STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GARY BRYNES	:	DECISION DTA No. 807441
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1984	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 28, 1991 with respect to the petition of Gary Brynes, 1755 York Avenue, Apt. 9G, New York, New York 10128 for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1984. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

The Division of Taxation filed a brief on exception. Petitioner filed a letter in response. The Division of Taxation's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner has demonstrated that reliance on his accountant constitutes reasonable cause pursuant to Tax Law § 685(a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "6(a)" and "6(b)" which have been modified and deleted, respectively. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner, Gary Brynes, in 1984, resided in New York at 440 East 62nd Street, Apt. 12-A, New York, New York 10021. He had moved to New York from Maine at the end of 1982.

Petitioner was a 50% shareholder in Bryco, Inc. of 813 Washington Avenue, Portland, Maine 04103. That corporation is on a fiscal year ending March 31. It was a "subchapter S" corporation for Federal purposes.

On April 15, 1985, petitioner's accountants filed an Application for Automatic Extension of Time to File (Form IT-370). That application showed estimated New York State and New York City tax liabilities of $4,894.00 and $1,639.00, for a total of $6,533.00. After withheld amounts totalling $2,373.00, a tax due was shown of $4,160.00. This was paid at that time.

The tax return as finally filed by petitioner showed a total tax due of $9,101.43. After withheld amounts of $2,373.00 and the April 15 payment of $4,160.00, a net amount due of $2,569.00 was shown and this was paid with the return on August 7, 1985.

The Division of Taxation, by a statement dated October 15, 1985, calculated a penalty due for late filing and late payment of $513.69 and interest of $86.56. After showing an amount paid of $.57, a net amount due of $599.68 was shown.

The penalty and interest was paid on or about October 31, 1985. A claim for refund was made at the same time.

We modify finding of fact "6(a)" of the Administrative Law Judge's determination to read as follows:

> The claim for refund of penalties and interest is based upon the claim that petitioner's accountants, located in Portland, Maine, did not have complete instructions on New York State tax returns and were aware that New York State had enacted new legislation in 1984 which affected S corporation shareholders. Therefore, they could not make a closer estimate of tax than that which was made.[1]

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[1] The Administrative Law Judge's finding of fact "6(a)" read as follows:

> "The claim for refund of penalties and interest is based upon the claim that petitioner's accountants, located in Portland, Maine, did not have sufficient information of New York

Finding of fact "6(b)" of the Administrative Law Judge's determination is deleted.[2]

OPINION

The Administrative Law Judge determined that the failure to secure an automatic extension of time to file an income tax return does not preclude the waiver of penalties for late filing and late payment of income tax. Further, the Administrative Law Judge found that petitioner's delay in filing and paying his income tax was reasonable, given that his accountants lacked essential information, and that he reasonably relied on his accountants' estimate of income tax due. Finally, the Administrative Law Judge determined that 20 NYCRR former 102.7(b)(10) was invalid, in part, in that it was inconsistent with the parallel Federal provision, Internal Revenue Code § 6651. Therefore, the Administrative Law Judge granted the petition of petitioner and ordered that petitioner receive his refund plus interest.

On exception, the Division of Taxation (hereinafter the "Division") asserts that petitioner failed to present sufficient evidence to justify reliance on his accountant and that the Administrative Law Judge incorrectly interpreted Tax Law § 685(a) and its supporting regulations. The Division also asserts that reliance on the advice of a professional is not reasonable action per se, but rather that it must be determined on a case-by-case basis, and that

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> legislation concerning subchapter S corporations and so could not make a closer estimate of tax than that which was made."

This fact was modified to more fully reflect the record.

[2]The Administrative Law Judge's finding of fact "6(b)" read as follows:

> "Judicial notice is taken that in the spring of 1984, legislation was pending in the New York State Legislature in relation to the taxation of subchapter S corporations and that that legislation was to be applicable to taxable years beginning after December 31, 1982. This legislation was approved on July 27, 1984 and became chapter 606 of the Laws of 1984."
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> This finding of fact dealt with the Administrative Law Judge taking judicial notice of the enactment of new legislation concerning the taxation of subchapter S corporations. The Division challenged this action, asserting that petitioner did not identify the legislation with sufficient clarity to support the taking of judicial notice. As this case has been resolved without the need to address the issue, finding of fact "6(b)" has been removed.

efforts to secure necessary income tax information is an important factor in determining reasonable cause and good faith.

