

TAMOR SUPERSAVER, INC.  
4490 Hwy. 80 W  
P.O. Box 3619  
Phenix City, AL 36868-3619,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 04-356

### FINAL ORDER DISMISSING APPEAL

This case involves a disputed final assessment of sales tax entered against Tamor Supersaver, Inc. ("Taxpayer") for April 2000 through December 2002. The Department has filed a motion to dismiss the appeal because the Taxpayer failed to timely appeal the final assessment within 30 days, as required by Code of Ala. 1975, §40-2A-7(b)(5). The motion is granted for the reasons explained below.

A taxpayer must appeal a final assessment within 30 days. Code of Ala. 1975, §40-2A-7(b)(5)a. The 30 day appeal period must be strictly followed. *Dansby v. State, Dept. of Revenue*, 560 So.2d 1066 (Ala.Civ.App. 1990). If the appeal is not timely filed, "the appeal shall be dismissed for lack of jurisdiction." Code of Ala. 1975, §40-2A-7(b)(5)c.

The final assessment in issue was entered on March 1, 2004. The Taxpayer's CPA received the final assessment on March 10, 2004. An attachment to the final assessment informed the Taxpayer of its right to appeal within 30 days to either the Administrative Law Division or circuit court. The Department also claims that Joe Cowen, the Director of the Department's Sales and Use Tax Division, telephoned the Taxpayer's attorney on March 17, 2004 and informed him that any appeal must be filed within 30 days.

The CPA subsequently wrote a letter dated March 30, 2004 to Cynthia Underwood, the Revenue Department's Assistant Commissioner. The letter indicated that the Taxpayer had filed amended corporate income tax returns for 2000 and 2001 in June 2003, and that the amended returns would change the sales tax due as assessed by the Department. The CPA further indicated that he would like to meet with the Department examiner as soon as possible so that the matter could be settled. There is no evidence establishing when the letter was mailed.

Assistant Commissioner Underwood received the CPA's letter on or before April 7, 2004, and responded by letter dated April 7, as follows:

I have received your letter of March 30, 2004, regarding the final assessment entered against your client. The Notice of Final Assessment clearly stated that the taxpayer had the right to appeal the assessment to either the Administrative Law Division of the Revenue Department or Circuit Court within thirty days of the final assessment date. Specific instructions were enumerated for the filing of an appeal, including mailing addresses of the recipient.

The Administrative Law Division has informed me that no appeal has been timely filed in the case of your client. Therefore, unless you have filed an appeal with the Circuit Court, the time limit for filing such appeals has expired and the case will be referred to our Collection Services Division. The only alternative available at this point would be for your client to pay the assessment in full and file a petition for refund with the Department.

By letter dated April 12, 2004, the Taxpayer's attorney filed a notice of appeal with the Administrative Law Division concerning the final assessment. The Department responded by filing the motion to dismiss in issue, arguing that the notice of appeal had not been timely filed as required by §40-2A-7(b)(5)a.

The Administrative Law Division entered a Preliminary Order directing the Taxpayer's attorney to respond to the motion. The attorney responded by arguing that the

CPA's March 30, 2004 letter to Assistant Commissioner Underwood should be treated as a timely filed appeal. He also submitted an affidavit in which the CPA asserts that he mailed his March 30, 2004 letter to Assistant Commissioner Underwood on that date by regular mail.

For the CPA's March 30, 2004 letter to constitute a timely filed appeal, (1) the letter must have been filed within the 30 day appeal period, (2) the letter must be treated as a notice of appeal, and (3) the filing of the letter with Assistant Commissioner Underwood must be treated as a constructive filing with the Administrative Law Division.

The March 30, 2004 letter was not actually received by the Administrative Law Division within the 30 day appeal period; nor is there evidence that it was received by Assistant Commissioner Underwood within the required 30 days. An appeal may, however, still be treated as timely filed if it was postmarked within the 30 day period. Code of Ala. 1975, §40-1-45. It is not known when the CPA's letter was postmarked because the envelope is not evidence.

In any case, the "mailbox" rule at §40-1-45 also requires that for a timely postmarked appeal to be treated as timely filed, the envelope in which the appeal is mailed must be properly addressed, in this case to the Administrative Law Division. Section 40-1-45(a)(2)b. The CPA's letter was mailed to Assistant Commissioner Underwood, not the Administrative Law Division. Consequently, even if the appeal had been postmarked within the required 30 days, the mailbox rule would not apply. The Administrative Law Division also never received the CPA's March 30 letter, which also is required by the mailbox rule at §40-1-45. See, *State of Alabama v. Eli Witt Company, Inc.*, 627 So.2d 947 (Ala. Civ. App. 1993).

The issues of whether the CPA's letter should be treated as a notice of appeal and whether filing the letter with Assistant Commissioner Underwood constituted constructive filing with the Administrative Law Division is pretermitted by the above holding.

The Taxpayer may still pay the final assessment in full and then petition for a refund. If the refund is denied, the Taxpayer may appeal to the Administrative Law Division or to circuit court pursuant to Code of Ala. 1975, §§40-2A-7(c)(5)a. and b., respectively.

This Final Order Dismissing Appeal can be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §§40-2A-9(b) and (g) and Department Reg. 810-14-1-.24(3).

Entered June 21, 2004.

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BILL THOMPSON  
Chief Administrative Law Judge