

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
DWORKIN CONSTRUCTION CO., INC. DETERMINATION
for Redetermination of Deficiency or for Refund
of Personal Income Taxes under Article 22 of
the Tax Law for the Years 1978 through 1981.

Petitioner, Dworkin Construction Co., Inc., 100 Dutch Hill Road, Orangeburg, New York 10962, filed a petition for redetermination of deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the years 1978 through 1981 (File No. 49941).

A hearing was commenced at the offices of the State Tax Commission, Two World Trade Center, New York, New York on November 20, 1985 at 1:15 P.M. and was continued to conclusion on May 7, 1987 at 1:30 P.M. Petitioner appeared by Lawrence Dworkin. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq. of counsel).

ISSUES

I. Whether petitioner has established that it had reasonable cause for its failure to timely file withholding tax returns and pay over taxes due, entitling it to an abatement of penalties.

II. Whether a summary decision should be issued in petitioner's favor on the ground that the Law Bureau failed to serve an answer to the perfected petition within sixty days.

FINDINGS OF FACT

1. By letter dated July 15, 1983, petitioner, Dworkin Construction Co., Inc. ("Dworkin"), requested an abatement of the penalties imposed by the Audit

Division under sections 685(a)(1) and 685(a)(2) of the Tax Law for late filing of returns and late payment of withholding taxes for the years 1978 through 1981. The total amount of the disputed penalties was \$7,805.25. In that letter, five business transactions were described, each of which had resulted in severe financial losses to Dworkin. These financial losses were asserted to constitute reasonable cause for Dworkin's failure to comply with the Tax Law.

2. The Audit Division denied Dworkin's request for abatement of penalties by letter dated August 2, 1983. The denial stated, in part, "financial difficulties of an employer may not be accepted as reasonable cause for the cancellation of assessed penalty."

3. Dworkin conceded that it used State and Federal withholding taxes for its own corporate purposes. Dworkin's president testified as follows: "So, did we use fiduciary funds in order to pay labor and pay subcontractors? The answer is unequivocally yes - we did." Dworkin took the position that its decision to use State funds in this manner was necessary to maintain financial solvency and was reasonable and prudent under the circumstances. Dworkin believed that its own economic necessity constituted reasonable cause for its failure to pay over withholding taxes due to the State.

4. Dworkin's financial statements, prepared by an independent firm of certified public accountants, established that Dworkin was in poor financial condition during the period at issue. Its balance sheet shows that as of September 30, 1980, Dworkin had a total deficit of \$195,548.00.

5. The Internal Revenue Service abated penalties asserted against Dworkin for its failure to pay over Federal withholding taxes for the period March 31, 1978 through December 31, 1981. In a letter prepared at Dworkin's request, a

revenue officer stated that the "penalties were abated for 'reasonable cause' due to the economic distress of the taxpayer."

6. Dworkin's perfected petition was received by the Tax Appeals Bureau on April 1, 1985. The answer of the Law Bureau is dated June 4, 1985. At hearing, Dworkin moved to dismiss the answer of the Audit Division on the ground that it was late filed and also moved for a summary decision in favor of the petitioner.

CONCLUSIONS OF LAW

A. That every employer maintaining an office or transacting business in New York State and making payments of wages taxable under Article 22 of the Tax Law is required to deduct and withhold from such wages a tax to be computed as prescribed by statute (Tax Law § 671). Every employer required to deduct and withhold tax is made liable for that tax by section 675 of the Tax Law. Taxes actually deducted and withheld under Article 22 are held to be a special fund in trust for the Tax Commission (Tax Law § 675).

B. That Tax Law § 685(a)(1) imposes an addition to tax for failure to file a return and Tax Law § 685(a)(2) imposes an addition to tax for failure to pay the amounts shown as tax on any return required to be filed. The penalties imposed under these provisions of the statute are mandatory, unless it is shown that the failure to comply with the Tax Law was due to reasonable cause and not to willful neglect.

C. That Tax Law § 685(a) is modeled after section 6651 of the Internal Revenue Code and therefore Federal law may be looked to for guidance and interpretation (Yellin v. New York State Tax Commn., 81 AD2d 196). Treasury Regulation § 301.6651-1(c)(1) provides that a failure to pay will be considered to be due to reasonable cause if 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...if he paid on the due date." In making the determination, consideration will be given to all the facts and circumstances of the taxpayer's financial situation.

D. That while Federal law is relevant to this inquiry, the decision of the Internal Revenue Service ("IRS") to abate penalties asserted against petitioner under Federal law is not, in itself, determinative of the issues raised under New York State Tax Law. The record does not establish what facts, documents or other information was considered by the IRS in arriving at its decision. Furthermore, the statement supplied by the IRS revenue officer does not show that petitioner exercised ordinary business care and prudence in providing for the payment of his New York State tax liability.

E. That petitioner has failed to carry its burden of proof under Tax Law § 689(e) to show that its failure to comply with the Tax Law was due to reasonable cause and not to willful neglect. A taxpayer is considered to have exercised ordinary business care and prudence if he made reasonable efforts to conserve sufficient assets, in marketable form, to satisfy his tax liability but was unable to pay all or part of the tax when it became due (Treas. Reg. § 301-6651-1(c)(1)). Withholding taxes require the exercise of a greater degree of care and prudence than other taxes. What constitutes reasonable cause for nonpayment of a taxpayer's own income taxes may not constitute reasonable cause for failure to pay over withholding taxes (Treas. Reg. § 301.6651-1(c)(2); cf. Levin v. Gallman, 42 NY2d 32). Petitioner admitted it failed to pay over withholding taxes to the State and that it used such monies for other corporate purposes. Such behavior demonstrates a willful misuse of funds belonging to the State. Mere insufficiency of funds does not demonstrate

-5-

reasonable cause, and petitioner did not present sufficient evidence to show that it exercised ordinary business care and prudence in providing for the payment of its tax liability.

F. That 20 NYCRR 601.6(a)(4), in effect during the periods in question, provided as follows:

"Where the Law Bureau fails to answer within the prescribed time, petitioner may make a motion to the Commission... for a determination on default. Commission shall either grant that motion and issue a default decision or shall determine such other appropriate relief as it deems is warranted."

Inasmuch as petitioner has not shown that it was prejudiced in any way by the Law Bureau's failure to answer within 60 days, its motion to dismiss the answer and its motion for a summary decision in its favor is denied.

G. That the petition of Dworkin Construction Co., Inc. is denied, and the penalties asserted under section 685(a)(1) and section 685(a)(2) of the Tax Law are sustained.

DATED: ALBANY, New York

SEP 03 1987


ADMINISTRATIVE LAW JUDGE