STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
:
of
:
TALLARDY ELECTRIC, INC. : DECISION

for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Period May 1, 1980 through December 31, 1980. :

Petitioner, Tallardy Electric, Inc., P.O. Box 3326, Poughkeepsie, New York 12603, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period May 1, 1980 through December 31, 1980 (File No. 45573).

A formal hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on May 21, 1985 at 2:45 P.M., with all briefs to be submitted by September 16, 1985. Petitioner appeared by Lou Lewis, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner's untimely filing of its withholding tax returns and late payment of the withholding tax for the period at issue was due to reasonable cause and not willful neglect.

FINDINGS OF FACT

1. On December 3, 1981, the Audit Division issued to Tallardy Electric, Inc. (hereinafter "petitioner"), a Notice and Demand for Unpaid Withholding Tax Due for the year 1980 which asserted a balance of withholding tax in the amount

of $87,218.74, plus interest of $11,360.16 and penalties under sections 685(a)(1) and (2) of the Tax Law of $26,247.41, for a total amount due of $124,826.31.

2. Petitioner paid the total amount due, but subsequently filed a claim for refund of $26,086.30 which amount represents the penalties assessed under sections 685(a)(1) and (2) of the Tax Law for the period May 1, 1980 through December 31, 1980 for the late filing and payment of income tax withheld from its employees during this period. It is petitioner's position that during the period at issue, its failure to timely file and pay withholding taxes was due to reasonable cause and not willful neglect and that penalties should not, therefore, be assessed. This position is based upon petitioner's contention that he was forced to rely upon his employees' missrepresentations and that, due to his illness and frequent absence from work, he lacked the ability to verify the truth of the employee's statements.

3. Petitioner has a history of failing to file and pay withholding taxes within the prescribed time period, including the entire year of 1978 and ten out of twelve months in 1979.

4. C. Carl Tallardy, Jr. (hereinafter "Tallardy"), the president of petitioner, was its sole shareholder until July, 1980 when petitioner merged with Charles C. Tallardy, III, Inc. which became a wholly-owned subsidiary. As consideration for this merger, Tallardy's son, Charles C. Tallardy, III, became a 50 percent shareholder of petitioner. Tallardy was responsible for office administration while his son's duties were primarily in the field.

5. For a period of approximately five years, ending on June 30, 1981, petitioner's bookkeeper was entrusted by Tallardy with the responsibility of filing State withholding tax returns and paying the tax. Tallardy also delegated similar responsibilities to petitioner's

functions were performed without Tallardy's supervision; the bookkeeper was given an authorized stamp of Tallardy's signature to enable her to sign paychecks and legal documents without Tallardy's approval.

6. In the last quarter of 1979, Tallardy began to feel ill and, as a result thereof, he substantially reduced his workload. In 1980, Tallardy had difficulty breathing and suffered from angina attacks and dizzy spells. Tallardy was hospitalized several times during the period at issue and, in November of 1981, underwent a carotid arterectomy. Petitioner attributes its failure to file returns and pay withholding taxes during the period at issue to Tallardy's illness and incapacity.

7. While Tallardy was ill, he inquired about the filing of the withholding tax returns and payment of withholding taxes from the bookkeeper and the accountant, but he was not informed that returns had not been filed and taxes had not been paid. Because she was extremely concerned with Tallardy's health and did not want to cause him further stress which could cause a deterioration of his condition, the bookkeeper, whenever asked about the status of the withholding taxes by Tallardy, always told him that the returns had been filed and the taxes had been paid.

8. Because of Tallardy's illness and absence from work, petitioner suffered financial losses and severe cash flow difficulties with the result that petitioner's bookkeeper diverted withholding tax monies to other obligations of petitioner.

9. Petitioner denies responsibility for the conduct of its bookkeeper who was specifically instructed to keep Tallardy informed as to corporate activities but who, nevertheless, acted beyond her authority by failing to pay withholding

taxes as instructed and by failing to inform Tallardy that said taxes had not been paid when specifically asked by Tallardy.

CONCLUSIONS OF LAW

A. That section 685(a)(1) of the Tax Law imposes a penalty for failure to file a tax return on or before the prescribed date and section 685(a)(2) imposes a penalty for failure to pay the amounts shown as tax on any return required to be filed on or before the prescribed date "unless it is shown that such failure is due to reasonable cause and not due to willful neglect...".

B. That section 607(a) of the Tax Law provides as follows:

> "Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required. Any reference in this article to the laws of the United States shall mean the provisions of the internal revenue code of nineteen hundred fifty-four, and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes, as the same may be or become effective at any time or from time to time for the taxable year."

C. That section 7501(a) of the Internal Revenue Code provides as follows:

> "Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

D. That Treas. Reg. section 301.6651-1(c)(1) provides, in pertinent part, as follows:

> "A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship (as described in 1.6161-1(b) of this chapter) if he paid on the due date."

Treas. Reg. section 301.6651-1(c)(2) sets a higher standard for ordinary business care and prudence in the case of withholding taxes by providing as follows:

> "In determining if the taxpayer exercised ordinary business care and prudence in providing for the payment of his tax liability, consideration will be given to the nature of the tax which the taxpayer has failed to pay. Thus, for example, facts and circumstances which, because of the taxpayer's efforts to conserve assets in marketable form, may constitute reasonable cause for nonpayment of income taxes may not constitute reasonable cause for failure to pay over taxes described in section 7501 that are collected or withheld from any other person."

E. That petitioner failed to exercise ordinary business care and prudence in providing for the payment of its tax liability by entrusting its bookkeeper and accountant with the responsibility of filing returns and paying taxes, in light of their past delinquencies.

F. That the United States Supreme Court, in United States v. Boyle, 105 S. Ct. 687, 83 L. Ed.2d **622**, noted that administrative regulations and practices exempt late filings from the penalty when the tardiness results from postal delays, illness and other factors largely beyond the taxpayer's control. In the case at bar, however, petitioner's decision to entrust its bookkeeper and accountant with the responsibility for filing withholding tax returns and paying taxes was made prior to the period at issue and was not made as a result of Tallardy's illness.

G. That the petitioner incorrectly contends that the wrongful acts of unsupervised agents are not attributable to the corporation for the purpose of refuting the existence of reasonable cause for the late filing and payment of withholding taxes.

"The absence of reasonable cause for delay and the existence of wilful neglect on behalf of...an employee of plaintiff corporation, may be imputed to plaintiff corporation to establish its absence of reasonable cause and the existence of wilful neglect. Plaintiff corporation cannot avoid liability for assessed tax penalties by delegating the ministerial responsibility of complying with known federal employment tax obligations to an unsupervised employee." Obstetrical & Gynecological Group, P.A. v. U.S., *79-2* U.S.T.C. 119511.

H. That the petition of Tallardy Electric, Inc. is denied.

DATED: Albany, New York

JAN 28 1986

STATE TAX COMMISSION

Roderick G. W. Chu

PRESIDENT

Francis R. Koenig

COMMISSIONER

COMMISSIONER