

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

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. MISC. 99-314

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

FINAL ORDER

M.O. Carroll-Newton Company, Inc. (ATaxpayer@) applied for a refund of a disallowed tobacco tax discount concerning November 1996. The Department denied the refund. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, '40-2A-7(c)(5)a. A hearing was conducted on September 2, 1999. Jim Sizemore represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The disallowed discount relates to the Taxpayer's tobacco tax payment for November 1996. As explained below, the Taxpayer's payment for that month was late because of a mix-up at the Taxpayer's bank. In 1998, the Legislature amended Code of Ala. 1975, '41-1-22 to authorize all State agencies, including the Revenue Department, to waive a disallowed discount in certain circumstances. The issue in this case is whether '41-1-22, as amended, authorizes the Department to waive the November 1996 disallowed discount in question.

The Taxpayer sells tobacco products and purchases tobacco stamps on consignment from the Department, as allowed by Code of Ala. 1975, '40-25-5. That

section also allows a 72 percent discount; provided, the discount shall be forfeited if the wholesaler or jobber fails to report and pay the tax by the 20th of the next month. The Taxpayer failed to timely report and pay its November 1996 tobacco tax. The Department disallowed the 72 percent discount. The Taxpayer appealed to the Administrative Law Division.

The Administrative Law Division affirmed the disallowance of the discount in a Final Order entered on July 30, 1997, and in a Final Order on Application for Rehearing entered on September 23, 1997. The circumstances concerning the November 1996 late payment were set out in the Final Order, as follows:

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 72 percent discount, on December 26, 1996.

* * *

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.@

M.O. Carroll-Newton Company v. State, Misc 97-201 (Admin. Law Div. 7/30/99), at 2, 3.

The Taxpayer timely applied for a rehearing, which read in part as follows:

Our position was and is that we did exactly what we should have done in order to make sure that the Department of Revenue would receive its money in a timely fashion. This is not a case where we did not remit in a timely fashion, the state required us to use the EFT (Electronic Funds Transfer) method of paying our bill. The necessary result of this is that some of the control for this sizeable transaction is taken away from us and handed to large financial institutions which sometimes make mistakes; mistakes which we can only correct after the fact. The state's damage in this case is minimal, a few days interest, compared to the penalty that we are now faced with paying. To paraphrase the old saying >the punishment don't fit the crime.=@

Taxpayer's Application for Rehearing in Misc. 97-201, at 1.

The Administrative Law Division denied the Taxpayer's application for rehearing based on the mandatory language of '40-25-5. The Final Order on Application for

Rehearing stated, however, that under the circumstances, if the Administrative Law Division had the discretion to allow the discount, it would be allowed.

The Taxpayer paid the disallowed discount on November 5, 1997.

In 1998, the Alabama Legislature amended ' 41-1-22 by Act 98-637. The Act became law on May 6, 1998, and was made retroactively effective October 1, 1997.

Section 41-1-22, as amended, reads as follows:

ATo allow for possible late payments due to unexpected problems arising at financial institutions, federal reserve facilities, the automated clearing house system, or state agencies where it is proven that a good faith attempt was made and due diligence was exercised to initiate payment correctly and on a timely basis, the administering state agency is specifically authorized to waive all penalties, interest, or disallowed discount on late payments for a period not to exceed two business days following the due date of the payment.@

After the passage of Act 98-637, the Taxpayer timely petitioned for a refund of the November 1996 disallowed discount. The Department denied the refund. The Taxpayer appealed.

The Department argues that the Taxpayer's claim for refund must be denied because:

- (1) The Taxpayer's claim is barred by the doctrine of res judicata;
- (2) The discount cannot be allowed pursuant to ' 41-1-22 because the discount involved November 1996, a period before the October 1, 1997 effective date of Act 98-637; and,
- (3) Even if ' 41-1-22 applies, the discount still cannot be allowed because the Taxpayer failed to remit the November 1996 payment within two business days from the due date, as required by the statute.

Concerning Department argument (1), I disagree that the Taxpayer's claim is

barred by the doctrine of res judicata.

