

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FOOD FIRST INCORPORATED : DETERMINATION
for Redetermination of Deficiencies or for Refund of New : DTA NO. 818250
York State and New York City Personal Income Taxes :
under Article 22 of the Tax Law and the New York :
City Administrative Code for the Period October :
10, 1996 to December 29, 1997. :

Petitioner, Food First Incorporated, 32 Court Street, Suite 201, Brooklyn, New York 11201, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the period October 10, 1996 to December 29, 1997.

A small claims hearing was held before Gary R. Palmer, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 31, 2002 at 9:15 A.M., with all briefs to be filed by August 16, 2002, which date began the three-month period for the issuance of this determination. Petitioner appeared by Heath Gurinsky, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Mac Wyszomirsky).

ISSUE

Whether reasonable cause exists to support the abatement of late filing and late payment penalties.

FINDINGS OF FACT

1. Food First Incorporated is a not-for-profit social services agency serving the needs of the poor, homeless and persons afflicted with AIDS/HIV within New York City.

2. On May 23, 1997 the Division of Taxation (“Division”) issued to petitioner a notice and demand (notice number L013542221) imposing late filing and late payment penalties pursuant to Tax Law § 685 (a)(1) and (2) in the total sum of \$930.72, plus interest in the sum of \$103.53, for the late filing of New York State employer’s returns of tax withheld, form WT-1, for the payrolls made by petitioner on October 7, October 21, November 4, November 18, December 2 and December 30, 1996, and the late payment of the tax reported therein.

3. On September 29, 1997 the Division issued to petitioner a notice and demand (notice number L014136457) imposing late filing and late payment penalties in the total sum of \$1,739.79, plus interest in the sum of \$257.84, for the late filing of New York State employer’s returns of tax withheld, form WT-1, for the payrolls made by petitioner on April 7, April 21, May 5, May 19, June 2, June 16 and June 30, 1997, and the late payment of the tax reported therein.

4. On November 17, 1997 the Division issued to petitioner a notice and demand (notice number L014418545) imposing late filing and late payment penalties in the total sum of \$1,040.49, plus interest in the sum of \$97.23, for the late filing of New York State employer’s returns of tax withheld, form WT-1, for the payrolls made by petitioner on July 28, August 11, August 25, September 8 and September 22, 1997, and the late payment of the tax reported therein.

5. On March 20, 1998 the Division issued to petitioner a notice and demand (notice number L014723178) imposing a withholding tax deficiency in the sum of \$2,664.61, with late filing and late payment penalties in the total sum of \$1,740.70, plus interest in the sum of \$268.47 for the late filing of New York State employer's returns of tax withheld, form WT-1, for the payrolls made by petitioner on October 6, November 3, November 17, December 1, December 15 and December 29, 1997 and the late payment of the tax reported therein. The \$2,664.61 withholding tax deficiency was paid by petitioner in or about October 1998.

6. A request for a conciliation conference was received by the Division's Bureau of Conciliation and Mediation Services ("BCMS") on December 21, 1998 relating to notice number L014723178. A second request for a conciliation conference, relating to the remaining three notices, was received by BCMS on July 2, 1999.

7. A conciliation order sustaining the four statutory notices was issued on March 24, 2000.

8. A petition was received by the Division of Tax Appeals on January 4, 2001. On February 8, 2001 the Division of Tax Appeals issued a notice of intent to dismiss petition, which notice was thereafter withdrawn and the matter was scheduled for a small claims hearing in the Division of Tax Appeals.

9. Petitioner, in its quarterly combined withholding and wage reporting return, form WT-4-A, for the third quarter of 1996, requested the refund of an overpayment of withholding tax made by it in the sum of \$2,664.61. The Division offset penalties and interest for the late filing of returns and late payment of withholding taxes during that quarter and issued a refund to petitioner in the sum of \$2,087.85.

10. The Division, in its letter brief, conceded that all four assessments are now fully paid.

SUMMARY OF THE PARTIES' POSITIONS

11. Petitioner maintains that it made an overpayment of withholding tax for the fourth quarter of 1996 in the sum of \$2,664.61 which formed the basis of its claim for a credit on one of its forms WT-4-A filed in 1997. Petitioner contends that following a delay, the Division issued a refund check to petitioner which petitioner immediately returned to the Division because petitioner had already setoff its overpayment as a credit on its WT-4-A. Under these circumstances, it is petitioner's position that the various assessments of penalty and interest for late filed returns and late paid withholding taxes are both excessive and unwarranted.

