

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:

The Proposed Assessment of Cigarette)
Excise Tax for the period September 2005)
by the Secretary of Revenue of the State)
of North Carolina)
vs.)
Taxpayer)

FINAL DECISION
Docket No. 2006-25

This matter was heard before Eugene J. Cella, Assistant Secretary for Administrative Tax Hearings, at the North Carolina Department of Revenue in the City of Raleigh on June 14, 2006 regarding the cigarette excise tax assessment proposed against "Taxpayer" for the tax period September 2005. Taxpayer was represented at the hearing by its Vice President of Accounting, Tax and Finance. The Corporate, Excise and Insurance Tax Division of the Department of Revenue ("Division") was represented by Gregory B. Radford, Director, and Jonathan K. Tart, Administrative Officer.

ISSUE

Whether the proposed assessment of additional cigarette tax and interest for the month of September 2005 resulting from the disallowance of the two percent discount as provided under G.S. 105-113.21(a1) was lawful and proper?

EVIDENCE

The following items were introduced as evidence by the parties at or subsequent to the hearing and made part of the record:

Submitted by the Division

Exhibit D-1 Notice of Tax Assessment dated December 8, 2005 for the month of September 2005

Exhibit D-2 Letter dated January 4, 2006 from Taxpayer to Greg Radford, Director of the

Corporate, Excise and Insurance Tax Division, with related attachments

- Exhibit D-3 Form B-A-5, Monthly Return of Resident Cigarette Distributor for September 2005
- Exhibit D-4 EFT Payment Table Detail Screen for Taxpayer's September 2005 payment
- Exhibit D-5 Letter dated January 31, 2006 from Assistant Secretary Eugene J. Cella to Taxpayer
- Exhibit D-6 E-mail dated March 3, 2006 from Lynda Kribs, Tax Examiner – Tobacco Tax Unit, to Gregg Martin, former Administrative Officer in the Corporate, Excise and Insurance Tax Division
- Exhibit D-7 EFT Information Booklet published by the Department of Revenue
- Exhibit D-8 EFT ACH Debit Instructions and Guidelines
- Exhibit D-9 EFT administrative rules adopted by the Department of Revenue, T17 NCAC 1C .0501-.0513
- Exhibit D-10 Letter dated March 27, 2006 from Taxpayer to Assistant Secretary Cella
- Exhibit D-11 Letter dated March 30, 2006 from Assistant Secretary Cella to Taxpayer
- Exhibit D-12 Department's Brief for Tax Hearing
- Exhibit D-13 Cover Sheet dated February 11, 2004 faxed by Taxpayer to Diana Saunders with the Department
- Exhibit D-14 Electronic Funds Transfer Authorization Agreement dated February 11, 2004 submitted by Taxpayer to Department
- Exhibit D-15 Letter dated February 11, 2004 from Diana Saunders to Taxpayer approving Taxpayer's request to remit tobacco products tax payments by EFT
- Exhibit D-16 Department's *Schedule of Original Monthly Tax Reports for the Reporting Period from 1/01/2004 to 4/30/2006* for Taxpayer's Tobacco Products Tax
- Exhibit D-17 Department's Post-Hearing Brief

Submitted by the Taxpayer

- Exhibit TP-1 Cigarette Distributor's License for Taxpayer issued on December 30, 2003
- Exhibit TP-2 Certificate of Merger for former taxpayer into Taxpayer effective January 1, 2004
- Exhibit TP-3 Certificate of Withdrawal with Secretary of State for former taxpayer
- Exhibit TP-4 Letter dated January 4, 2006 from Taxpayer to Greg Radford, Director of the Corporate, Excise and Insurance Tax Division, with related attachments

Exhibit TP-5 Letter dated August 2, 2006 from Taxpayer to Assistant Secretary Cella

Exhibit TP-6 Letter dated September 11, 2006 from Taxpayer to Assistant Secretary Cella

