

STATE OF ALABAMA
DEPARTMENT OF REVENUE ,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

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DOCKET NO. MISC. 91-125

ELI WITT COMPANY, INC.
P.O. Box 1909
Tampa, FL 33601,

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Taxpayer.

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FINAL ORDER

The Revenue Department assessed tobacco tax against Eli Witt Company, Inc. (Taxpayer) for the period June, 1990. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on May 16, 1991. Jeff Kohn, Esq. appeared for the Taxpayer. Assistant counsel J. Wade Hope, Esq. represented the Department. This Final Order is based on the evidence and arguments presented by the parties.

FINDINGS OF FACT

The Taxpayer is a wholesale tobacco dealer subject to the tobacco tax levied at Code of Ala. 1975, §40-25-2. A 7 1/2 percent discount is allowed if the tobacco tax is timely remitted to the Department -by the 20th of the subsequent month. See, Code of Ala. 1975, §40-25-5. The issue in this case is whether the Taxpayer timely remitted its June, 1990 tobacco tax payment to the Department by July 20, 1990. The facts are as follows:

on July 20, 1990, the Taxpayer issued check No. 279708 in the amount of \$459,706.50 payable to the Department. The check was issued at the Taxpayer's office in Tampa, Florida in payment for

the Taxpayer's Alabama tobacco tax liability for the month of June, 1990.

The check was processed through the company's check signing machine by the Taxpayer's accounts payable clerk and then initialed by the accounting manager. The accounts payable clerk put the check in an envelope and a certified mail address label was placed on the envelope by the accounting manager's secretary. The addressed envelope was then delivered to the mail room. The above facts were submitted through the sworn affidavit of the accounts payable clerk, see Taxpayer's Exhibit 1.

The Taxpayer's mail clerk affixed the proper postage on the envelope in the mail room and then placed the envelope on top of a mail bag along with the other envelopes that were to be sent that day by certified mail. The mail bag and accompanying envelopes were subsequently picked up by the Taxpayer's courier service and delivered to the United States Post Office in Tampa on July 20th.

The above facts were submitted through the sworn affidavits of the mail clerk and the contract courier that picked up the mail on the day in question, see Taxpayer's Exhibits 2 and 3. The Department objected to all three affidavits because the affiants were not available for cross-examination.

The Taxpayer discovered on or about August 21, 1990 that the check issued on July 20th had not cleared banking channels. The Taxpayer contacted the Department and was informed that the check had not been received by the Department. The Taxpayer immediately

issued a second check to the Department less the 7 1/2 percent discount of \$37,237.50. The Department disallowed the discount and entered the preliminary assessment in issue. The Taxpayer appealed.

CONCLUSIONS OF LAW

The Administrative Law Division has issued two prior Recommended Orders involving timely remittance of the tobacco tax and the 7 1/2 percent discount. Both cases held that payment must only be mailed by the 20th of the month and not actually received by the Department by that date. The Recommended Orders were adopted as Final orders by the Commissioner. In Docket No. 88-148, the Department conceded that the wholesaler had timely mailed the payment by the 20th, but disallowed the discount because the envelope containing the payment was postmarked on the 21st and received on the 25th. The discount was allowed because payment had been timely mailed. The opinion read in part as follows:

Black's Law Dictionary, Revised Fourth Edition, defines "remittance" as "Money sent by one person to another, either in specie, bill of exchange, check, or otherwise." That same source defines "remit" as "To send or transmit; as to remit money." Further, the American Heritage Dictionary, Second College Edition, defines "remittance" as "Money or credit sent to someone; The act of sending money or credit". "Remit" is defined as "To send (money); transmit."

Thus, by the specific language of §40-25-5, the tobacco tax payment must only be transmitted or sent, i.e., mailed, on or before the 20th of each subsequent month. The statute does not require that payment must be actually filed with or received by the Department by the 20th

Whether payment is remitted by the prescribed date thus is a question of fact. In the present case, the Department agrees that payment was mailed on August 20th.

Accordingly, the Taxpayer timely remitted the July, 1987 payment to the Department and thus should be allowed the discount provided by §40-25-5.

In Docket No. 88-180, the check was prepared by the 20th but the envelope was postmarked the 23rd and received on the 24th. The discount was disallowed because there was no evidence that the check had actually been mailed by the 20th.

This case is somewhere between the above two cases. The Department does not concede that payment was timely mailed on the 20th, as in Docket No. 88-148, but unlike Docket No. 88-180 there is evidence that the check was mailed on the 20th.

As in the two prior cases, this case must be decided on its own particular facts. The Taxpayer's disbursements journal shows that the check was issued on July 19th and the affidavits submitted by the Taxpayer indicate that the check was signed, initialled, placed in an envelope, addressed, delivered to the mail room and then delivered to the U.S. Post Office for mailing on July 20th.

The check could have been misplaced or lost before delivery to the Post Office, but it also could have been lost by either the Postal Service during transit or by the Department after receipt. In my opinion the evidence reasonably proves that the payment was remitted by the Taxpayer to the Department by July 20th. Accordingly, the discount should be allowed and the assessment

should be reduced to show only interest due from the due date of the payment until actual receipt of payment by the Department (unless interest for that period was included in the Taxpayer's payment).

The Department objected to the affidavits because the affiants could not be cross-examined. The Taxpayer's attorney contends that affidavits were used only because he understood that the Department would not dispute the facts contained in the affidavits. Nonetheless, the Department's objection to the affidavits is technically correct. Consequently, if the Department deems that cross-examination of the affiants is necessary, it will be allowed fifteen days from this Final Order to request a rehearing at which the affiants will be required to attend and testify.

Finally, the Department should understand that this decision does not give blanket approval of all discounts where the wholesaler claims to have timely mailed payment by the 20th. A bare claim that payment was mailed should not be accepted unless accompanied by sufficient corroborating evidence reasonably indicating that the check was timely mailed, as in this case. The burden is on the wholesaler to provide that evidence.

The Department is hereby directed to reduce and make final the assessment as indicated above. The final assessment may be appealed by either the Department or the Taxpayer pursuant to Code of Ala. 1975, §40-2-22.

Entered on August 6, 1991.

BILL THOMPSON
Chief Administrative Law Judge