

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

LA STRADA GENERAL CONTRACTING CORP.

DECISION

for Redetermination of a Deficiency or for
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law and New York
City Personal Income Tax under Chapter 46,
Title T of the Administrative Code of the City :
of New York for the Years 1979 and 1980.

Petitioner, La Strada General Contracting Corp., 29-44 120th Street,

College Point, New York 11354, filed a petition for redetermination of a
deficiency or for refund of New York State personal income tax under Article 22
of the Tax Law and the New York City personal income tax under Chapter 46,
Title T of the Administrative Code of the City of New York for the years 1979
and 1980 (File No. 54249).

A hearing was held before James Hoefer, Hearing Officer, at the offices of
the State Tax Commission, Two World Trade Center, New York, New York on March 6,
1986 at 11:15 A.M., with **all** briefs to be submitted by June 15, 1986. Petitioner
appeared by Marvin Arnold Pollack. The Audit Division appeared by John P. Dugan,
Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether penalties asserted against petitioner for failure to timely file
withholding tax returns and failure to timely pay the taxes due thereon should
be abated.

FINDINGS OF FACT

1. La Strada General Contracting Corp. (hereinafter "petitioner") late filed several New York State and City withholding tax returns during the years 1979 and 1980. The withholding taxes due thereon were delinquentlly paid. Accordingly, penalties were asserted against petitioner for such late filing and delinquent payment of the withholding taxes. Said penalties of \$13,716.07 for 1979 and \$1,003.18 for 1980 were subsequently paid by petitioner.

2. On July 6, 1984, petitioner filed a form IT-113-X for each year at issue whereon it claimed a refund of the aforesaid penalties paid. Its grounds for claiming such refunds were that:

(a) the Internal Revenue Service abated half the penalties it similarly asserted against petitioner for 1979; and

(b) reasonable cause for petitioner's failure to timely file and pay the withholding taxes had been shown.

3. On July 30, 1984, the Audit Division issued a formal notice of disallowance wherein petitioner's claims for refund were disallowed in full.

4. The withholding taxes were not timely paid due to serious financial difficulties petitioner experienced during the years at issue. Such financial difficulties, which petitioner alleges constitute reasonable cause, were detailed in a letter dated October 7, 1981 from one Ronnie D. Wax, La Strada's attorney, wherein it was explained that:

"During said period (1979 and 1980), my client's funds were so low and limited that many suppliers and vendors refused to supply my client without receiving payment in advance.

Additionally, my client was having trouble making payments to its sub-contractors on projects which resulted in lawsuits and/or required installment payments during said period.

In order to stay in business, my client made the necessary payments to its suppliers, vendors and sub-contractors, leaving it unable to make the requisite tax payments."

CONCLUSIONS OF LAW

A. That section 685(a)(1) and (2) of the Tax Law, as in effect during the years at issue, provided as follows:

"Additions to tax and civil penalties

(a)(1) Failure to file tax return. - In case of failure to file a tax return under this article on or before the prescribed date (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate. For this purpose, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return.

(2) Failure to pay tax shown on return. - In case of failure to pay the amounts shown as tax on any return required to be filed under this article on or before the prescribed date (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return one-half of one percent of the amount of such tax if the failure is not for more than one month, with an additional one half of one per cent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five per cent in the aggregate. For the purpose of computing the addition for any month, the amount of tax shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the beginning of such month and by the amount of any credit against the tax which may be claimed upon the return. If the amount of tax required to be shown on a return is less than the amount shown as tax on such return, this paragraph shall be applied by substituting such lower amount." (Emphasis supplied.)

B. That section 675 of the Tax Law provides, in pertinent part, that:

"Any amount of tax actually deducted and withheld under this article shall be held to be a special fund in trust for the tax commission."

C. That sections T46-175.0, T46-185.0(a)(1) and T46-185.0(a)(2) of the Administrative Code of the City of New York are essentially identical to sections 675, 685(a)(1) and 685(a)(2) of the Tax Law, respectively.


D. That petitioner's reasons for late filing and payment of the New York State and City withholding taxes do not constitute reasonable cause. Accordingly, the penalties asserted are sustained.

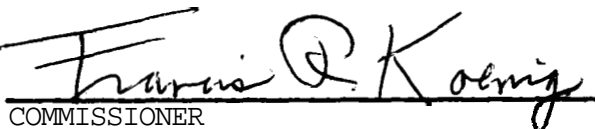
E. That the petition of La Strada General Contracting Corp. is denied, and the formal notice of disallowance issued July 30, 1984 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 14 1986


PRESIDENT


COMMISSIONER


COMMISSIONER