FINDINGS OF FACT

Based on the foregoing evidence of record, the Assistant Secretary makes the following findings of fact:

1. Taxpayer is a distributor of cigarettes and holds cigarette distributor's license # 958 issued by the Department on December 30, 2003 and effective January 1, 2004.
2. Taxpayer voluntarily submitted an Electronic Funds Transfer Authorization Agreement to pay its tobacco products tax on February 11, 2004.
3. The Department notified Taxpayer on February 11, 2004 that the request to remit its tobacco products tax payments by EFT was approved (Exhibit D-15). The notification included the guidelines and the instructions for the Electronic Funds Transfer Program.
4. Taxpayer began paying its tobacco products tax by EFT on February 20, 2004 and has timely paid by EFT in accordance with the Department's rules each month since then except for the month of September 2005.
5. Taxpayer has not notified the Department that it wished to stop paying by EFT.
6. Taxpayer's cigarette excise tax report and payment for the month of September 2005 were due on October 20, 2005.
7. On Thursday, October 20, 2005, Taxpayer initiated transmittal of a payment in the amount of \$2,693,446.31 via electronic funds transfer for its September 2005 cigarette excise tax liability.
8. The amount paid was determined by applying the statutory rate to taxable packs of cigarettes and then subtracting a 2% discount.
9. Taxpayer called the Department's third party contract service, known as a Data Collection Center (DCC), through which Electronic Funds Transfer payments are made via the Automated Clearing House (ACH) at 8:56 A.M. eastern time on Thursday, October 20, 2005.
10. The payment was included in the DCC's report of collections on Thursday, October 20, 2005 and settled in the Department's bank account and was credited to Taxpayer's account on Friday, October 21.

11. On December 8, 2005, the Department issued a Notice of Tax Assessment for additional tax, a ten percent late payment penalty pursuant to G.S. 105-236(4), and interest in the amount of \$325,276.40.
12. The additional tax resulted from the disallowance of the 2% discount because the payment was not received by the due date of October 20, 2005.
13. Taxpayer timely protested the assessment and requested a hearing before the Secretary of Revenue.
14. Taxpayer paid the additional tax and interest in full and the Department waived the late-payment penalty.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Assistant Secretary makes the following conclusions of law:

1. Cigarette tax reports and payments are due monthly on the 20th day of the month following the month covered by the report.
2. A taxpayer who files a timely cigarette tax report and timely pays the cigarette excise tax may reduce the amount due by a discount of 2%.
3. The discount is similar in nature to a deduction or exemption. Discounts are privileges, not matters of right, and are allowed as a matter of legislative grace. A taxpayer claiming a discount must bring itself within the statutory provisions authorizing the discount.
4. The Secretary of Revenue may require cigarette excise taxpayers to pay the tax electronic funds transfer if, for the previous twelve months, the taxpayer's required payment of tax was at least \$20,000 per month.
5. The Secretary of Revenue has the statutory authority to adopt rules needed to administer the Revenue Laws, including the guidelines for the Electronic Funds Transfer Program.
6. The Department has adopted rules, numbered .0502 through .0513 of Chapter 1C of Title 17 of the North Carolina Administrative Code, setting forth guidelines and instructions for the Electronic Funds Transfer Program.
7. Payments by EFT are subject to specific rules and Guidelines adopted by the Secretary of Revenue pursuant to G.S. 105-262.
8. Taxpayers participating in the EFT Program make payments via the ACH debit method.