In opposition, petitioner asserts that the determination of the Administrative Law Judge was proper, and that the four years he spent attempting to get a response from the Department of Taxation and Finance demonstrates the level of difficulty his accountants probably experienced in seeking data regarding the 1984 income tax return.

We reverse the Administrative Law Judge's determination that a refund should be issued.

The Division disagreed with the Administrative Law Judge's interpretation of the applicable law and regulations. The following analysis is intended to clarify the law and its supporting regulations.

Tax Law § 685 imposes a penalty for failure to either file a tax return or pay tax as shown on the return on or before the specified date (Tax Law § 685[a][1] and [2]). This penalty may be waived if it is shown that the failure was due to reasonable cause and not due to willful neglect (Tax Law § 685[a][1] and [2]).

Tax Law § 657 allows the Commissioner of Taxation and Finance to grant an extension of time for, inter alia, the filing of returns and the payment of taxes due (Tax Law § 657[a]). The requirements and procedures regarding these extensions, for the purposes of the present case, are set out in the Department of Taxation and Finance's regulations at 20 NYCRR former 151.

The regulations allow an automatic four month extension for filing a New York State income tax return (20 NYCRR former 151.2[a]). An application for extension (form IT-370) must be prepared and filed on or before the income tax filing date (20 NYCRR former 151.2[a]). Petitioner's Maine accountants had filed an IT-370 in a timely manner.

Reasonable cause is addressed in 20 NYCRR former 151.8, as well as in 20 NYCRR former 102.7. 20 NYCRR former 151.8 states that reasonable cause will be presumed if ninety percent of the income tax due was received by New York State on or before the due date, without regard to any extension of time (20 NYCRR former 151.8[b][2]). Failure to meet the ninety

percent requirement is not fatal, as a taxpayer may still show reasonable cause under 20 NYCRR former 102.7.

20 NYCRR former 102.7 states that reasonable cause must be affirmatively shown by the taxpayer (20 NYCRR former 102.7[b]). Numerous grounds for reasonable cause are set out. The grounds found relevant by the Administrative Law Judge are as follows:

> Grounds for reasonable cause, where clearly established, may include the following:
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> * * *
>
> (7) inability to obtain and assemble essential information required for the preparation of a complete New York State income tax return despite reasonable efforts;
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> * * *
>
> (10) any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a New York State income tax return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance will be taken into account. Ignorance of the law, however, will not be considered reasonable cause (20 NYCRR former 102.7[b][7] and [10]).

Petitioner bears the burden of proof to demonstrate reasonable cause and the absence of willful neglect (see, Tax Law § 689[e]). Petitioner has failed to carry this burden.

Petitioner has failed to establish what essential information his accountants needed, what efforts were taken to secure it, and what was the precise effect of not having it. The only relevant evidence submitted by petitioner is the letter from his Maine accountants, which states, in part:

> "At the time of our firm's NYS estimate, we did not have the complete instructions on NYS tax returns and we were aware that NYS has enacted new legislation affecting S corporation shareholders" (letter dated 10/31/85

> from petitioner's Maine accountants, Filler & How, P.A., to New York State Department of Taxation and Finance) (emphasis added).

This letter fails to provide any information that would demonstrate reasonable cause (see, Matter of John Grace & Co., Tax Appeals Tribunal, May 10, 1990; Matter of McDonnell Douglas Corp., Tax Appeals Tribunal, May 4, 1989; see also, 20 NYCRR former 102.7[b][7]). The bare assertion of pending legislation, by itself, is insufficient. We cannot speculate as to the relevance, necessity, and scope of the information petitioner's Maine accountants alleged was needed. Further, we cannot speculate as to what steps were taken to secure the information, or what responses were given by the Division. On this point, we note that the experiences of petitioner in his dealings with the Division cannot be inferred to have also been experienced by petitioner's Maine accountants in their contact with the Division.

