

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Fieldston Lodge Nursing Home :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1974 - 1977. :
_____ :

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of December, 1983, he served the within notice of Decision by certified mail upon Scott B. Lunin, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Scott B. Lunin
39 Broadway, Suite 2201
New York, NY 10066

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
20th day of December, 1983.

Daniel Parchuck

William O. Hagedorn Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

December 20, 1983

Fieldston Lodge Nursing Home
666 Kappock St.
Bronx, NY 10463

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Scott B. Lunin
39 Broadway, Suite 2201
New York, NY 10066
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
FIELDSTON LODGE NURSING HOME	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1974 through 1977.	:	

Petitioner, Fieldston Lodge Nursing Home, 666 Kappock Street, Bronx, New York 10463, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1974 through 1977 (File No. 30635).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 22, 1983 at 9:30 A.M. Petitioner appeared by Marvin L. Tenzer, P.C. (Scott B. Lunin, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether petitioner's late filing and delinquent payment of withholding taxes under section 674(a) of the Tax Law was due to reasonable cause and not willful neglect and therefore not subject to penalties under section 685 of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Fieldston Lodge Nursing Home, had been assessed \$102,168.46, plus penalty and interest of \$31,594.78 for withholding taxes due for the years 1974 through 1977. On April 26, 1979, the Audit Division issued 36 Payment Documents to petitioner indicating a total balance due of \$24,073.52 on said

assessments. On December 27, 1979, after payment of all of the aforesaid taxes, penalty and interest, petitioner filed an application for refund of the penalty and interest paid in the amount of \$31,594.78. The Audit Division denied said refund claim in full by letter dated March 31, 1980 and petitioner requested a hearing.

2. At a pre-hearing conference held on March 26, 1981, petitioner and a representative of the Audit Division agreed to a refund of the penalties in the amount of \$20,341.86 and petitioner, by one of its partners, executed a Withdrawal of Petition and Discontinuance of Case. On March 8, 1982, petitioner was advised by the Department of Taxation and Finance that the Department of Audit and Control had rejected the refund recommended at the pre-hearing conference. Therefore, on July 9, 1982, petitioner filed a new petition claiming a refund of the penalties imposed for the years 1974 through 1977 in the amount of \$21,044.60. However, no evidence was submitted to substantiate the increase in the refund of \$702.74 and petitioner did not object when the Audit Division stated the amount at issue was \$20,341.86.

3. Petitioner is a partnership which operates a 200 bed, licensed residential health care facility located in the Bronx, New York. The facility provides services to elderly people who require 24 hour nursing care. The nursing home requires a nursing staff consisting of registered nurses, licensed practical nurses, and nurse's aides, as well as a dietary staff, kitchen staff, and housekeeping and maintenance staff. During the period in issue, all 200 beds at the nursing home were utilized at all times.

4. From 1974 through 1979, petitioner operated continuously at deficits ranging from \$290,000.00 to over \$1,000,000.00. The prime cause of this operating deficit was late payment of Medicaid funds by New York City. Ninety

percent of petitioner's income during the years in issue was derived from the Medicaid program. New York State operated the program and New York City paid the funds. Up to 1973, the flow of Medicaid funds had been uninterrupted. However, starting in 1974, New York City was constantly delinquent in its Medicaid payments. The amounts owed petitioner during the years in issue ranged from \$200,000.00 to \$400,000.00 at the end of each year.

5. The Medicaid payment situation created cash flow problems for petitioner to the extent that it was six months behind in its rental payments, could not contribute to its employees' pension plan, and was threatened with service cutoffs by the telephone and utility companies. Petitioner's landlord began an eviction proceeding against petitioner in the Bronx County Housing Court to collect \$193,348.24 due and owing for rent. The court ordered that \$126,000.00 in Medicaid payments owed petitioner by New York City were to be paid directly to the landlord. The employee's union took action in the Supreme Court to force petitioner to contribute to the pension plan. The court issued a judgment in favor of the union by which liens were placed on petitioner's bank accounts, as well as on the individual partners' accounts. The liens resulted in petitioner's inability to pay its employees which resulted in a strike and petitioner was forced to confess to a judgment payable over a 24 month period.

