

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
T & T EXCAVATING & PAVING CORP. :
for Redetermination of a Deficiency or for Refund of :
Corporation Franchise Tax under Article 27 of the :
Tax Law for the Years 1986, 1987 and 1988. :

In the Matter of the Petition :
of :
T & T EXCAVATING & PAVING CORP. :
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period June 1, 1985 through August 31, 1990. :

DECISION
DTA NOS. 810715
810716 and 810717

In the Matter of the Petition :
of :
T & T EXCAVATING & PAVING CORP. :
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
for the Period June 1, 1985 through August 31, 1990. :

Petitioner T & T Excavating & Paving Corp., 42 Phillips Road, Stillwater, New York 12170, filed an exception to the determination of the Administrative Law Judge issued on October 28, 1993. Petitioner appeared by its president, Terry R. Stewart, Sr. The Division of Taxation appeared by William F. Collins, Esq. (Arnold Glass, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter in reply which was received on February 15, 1994 and began the six-month period to issue this decision. Petitioner's request for oral argument was denied.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUE

Whether petitioner had shown that its failure to timely file personal income tax returns (withholding tax), corporate franchise tax returns and sales tax returns was due to reasonable cause and not due to willful neglect.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "11" which has been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional finding of fact are set forth below.

During the years in issue, petitioner, T & T Excavating and Paving Corp. ("T & T"), was engaged in the business of blacktopping and excavation work utilizing a small backhoe, bulldozer and two small dump trucks.

Mr. Terry R. Stewart was the president and treasurer and his spouse, Karen Stewart, was the vice president and secretary. Mrs. Stewart acted as the bookkeeper for the business, while Mr. Stewart worked in the field.

During the period in issue, June 1, 1985 through August 31, 1990, Mrs. Stewart took responsibility for preparing and filing the various tax returns required to be filed on behalf of petitioner. Mr. Stewart spent the majority of his time preparing job estimates, managing the job operations and performing hands-on work.

Sometime in or about January 1990, during Mrs. Stewart's absence, Mr. Stewart discovered that his wife had not filed any returns or remitted any tax since 1985 to either the State or Federal taxing authorities.

Much confusion exists in the record with regard to petitioner's filing history. Upon audit, the auditor determined that corporation tax assessments for the years 1986 and 1987 had already

been issued and referred to the Tax Compliance Division. Petitioner paid the assessment for 1988 on September 12, 1990. After a conciliation conference, petitioner filed a claim for refund, dated September 18, 1991, for the years 1986, 1987 and 1988. The claim did not specify a dollar amount for which the claim was made, only a statement which sought a refund for penalties paid for the years 1986, 1987 and 1988.

By letter dated March 20, 1992, the Division of Taxation ("Division") denied the claim for refund of penalties, stating, in pertinent part, as follows:

"Your request for return of penalties paid is denied as not meeting the requirements as defined in State Law as reasonable cause for abatement or return of penalty for late filing or late payment of corporation tax."

Although the Division recomputed the tax due for the year 1986 (petitioner was a calendar year taxpayer) and found additional tax due, the statute of limitations prevented additional assessment.

Following a meeting and conversations between the auditor and Mr. Stewart, and the submission of personal income tax returns (none of which had been filed), the Division issued six statements of withholding tax audit changes to petitioner, dated December 5, 1990, which set forth the following:

ADJUSTMENT TO WITHHOLDING TAX PER PERIOD

<u>PERIOD ENDING</u>	<u>TAX DUE PER AUDIT</u>	<u>TAX DUE PER RETURN</u>	<u>ADDITIONAL TAX DUE</u>	<u>PENALTY ASSESSED</u>	<u>INTEREST COMPUTED</u>	<u>TOTAL LIABILITY</u>
06/30/85	816.60	0.00	816.60	524.59	559.21	1,900.40
12/31/85	619.90	0.00	619.90	768.09	364.22	1,752.21
06/30/86	534.60	0.00	534.60	297.18	273.60	1,105.38
12/31/86	799.50	0.00	799.50	766.21	352.69	1,918.40
06/30/87	1,002.15	0.00	1,002.15	494.26	387.22	1,883.63
12/31/87	1,002.15	0.00	1,002.15	918.49	335.67	2,256.31
01/31/88	62.40	0.00	62.40	75.84	20.64	158.88
02/29/88	78.00	0.00	78.00	94.48	25.16	197.64
03/31/88	156.00	0.00	156.00	132.18	48.76	336.94
04/30/88	216.80	0.00	216.80	143.68	65.68	426.16
05/31/88	221.10	0.00	291.30	155.89	82.64	529.83
07/31/88	168.80	0.00	168.80	131.57	46.26	346.63
08/31/88	231.60	0.00	231.60	142.21	61.25	435.06
09/30/88	177.20	0.00	177.20	131.47	45.22	353.89
10/31/88	148.10	0.00	148.10	125.61	36.41	310.12
11/30/88	158.10	0.00	158.10	126.62	37.42	322.14
12/31/88	141.50	0.00	141.50	422.84	31.51	595.85
01/31/89	190.40	0.00	190.40	130.29	41.53	362.22
02/28/89	190.40	0.00	190.40	129.44	39.84	359.68
03/31/89	238.00	0.00	238.00	135.56	47.31	420.87
04/30/89	243.60	0.00	243.60	135.17	45.98	424.75
05/31/89	308.70	0.00	308.70	143.00	55.11	506.81
06/30/89	233.90	0.00	233.90	131.43	39.45	404.78
07/31/89	181.50	0.00	181.50	123.48	28.79	333.77
08/31/89	318.70	0.00	318.70	139.49	47.10	505.29
09/30/89	192.20	0.00	192.20	122.78	26.33	341.31
10/31/89	49.30	0.00	49.30	54.89	6.23	110.42
11/30/89	31.20	0.00	31.20	34.58	3.63	69.41
12/31/89	0.00	0.00	0.00	250.00	0.00	250.00