12. The Division maintains that petitioner initially claimed the overpayment as a credit on its WT-4-A for the third quarter of 1996, rather than the fourth quarter of 1996, and denies that its refund check was returned by petitioner. The Division contends that the late filing penalties and late payment penalties were properly assessed because of the late filed withholding tax returns and the late payment of the tax reported therein.

CONCLUSIONS OF LAW

A. 20 NYCRR 174.1(b)(1)(i), which interprets Tax Law § 674(a)(1) and (3), states in pertinent part as follows:

Where such (New York State) employer was required to remit a cumulative aggregate amount of less than \$15,000 in withholding tax during the calendar year which precedes the previous calendar year, the cumulative aggregate amount of tax shall be paid over on or before the fifth business day . . . following the date of making such payroll.

Clause (i) further states that New York State employers who were required to remit a cumulative aggregate amount equal to or more than \$15,000.00 in withholding tax during the calendar year

which precedes the previous calendar year must pay over that cumulative aggregate amount on or before the third business day following the date of the making of such payroll.

Clause (ii) (a) of 20 NYCRR 174.1(b)(1) defines the term “new employer” and paragraph (b)(1) of clause (ii) directs that new employers shall file their returns of tax withheld (form WT-1) and pay over the tax on or before the fifth business day following the date of the making of each payroll.

The point of this analysis is that New York State employers are divided into two main groups for withholding tax purposes, with one group being required to pay over their withholding tax on or before the fifth business day from the date of the payroll, and the other group being required to pay over their withholding tax on or before the third business day following the making of the payroll. Because the record does not reveal which group petitioner belonged to, it is assumed for purposes of this analysis, that petitioner was required to pay over its withholding tax within five business days of the making of each payroll.

B. I have examined petitioner’s forms WT-1, returns of tax withheld, that are part of the record and which correspond to the four statutory notices at issue. For the fourth quarter of 1996 (notice number L013542221), of the 16 forms WT-1 filed by petitioner for that quarter, only one return, that bearing payroll date November 15, 1996, was timely filed. No late filing penalty or late payment penalty was assessed for that payroll date. For the second quarter of 1997 (notice number L014136457), of the 19 forms WT-1 filed, none were timely. For the third quarter of 1997 (notice number L014418545), of the 15 returns filed, three were timely. These three returns were each dated July 14, 1997 as the payroll date. No penalty was imposed for any returns bearing that date. Finally, for the fourth quarter of 1997 (notice number L014723178)

only two of the 13 returns were timely filed. The payroll date for each of the two timely filed returns is October 20, 1997. No penalty was assessed for that payroll date.

C. Tax Law § 685(a)(1)(A) imposes a penalty of five percent of the reported tax due per month or part thereof, where the return is not filed on or before the prescribed date, not to exceed 25 percent in the aggregate. Tax Law § 685(a)(2) imposes an additional penalty of ½ of one percent of the tax reported due for each month or part thereof that the tax remains unpaid, not to exceed 25 percent in the aggregate. The statute directs that the penalties shall be added to the reported tax unless the failure to file and failure to pay by the prescribed date is due to reasonable cause and not due to wilful neglect. I have examined the amounts of penalty assessed in the four statutory notices and find that all penalties were imposed in compliance with Tax Law § 685 (a)(1) and (2). Petitioner has the burden of proving that it had reasonable cause for its failure to timely file its returns and to timely pay its tax (Tax Law § 689[e]; *McCauley v. State Tax Commission*, 67 AD2d 51, 415 NYS2d 118).

D. According to the petition, petitioner made a withholding tax payment in January of 1997 that included an overpayment in the sum of \$2,664.61. The Division, in its letter brief, states that petitioner requested a refund in the sum of \$2,664.61 in its 1996 third quarter form WT-4-A (quarterly combined withholding and wage reporting return) and that because the return was filed late and the tax reported was paid late, the Division offset the late filing penalty and the late payment penalty and refunded to petitioner the sum of \$2,087.85. Petitioner has offered no excuse or explanation for its persistent failure to timely file its returns and pay its withholding tax, and accordingly, petitioner has not met its burden to prove that its failure to timely file its returns and timely pay its withholding tax was due to reasonable cause.

E. The petition of Food First Incorporated is denied and the four notices and demands are, in all respects, sustained.

Dated: Troy, New York
October 3, 2002

/s/ Gary R. Palmer
PRESIDING OFFICER