9. A taxpayer must contact the Data Collection Center by 3:45 P.M. eastern time on the business day prior to the day the funds are to be transferred to make timely payment by EFT.
10. If a taxpayer using the ACH Debit method does not communicate payment information to the DCC by 3:45 P.M. Eastern Standard Time on the business day before the due date, the payment is posted to the taxpayer's account as of the next business day following the due date and constitutes late payment.
11. Since Taxpayer was a new taxpayer in 2004, it did not have a twelve-month payment history and thus was not required to pay by EFT.
12. A taxpayer who is not required to pay by EFT may voluntarily pay by EFT with the Department's approval.
13. To voluntarily participate in the EFT program, the taxpayer must submit an EFT registration form to the Department and receive notice from the Department that the registration has been approved.
14. A taxpayer who voluntarily enrolls in the EFT program is subject to the administrative rules and guidelines governing the EFT program.
15. A taxpayer who receives permission from the Department to pay by EFT is required to make payments in that form for a minimum of 12 months. The taxpayer must give the Department at least 45 days notice in order to stop making payments by EFT.
16. Taxpayer was required to pay its September 2005 cigarette excise tax by EFT because it voluntarily elected to pay the tax by EFT and had not notified the Department that it wished to cease paying by EFT at least 45 days prior to the due date for paying the September 2005 tax.
17. Late payments of tax are subject to a 10% late payment penalty.
18. The Department of Revenue has the authority to reduce or waive any penalties assessed under Chapter 105.
19. Tax not paid by the due date is subject to interest from the date the tax was due until the date the tax is paid.
20. The 2% discount is a reduction to a taxpayer's tax liability offered as an incentive to file the return and pay the tax on time. It is not a penalty that is an addition to a taxpayer's tax liability for failure to file the return or pay the tax timely. The Department of Revenue does not have the authority to waive the tax due as a result of a taxpayer not being eligible for the discount.

21. The proposed assessment of additional cigarette excise tax, interest and a ten percent late payment penalty is lawful and proper. Taxpayer is not entitled to any refund of the additional tax and interest paid.

DECISION

Based on the aforementioned findings of fact and conclusions of law, I find that Taxpayer is not entitled to the 2% discount for the month of September 2005 because it did not pay its cigarette excise tax for that month in a timely manner. Taxpayer voluntarily participated in the Electronic Funds Transfer Program. By voluntarily participating, Taxpayer agreed to be subject to the same rules and Guidelines for the Electronic Funds Transfer Program as a taxpayer that was required to pay tax by EFT. Under those rules and guidelines, Taxpayer had to contact the Department's third party contract service, known as a Data Collection Center (DCC), through which Electronic Funds Transfer payments are made via the Automated Clearing House (ACH), by 3:45 P.M. eastern time on the business day prior to the day the funds were to be transferred by the DCC to the Department's bank to make timely payment by EFT. Since the funds had to be transferred to the Department's bank by October 20, 2005 in order to be timely, Taxpayer was required to contact the DCC by 3:45 P.M. eastern time on October 19, 2005. Taxpayer called the DCC at 8:56 A.M. eastern time on Thursday, October 20, 2005. As a result, the transaction was included in that business day's report and settled in the Department's account on October 21. Therefore, the payment was not timely and Taxpayer is not eligible for the 2% discount.

Taxpayer argues that it was not notified by the Department of the EFT requirements and that it was not enrolled in the EFT program. I reject this argument. Taxpayer was enrolled in the program because it voluntarily submitted an Electronic

Funds Transfer Agreement to pay its tobacco products tax by EFT and the Department sent notification approving this request that included the guidelines for the EFT program. Taxpayer has not notified the Department that it no longer wanted to participate in the program. I find that Taxpayer was required to abide by the rules of the EFT program based on its voluntary participation in the program.

I also find that the discount is a privilege granted to those taxpayers that meet the statutory provisions authorizing the discount. Taxpayer did not meet those provisions in this case so the discount was not allowed. The disallowance of the discount is not the same as a penalty, which is imposed as an addition to tax as a punitive action. The law authorizes the Department to waive or reduce penalties but does not authorize the Department to allow a discount if the taxpayer has not met the statutory provisions authorizing it.

CONCLUSION

The proposed assessment of additional tax and interest is hereby sustained and Taxpayer is not entitled to any refund of the additional tax and interest paid on January 4, 2006.

This the ___ day of _____, 2006.

Signature _____

Eugene J. Cella
Assistant Secretary of Revenue