ADJUSTMENT TO WITHHOLDING TAX PER PERIOD

<u>PERIOD ENDING</u>	<u>TAX DUE PER AUDIT</u>	<u>TAX DUE PER RETURN</u>	<u>ADDITIONAL TAX DUE</u>	<u>PENALTY ASSESSED</u>	<u>INTEREST COMPUTED</u>	<u>TOTAL LIABILITY</u>
01/31/90	0.00	0.00	0.00	0.00	0.00	0.00
02/28/90	0.00	0.00	0.00	0.00	0.00	0.00
03/31/90	0.00	0.00	0.00	0.00	0.00	0.00
04/30/90	11.65	0.00	11.65	12.62	0.78	25.05
05/31/90	37.32	0.00	37.32	40.25	2.12	79.69
06/30/90	69.65	0.00	69.65	74.78	3.29	147.72
07/31/90	19.92	0.00	19.92	2.38	0.75	23.05
08/31/90	12.13	0.00	12.13	0.00	0.34	12.47
09/30/90	0.00	0.00	0.00	0.00	0.00	0.00
10/31/90	0.00	0.00	0.00	0.00	0.00	0.00
11/30/90	0.00	0.00	0.00	0.00	0.00	0.00
12/31/90	0.00	0.00	0.00	0.00	0.00	0.00

Petitioner consented to the tax and interest set forth on said statements but disagreed with the penalties assessed.

On January 14, 1991, the Division issued six notices of deficiency to petitioner, one for each of the years 1985, 1986, 1987, 1988, 1989 and 1990. The notices set forth the same amount of tax as the statements of audit adjustment for each month of the years in issue with updated penalty and interest figures.

Petitioner was granted a conciliation conference on the matter and the statutory notices were sustained. This appeal followed, wherein petitioner concedes the tax and interest due but seeks cancellation of the penalty assessed, citing reasonable cause for its abatement.

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

Also, the auditor received from petitioner delinquent sales and use tax returns for the period June 1, 1985 through August 31, 1990. These returns were submitted to the Tax Compliance Division for generation of assessments. On February 11, 1991, the Division issued 19 notices and demands for sales and use taxes due for all quarters between June 1, 1985 and May 31, 1990. On September 5, 1991, the Division issued an additional notice and demand for sales and use taxes due for the quarter ending August 31, 1990.

Petitioner received a conciliation conference on the sales tax matter which resulted in an Order sustaining the statutory notices. Petitioner appealed to the Division of Tax Appeals, conceding the tax and interest assessed but seeking cancellation of the penalties assessed.¹

Petitioner believes that it has reasonable cause for the abatement of penalty. It contends that it had no knowledge of Mrs. Stewart's failure to prepare and file the requisite corporation tax, sales and use tax and income tax returns with proper payment. Further, as soon as the problem was discovered, petitioner made and is making every effort to file all returns and make all payments due. Petitioner also argued that significant weight should be given to the fact that the Internal Revenue Service abated penalties for petitioner.

We find the following additional fact:

The Division's audit report (Division's Exhibit "E") contains a memorandum dated December 24, 1990 from the auditor to her supervisor concerning petitioner's request for abatement of penalties which reads as follows:

"[a]ttached please find a copy of a letter received from Terry Stewart, President of T & T Excavating, requesting the waiving of penalties for all years under audit. The following amounts reflect the penalties assessed:

1985	\$1,292.68
1986	1,063.39
1987	1,412.75
1988	1,825.86
1989	1,530.11
1990	130.03

TOTAL	\$7,254.82
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"Per Terry Stewart, the IRS has decided to waive at least 50% of their penalties. He has no paperwork to verify this, but he did give me two people to call at the IRS who are working on his case. Jim Benson suggested that I have you speak to them regarding any decision you may want to make on this. They are Mr. Smith, auditor, at 793-3494, and Ms. Lois Dworkins, who made the decision re: the % of penalties waived, at 472-2445.

¹We modified this finding of fact to reflect the fact that 19 notices and demands for sales and use taxes due were issued on February 11, 1991 and one notice and demand was issued on September 5, 1991.

"It is my opinion that we should follow their lead, with the exception of 1990, which I feel should stay as is as he discovered the problem at the beginning of that year and was still late with his payment" (Division's Exhibit "E").

