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SC TECHNICAL ADVICE MEMORANDUM #91-1

TO: Mr. William F. Bray, Director
Office Services Division

FROM: Deana West, Tax Analyst
Tax Policy Department

DATE: April 18, 1991

SUBJECT: Checks Returned Due to Insufficient Funds
(All Taxes)

REFERENCE: S. C. Code Ann. Section 12-54-40 (Supp. 1990)
S. C. Code Ann. Section 12-54-50 (Supp. 1990)

AUTHORITY: S. C. Code Ann. Section 12-3-170 (1976)
SC Revenue Procedure #87-3

SCOPE: A Technical Advice Memorandum is a temporary document issued to an individual within the Commission, upon request, and it applies only to the specific facts or circumstances related in the request.

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Question:

When a check received by the Commission in payment of a tax liability is returned by the bank due to insufficient funds, what penalties may the Commission impose?

Facts:

Many tax payments are remitted by check to the Tax Commission. Situations arise whereby a bank returns the check due to insufficient funds. Advice has been requested concerning what penalties should be imposed.

Discussion:

Code Section 12-54-50 specifically imposes a penalty for checks that are returned by the bank due to insufficient funds and states:

When the bank upon which any uncertified check tendered to the Commission in payment of any obligation due to the Commission, refuses payment of the check on account of insufficient funds of the drawer in the bank and the check is returned to the Commission, a penalty of ten dollars must be imposed. This section applies to all taxes or license fees levied or assessed by the Commission.

In order to determine if any other penalties are applicable, it must be determined at what time a liability is paid when a check is given to the Commission.

An Attorney General's Opinion dated February 1, 1932 provides guidance in making this determination. The opinion concluded "a check given in payment of taxes is, at most, only a conditional payment...A check or draft given to a collector for the payment of taxes does not discharge the taxes, unless the check or draft be in fact paid."

Furthermore, in State ex rel. Cherokee County et al. v. Brown et al., 187 SC 223, 196 SE 889 (1938), the Supreme Court of South Carolina reviewed the situation of a county treasurer holding checks given in payment of taxes for several months before depositing them. The Court determined that "[t]he law does not regard the taxes as paid until the checks are paid."

Based upon the above, a tax liability is not considered paid by check unless the check is cleared and paid in the normal banking process.

Code Section 12-54-40(b)(2) states:

(a) In case of failure to pay the amount shown as tax on any return on or before the date prescribed by law (determined with regard to any extension of time for paying), there must be added to the tax due a penalty of one-half of one percent of the amount of tax if the failure is for not more than one month, with an additional one-half of one percent for each additional month or fraction of the month, during which the failure continues, not exceeding twenty-five percent in the aggregate.

(b) In case of failure to pay any amount in respect of any tax required to be shown on a return which is not so shown (including an assessment) within ten days of the date of the notice and demand for payment, there must be added to the amount of tax stated in the notice and demand one-half of one percent of the amount of the tax if the failure to file is for not more than one month, with an additional one-half of one percent for each additional month or fraction of a month during which the failure continues, not exceeding twenty-five percent in the aggregate.

Conclusion:

When a check received by the Commission in payment of a tax liability is returned by the bank due to insufficient funds, the Commission will generally impose the failure to pay penalty under Code Section 12-54-40(b)(2) and the penalty for a returned check under Code Section 12-54-50. Other penalties such as the negligence and fraud penalties will be imposed when appropriate.

NOTE: Taxpayers whose checks are returned by the bank due to insufficient funds will forfeit discounts available for timely filing of returns and payment of taxes and be assessed penalties as provided in this ruling on the total tax payment due, without regard to discounts.