The Administrative Law Judge erred in his determination. The Administrative Law Judge found that petitioner's Maine accountants were unable to secure information regarding pending 1984 legislation concerning the taxation of S corporations.[3] Further, the Administrative Law Judge found that the Maine accountants' delay in preparing petitioner's return was reasonable based upon this lack of information. This was incorrect in light of the preceding analysis.

Ignorance of the law is no excuse (Matter of 1230 Park Assoc. v. Commissioner of Taxation & Fin., ___ AD2d ___, 566 NYS2d 957; see, Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121; see also, 20 NYCRR former 102.7[b][10]). However, the Administrative Law Judge determined that this concept, as set out in 20 NYCRR former 102.7(b)(10), was inapplicable to the present case.

The Administrative Law Judge determined that Internal Revenue Code § 6651 was identical to Tax Law § 685(a), and dismissed the last line of 20 NYCRR former 102.7(b)(10) based upon the Federal interpretation of the phrase "reasonable cause" as found under Internal

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[3] As noted earlier, the Division challenged the Administrative Law Judge's taking of judicial notice of the enactment of new legislation concerning the taxation of subchapter S corporations, asserting that petitioner did not identify the legislation with sufficient clarity. We reserve decision on the issue of taking judicial notice, as other factors permit us to decide this case without reaching that issue.

Revenue Code § 6651 and its supporting regulations. He then concluded that a taxpayer who relied on incorrect substantive tax advice from an accountant was absolved from liability under Internal Revenue Code § 6651, citing United States v. Boyle (469 US 241) and Estate of Paxton v. Commissioner (86 TC 785, 819-820) for support. Based upon this, the Administrative Law Judge found that 20 NYCRR former 102.7(b)(10) was inapplicable to the situation before him, and determined that petitioner's reliance upon the incorrect advice of his Maine accountants was reasonable.

The Administrative Law Judge erred in finding 20 NYCRR former 102.7(b)(10) invalid, in part. "It has long been the policy of [the New York courts] to adopt, whenever reasonable and practical, the Federal construction of substantially similar tax provisions" (Matter of Marx v. Bragalini, 6 NY2d 322, 189 NYS2d 846, 854) (emphasis added). However, it is unreasonable and impractical to look to the Federal interpretation of a parallel Internal Revenue Code provision when the issue is squarely addressed in the State case law. This is the situation before us (see, Matter of 1230 Park Assoc. v. Commissioner of Taxation & Fin., supra; Matter of LT & B Realty Corp. v. New York State Tax Commn., supra). Therefore, it is unnecessary to look to parallel Internal Revenue Code provisions for guidance.

Reliance on an accountant may be found to be reasonable. However, the mere demonstration of reliance on an accountant is not reasonable per se (Matter of LT & B Realty Corp. v. New York State Tax Commn., supra; Matter of Etheredge, Tax Appeals Tribunal, July 26, 1990). Rather, the reasonableness of the reliance must be determined on a case-by-case basis (Matter of LT & B Realty Corp. v. New York State Tax Commn., supra; Matter of Etheredge, supra; Matter of Erikson, Tax Appeals Tribunal, March 22, 1990).

Petitioner has failed to demonstrate that his reliance on his accountants was reasonable. Petitioner's accountants were located in Maine. Relying on an accountant in Maine to properly prepare and file a New York State income tax return is not, by itself, a reasonable course of action (see, Matter of Bachman v. State Tax Commn., 89 AD2d 679, 453 NYS2d 774; Matter of Etheredge, supra). This conclusion is further supported by the letter submitted by the Maine

accountants, which stated that they did not have complete instructions on New York State tax returns when they filed petitioner's estimate. Based on this, we find petitioner's reliance on the Maine accountants to be unreasonable.

Accordingly, it is ORDERED, ADJUDGED, and DECREED, that

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Gary Brynes is denied; and

4. The refund of Gary Brynes is denied.

DATED: Troy, New York
November 21, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner