

W. K. UPCHURCH CONSTRUCTION
COMPANY, INC.
P.O. Box 230487
Montgomery, AL 36123-0487,

Petitioner,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 98-243

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

ORDER DENYING PETITIONER-S
MOTION FOR RELIEF

The Department denied a sales tax refund requested by W. K. Upchurch Construction Company, Inc. (APetitioner@) for July 1995 through March 1996. The Petitioner appealed to the Administrative Law Division. The Administrative Law Division notified the Department's Legal Division of the appeal by letter dated April 28, 1998.

The Department requested, and was granted, additional time to file its Answer. The Order granting the extension stated in part - AThe Answer should be filed on or before July 28, 1998.@ The Department filed its Answer on that date.

The Petitioner filed a AMotion To Grant Relief To Petitioner@on July 31, 1998. The motion claims that the Petitioner is entitled to relief because the Department failed to file its Answer within 90 days, as required by Code of Ala. 1975, § 40-2A-9(g). The motion is denied for the reasons stated below.

First, the Legal Division is required to file an Answer within 90 days (initial 30 days plus 60 day extension) from the date it receives the notice from the Administrative Law Division, not 90 days from the date the notice is issued by the Administrative Law Division. Code of Ala. 1975, § 40-2A-9(c). The Department submitted a copy of the notice issued by the Administrative Law Division in this case which shows a Legal Division receipt date of May 7, 1998. The Legal Division thus had 90 days from May 7, 1998, or until August

5, 1998, to file its Answer. The Department timely filed its Answer within that period.

The copy of the notice letter submitted by the Department is confusing because it is also stamped **A**received@on May 4, 1998 by **A**Revenue Department Assessments.@ The Administrative Law Division routinely mails a copy of the notice to the applicable operating division. Consequently, I assume the copy submitted by the Department was the copy first sent to the Sales Tax Assessment Section, not the copy sent directly to the Legal Division. If so, it is relevant on what date the Legal Division received its copy of the notice from the Administrative Law Division.

If the Legal Division received its copy of the notice on April 28, then technically the Answer was filed late on the 91st day. It is unlikely, however, that the Legal Division received the notice on that date.

All documents prepared by the Administrative Law Division during a workday are customarily copied and placed in the outgoing mail at the end of the day, usually between 4:30 p.m. and 5:00 p.m. All mail to the Legal Division is placed in a **A**Legal Division@ basket in the Administrative Law Division. The mail is subsequently picked up and delivered to the Legal Division by a Department attorney. There are no scheduled pick-up times. Rather, a Department attorney usually picks up the mail in conjunction with a visit to the Administrative Law Division for some other purpose, i.e. filing an Answer or other document, attending a hearing, etc. Given that the notice in issue was not copied and placed in the Legal Division mail basket until late on the 28th (or perhaps not until the 29th), it is unlikely that the notice was picked up by a Department attorney on that date.

Even if the Legal Division received the notice on April 28, the Petitioner still would not be entitled to relief. The Order granting the Department additional time specified that the Legal Division had until July 28, 1998 to file its Answer. The Answer was filed on that date. The Alabama Supreme Court has held that if a court erroneously notifies a party concerning a date, and the party appeals late as a result of the incorrect

notice, the appeal will be deemed timely. Wallace v. Moore, 684 So.2d 161 (Ala.Civ.App.1996); Ex parte Tanner, 553 So.2d 598 (Ala. 1989).

In Tanner, a condemnation Order was entered against the Tanners on May 8, 1984. The Probate Court incorrectly notified the Tanners that the Order was entered on May 22, 1984. The Tanners relied on that notice, and appealed on June 19, 1984. The Alabama Supreme Court held that the appeal should be deemed timely, even though it was actually filed outside of the 30 day appeal period.

In Wallace v. Moore, the Mobile County District Court entered an Order on May 31, 1995, but incorrectly noted that it was entered on June 1, 1995. Moore appealed on June 15, 1995, after the 14 day appeal period expired. Again, the Supreme Court held that the appeal was timely because Moore had relied on the Court's erroneous notice, and to hold otherwise would create inequitable results.

Likewise, the Legal Division should not be punished in this case because it relied on the Order from the Administrative Law Division. An analogous result was reached in State v. S. D. Warren Co., F. 94-226 (Admin.Law Div. 7/18/94). In that case, the taxpayer's attorney telephoned the Administrative Law Division and asked if he could file a notice of appeal by facsimile. This Administrative Law Judge informed the attorney that an appeal filed by facsimile would be accepted. The Department later moved to dismiss the appeal as improper, citing Ex parte Tuck, 622 So.2d 929 (1991). (In Tuck, the Alabama Supreme Court held that a notice of appeal could not be filed by facsimile.) The Department's motion was denied, however, because the taxpayer's attorney had relied on the erroneous information given by the Administrative Law Division.

The Petitioner's motion is denied. The case will be heard as scheduled on November 5, 1998.

Entered September 14, 1998.

BILL THOMPSON

Chief Administrative Law Judge

BT:ks

cc: Wade Hope, Esq.
William Sellers, Esq.
James Browder