The following elements are necessary for the doctrine of res judicata to apply so as to bar a subsequent suit: (1) the question or fact must have been litigated and determined by a court of competent jurisdiction; (2) the final judgment in the first action must have been rendered on the merits; (3) the parties in the first action, or those in privity with them, must be of such a relationship to the parties in the subsequent action as to entitle them to the benefits and/or burdens of the prior litigation; and (4) the same cause of action must be involved in both suits. Waters v. Jolly, 582 So.2d 1048 (Ala. 1991); Hughes v. Martin, 533 So.2d 188 (Ala. 1988); Stevenson v. International Paper Co., 516 F.2d 103 (5th Cir. 1975). If these elements are present, then any issue that was, or could have been, adjudicated in the prior action is barred from further litigation. Waters v. Jolly, supra; Hughes v. Martin, supra; Trimble v. Bramco Products, Inc., 351 So.2d 1357 (Ala. 1977); McGruder v. B&L Construction Co., 331 So.2d 257 (Ala. 1975).

Tommy Croft and Regina Croft v. Stan Pate, 585 So.2d 799 (1991), at 801.

As indicated, res judicata applies only if an issue raised in a subsequent action was or could have been decided in the prior action. The sole issue involved in the prior appeal, Misc. 97-201, was whether the Department was required to disallow the discount pursuant to '40-25-5. The issue in this appeal is whether the Department is authorized to waive the disallowed discount pursuant to '41-1-22, as amended. Obviously, that issue could not have been decided in the prior appeal because '41-1-22 was not amended until May 1998, after the prior appeal was finally decided. This appeal thus involves an entirely new issue. Res judicata does not apply.

Department argument (2) is that Act 98-637 does not apply because the disallowed discount occurred in November (or December) 1996, before the October 1, 1997 effective date of Act 98-637. I disagree.

The Act authorized the Department to waive a disallowed discount if a taxpayer

attempted in good faith to timely pay the tax. The Act granted the Department such authority retroactive to October 1997, thus ratifying or approving any discount waived by the Department after that date. The Act did not limit the Department's authority to only discounts disallowed after the effective date of the Act. Rather, the Department is currently authorized to waive a disallowed discount for any period, provided that the statute of limitations for petitioning for a refund of the disallowed discount has not expired. In this case, the Taxpayer timely petitioned for a refund within two years from when the discount was paid in November 1997. See, Code of Ala. 1975, ' 40-2A-7(c)(2). The claim was thus timely and should be allowed.

The above interpretation is supported by the rule of statutory construction that a remedial statute must be broadly construed to accomplish the purpose of the legislature. Spencer v. West Ala. Properties, Inc., 564 So.2d 425 (Ala. 1990). Act 98-637 clearly is a remedial statute. It was intended to benefit taxpayers by remedying the harsh effects of disallowing a discount where the taxpayer in good faith attempted to timely pay the tax. The Taxpayer in this case made a good faith effort to timely pay its November 1996 tobacco tax. The payment was not timely only because the Taxpayer's bank made a mistake. The intent of Act 98-637 is to grant relief in such instances.

Concerning Department argument (3), the Department claims the Taxpayer failed to pay its November 1996 tobacco tax within two business days of the due date, as required by ' 41-1-22. Again, I disagree.

Department Reg. 810-1-5-.01(1)(b) provides that if the last day for filing a

document with the Revenue Department falls on a weekend, a holiday, or on any other day on which the Department is closed, the last day becomes the next working day.

In this case, the Taxpayer's November 1996 tobacco tax payment was due on Friday, December 20. Saturday and Sunday, December 21 and 22, were not business days. Monday, December 23, was the first business day after December 20. The Department was closed for Christmas on Tuesday and Wednesday, December 24 and 25. The second business day after December 20 was Thursday, December 26. The Taxpayer remitted payment on that date, within the two business days required by ' 41-1-22.

The Department is directed to issue the Taxpayer a refund of its November 1996 disallowed discount, 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 November 12, 1999.