory - the wholesaler "shall forfeit the discount" - even if the wholesaler attempted in good faith to timely remit the amount due.

I note that although the tax was remitted late, the Department elected not to assess the 10 percent failure to timely pay penalty, which would have totaled over \$45,000.

The final assessment is affirmed. Judgment is entered against the Taxpayer for \$37,897.64, plus applicable interest.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, 40-2A-9(g).

Entered July 30, 1997.

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BILL THOMPSON  
Chief Administrative Law Judge

BT:dr

cc: Margaret Johnson McNeill, Esq.  
Frank N. Carroll  
Floyd Atkins