6. As a result of the court-ordered restrictions on its income, petitioner was forced to make choices as to which creditors received payments. The first priority went to food and fuel in order to ensure that the 200 elderly patients were fed and kept warm. According to Emanuel Birnbaum, one of petitioner's partners, "it would have been catastrophic" to pay the taxes due prior to paying the food suppliers and utilities. "The rubberband was stretched to the

limit" and it would have been "impossible to stay open if [petitioner] didn't pay [its creditors] at that point."

7. Petitioner was unable to pay its Federal withholding taxes during the period in issue and wrote letters periodically to the Internal Revenue Service explaining its situation and requesting a waiver of penalty for its late filing and payment of withholding taxes. The Internal Revenue Service found petitioner's reasons for late payment acceptable and waived all penalties for the years in issue.

8. Mr. Birnbaum attempted to obtain some relief from the Medicaid situation by writing to the New York State Department of Health. In a letter to the New York State Department of Social Services dated April 4, 1977, the Assistant Commissioner for Health Care Financing Operations advised that petitioner's financial stability was jeopardized by delinquent payments from the New York City Department of Social Services and requested that Social Services review the situation and take appropriate action. Petitioner eventually received all outstanding Medicaid payments from New York City in 1979. At that time, petitioner was able to pay all of its outstanding New York State taxes, interest and penalties. Since 1979, petitioner has been timely in all its payments of withholding taxes to New York State.

CONCLUSIONS OF LAW

A. That section 674(a) of the Tax Law provides that every employer required to deduct and withhold tax under Article 22 shall file a withholding return and pay over to the Tax Commission the taxes so required to be deducted and withheld. Section 685(f) provides that if any employer, without intent to evade or defeat any tax imposed by Article 22 or the payment thereof, fails to file a return and pay tax as required by section 674(a), such employer will be

liable for the tax plus interest and penalty as provided in section 685(a). Under section 685(a), a penalty is added for failure to file a return or pay tax unless it is shown that such failure is due to reasonable cause, not willful neglect.

B. That section 685(a) of the Tax Law is modeled after section 6651 of the Internal Revenue Code and therefore Federal law may be looked to for guidance and interpretation (see Yellin v. New York State Tax Commission, 81 A.D.2d 196).

C. That 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 the payment of his tax liability but 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 including the amount and nature of the taxpayer's expenditures in light of the income (or other amounts) he could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax. An undue hardship means that the taxpayer will suffer a substantial financial loss if he pays the taxes on the due date (Treas. Reg. §1.6161-1[b]). Consideration is also given to the nature of the tax which the taxpayer has failed to pay. Thus, reasonable cause for failure to file a return and pay income tax may not necessarily constitute reasonable cause for failure to pay over withholding tax (Treas. Reg. §301.6651-1[c][2]).

D. That petitioner had reasonable cause for failure to file a return and pay over withholding taxes during the period in issue. With 90 percent of its

income derived from New York City Medicaid payments, petitioner's entire financial structure was virtually dependent upon uninterrupted receipt of said payments. The payments had been timely in the past and petitioner could not have foreseen that such payments would be disrupted in the future. Even such payments as were received from New York City became subject to substantial court-ordered payments and liens to other creditors. Left with the choice of payment of taxes and shutting down the facility because the elderly patients could not be fed or kept warm or paying the utilities and food suppliers, petitioner clearly faced an undue hardship within the meaning and intent of Treasury Regulation §1.6161-1(b). Considering all the facts and circumstances, petitioner exercised ordinary business care and prudence in providing for its tax liability and was nonetheless unable to pay on time without incurring a severe financial hardship. Petitioner thus had reasonable cause for its failure to timely file a return or pay over withholding taxes within the meaning and intent of section 685(a) of the Tax Law and Treasury Regulation §301.6651-1(c) (see Glenwal-Schmidt v. United States, 78-2 USTC ¶9610 [D.D.C] [failure of petitioner to pay over Federal withholding taxes as a result of the Navy Department withholding almost a million dollars in contract payments was due to reasonable cause]).

E. That the petition of Fieldston Lodge Nursing Home is granted to the extent that the Audit Division is directed to authorize a refund of \$20,341.86, together with such interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 20 1983

Richard A. Clem
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Diella
COMMISSIONER