

STATE OF ALABAMA §
DEPARTMENT OF REVENUE, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

v. §

DOCKET NO. MISC. 88-180

M.O. CARROLL-NEWTON CO., INC. §
P.O. Box 1929
Ozark, AL 36361, §

Taxpayer. §

FINAL ORDER

The M.O. Carroll-Newton Company, Inc. ("Petitioner") filed a petition for refund concerning a tobacco tax discount for the month of April, 1988. The petition was denied by the Department and the Petitioner appealed to the Administrative Law Division. A hearing was conducted before the Administrative Law Judge on July 5, 1989.

Assistant counsel Wade Hope appeared for the Department and Frank N. Carroll represented the Petitioner. The following findings of fact and conclusions of law are hereby entered based on the evidence submitted at the hearing.

FINDINGS OF FACT

The Petitioner is a wholesale distributor of tobacco products and is located in Ozark, Alabama. As a wholesale tobacco dealer, the Petitioner is required to purchase tobacco stamps from the Revenue Department and to affix said stamps to its various tobacco products, see Code of Ala. 1975, §40-25-11, et seq.

Code of Ala. 1975, §40-25-5 allows certain wholesalers to purchase stamps on consignment, and further provides that such wholesaler "shall be required to make a full and complete

accounting and remittance on or before the twentieth of each month" for the stamps used during the preceding month. A 7 1/2% discount is allowed if the tax is timely accounted for and remitted on or before the due date.

The Petitioner purchased stamps on consignment during April, 1988 and remitted the amount due to the Department less the 7 1/2% discount. The payment was postmarked May 23, 1988 by the Petitioner's postage meter, and was received by the Department on May 24, 1988.

The Department denied the 7 1/2% discount because the payment was both postmarked and received after the May 20th due date. The Petitioner subsequently paid the disputed discount and petitioned for a refund. The refund was denied and the Petitioner requested a hearing with the Administrative Law Division.

The evidence shows that the subject check was prepared by Joe McKinney, the Accounts Payable Manager, on May 19th and dated May 20th. Frank N. Carroll, the Treasurer, testified that the business mail is customarily delivered to the Dothan Post Office early in the afternoon of each business day, and is delivered a second time to the Ozark Post Office later in the afternoon. The deliveries are made by any of a number of different employees.

Mr. Carroll testified that the mail, including the subject April payment, was probably delivered as usual to the Post Office on May 20th. However, no direct evidence was presented that the

April tobacco tax payment to the Department was mailed on May 20th.

In explaining the May 23rd postmark, Mr. Carroll testified that the payment was probably run through the company's postage meter on the twentieth, but that the date on the meter had probably been changed to the next business day by an unspecified employee before all the mail had been run through on the twentieth. However, again there is no direct evidence as to when the meter date was changed or who changed it.

CONCLUSIONS OF LAW

The Department argues that the discount should be denied because the payment was neither postmarked nor actually received by the Department by the prescribed due date, as required for the payment to be timely filed under Code of Ala. 1975, §40-1-45. However, the tobacco tax §40-25-5, provides only that payment shall be before the twentieth of each month.

"Remit" has been defined as "to send or transmit; as to remit money", see Black's Law Dictionary, Forth Revised Edition. Thus, the discount should be allowed if payment is mailed or otherwise remitted to the Department on or before the twentieth of the next month.

Whether payment is remitted by the prescribed date is a question of fact which must be decided on the particular facts of each case.

However, a discount is in the nature of a exemption or deduction, and thus, the burden is on the one seeking the discount to prove

that the payment was timely mailed or otherwise remitted.

In the present case, the Petitioner established that the mail is customarily delivered during each business day and that the tobacco tax payment is customarily mailed to the Department on the twentieth of each month. However, no direct evidence was presented that the specific payment in issue was in fact delivered to the Post Office on May 20th. The check was prepared by the twentieth, but could have been misplaced at the business or by the person in charge of delivering the mail on that particular day, and thus not mailed until the twenty-first, twenty-second or twenty-third. The payment could have been deposited at the Post Office on any of those dates, and then received by the Department on the twenty-fourth.

Consequently, despite the Petitioner's history of timely payment to the Department, the discount must be disallowed. Such a penalty is admittedly harsh, but is required by the plain language of the statute. "[E]very wholesaler or jobber refusing or failing to comply with this section shall forfeit the commission or discount on stamps used which he failed or refused to account or remit for in the time allowed . . .".

This is a Final Order for purposes of appeal pursuant to Code of Ala. 1975, §41-22-20.

Entered this the 3rd day of August, 1989.

JIM SIZEMORE, JR., Commissioner