OPINION

The Administrative Law Judge determined that, with respect to the penalty imposed under Tax Law § 1085(a)(1) and (2) for failure to timely file or pay corporate franchise tax, petitioner:

"has not established reasonable cause with regard to the corporation franchise tax reports for 1986, 1987 and 1988. The fact that a corporate officer failed to discharge her duties and that her failure was overlooked for nearly five years does not constitute reasonable cause. It does demonstrate a lack of internal controls and managerial oversight" (Determination, conclusion of law "A").

Citing Ross Viking Mdse. Corp. (Tax Appeals Tribunal, April 8, 1991), the Administrative Law Judge opined that "even if petitioner was able to show that the Internal Revenue Service abated penalties, it would not be determinative herein" (Determination, conclusion of law "A").

With regard to the penalty imposed pursuant to Tax Law § 1145(a)(1)(iii) for sales tax and Tax Law § 685(a)(1)(A) for withholding tax, the Administrative Law Judge stated:

"[p]etitioner is a very small corporation with only two officers who happen to have been husband and wife. Personal problems between officers which detrimentally affect the corporation cannot be construed to constitute reasonable cause within the meaning and intent of Tax Law §§ 1145(a)(1)(iii) and 685(a)(1)(A). Further, such marital problems are not within the more specific definitions and examples found in the regulations at 20 NYCRR 536.5(c)(1)-(5) (sales tax) and 20 NYCRR 107.6(d)(1)-(4) (income tax).

"Given the failure to demonstrate reasonable cause, the penalties assessed are sustained for both the income and sales and use tax matters" (Determination, conclusion of law "B").

On exception, petitioner reiterates the basic assertions made at hearing. The essence is captured in the following excerpts from petitioner's exception:

"[f]urthermore, the decision referred to the fact that a corporate officer failed to discharge her duties for nearly five years which did not constitute reasonable cause rather lack of internal controls and management. My request for abatement was not that a corporate

officer rather a paid employee, who also was a corporate officer in a position of authority, had either through negligence or deliberately and without my knowledge failed to do what was expected and necessary. This employee had filed the necessary returns prior to this period and demonstrated the ability to do so. I had no reason to question any of this until it all became known. At which time I was solely responsible and have made every attempt to file properly and pay whatever was possible.

" This decision appears to be based on denial in that personal or marital problems do not constitute reasonable cause. The explanation of my marital problems was not intended to be the reason but only to explain how it could be that such a long period of time elapsed until I became aware of the problem. I would again state that my reliance upon a qualified capable paid bookkeeper who had demonstrated the willingness and ability to file the appropriate forms was the reason. The fact that she was also a corporate officer was set forth to lend further credibility to the issue and the reason I did not review all records at the time. However, I am now the only officer and am entirely responsible for the tax, penalties and interest of something that was entirely beyond my control" (Petitioner's exception, p. 1).

In addition, petitioner submitted with its exception a letter dated June 19, 1991 from the Internal Revenue Service which indicates: "a partial abatement of the penalty is recommended." The reason for the partial abatement, rather than the full abatement requested by petitioner is stated as follows: "you have not proven reasonable cause for abatement of an amount greater than [sic] we have allowed."

On exception, the Division asserts that:

"Terry R. Stewart, the corporation's president blurs the distinction between tax, penalty and interest being asserted against the corporation as in this proceeding, and the circumstances if tax were asserted against him personally (which is not the subject of this proceeding). While marital discord could be a reasonable cause for abatement of penalties against him personally, it is not grounds with respect to the ongoing corporation's tax obligations, as set forth in . . . Administrative Law Judge Pinto's decision.

"Therefore, it is respectfully requested that the Administrative Law Judge's determination herein be sustained, and the exception denied" (Division's letter brief, pp. 1-2).
We affirm the determination of the Administrative Law Judge.

Under the Division's regulations, the applicable standard for determining reasonable cause in this case is the "ordinary person" standard, i.e.:

"[a]ny other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause" (20 NYCRR 46.1[d][4] [corporate franchise tax]; see also, 20 NYCRR 107.6 [income tax] and 20 NYCRR 536 [sales tax]).

The relevant inquiry in this case of a small, personally held corporation, with two corporate officers who were husband and wife, is whether the corporation's failure to ascertain that its income, corporate and sales tax obligations were not being met for a period of five years would appear "to a person of ordinary prudence and intelligence," as reasonable cause and not willful neglect for failure to comply with the Tax Law.

The good faith efforts of the president of the corporation to make amends after finally discovering the "problem" while laudable, are not relevant to the inquiry.

In our view, the Administrative Law Judge dealt fully and correctly with the issues in this case and we affirm his determination for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of T & T Excavating & Paving Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of T & T Excavating & Paving Corp. are denied; and

4. The Division of Taxation's denial of refund of corporation tax penalty, dated March 20, 1992, the six notices of deficiency dated January 14, 1991, the nineteen notices and demands dated February 11, 1991 and the one notice and demand dated September 5, 1991 are sustained.

DATED: Troy, New York
July 7, 1994

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

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