

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JEROME FARKAS	:	DECISION
	:	DTA NOS.
	:	801546/ 802968
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and Chapter 46, Title T of the	:	
Administrative Code of the City of New York for	:	
the Years 1977 through 1981.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on December 17, 1987 with respect to the petition of Jerome Farkas, 9 Behnke Court, Rockville Centre, New York 11570, for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1977 through 1981 (File Nos. 801546 and 802968). Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioner did not file a brief. The Division filed a letter brief in opposition to the exception.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether it was proper for the Division of Taxation to apply payments to interest and penalty accruing subsequent to the issuance of a Notice and Demand.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. These facts may be summarized as follows.

On July 30, 1984 the Division of Taxation issued a Notice of Deficiency to petitioner in the amount of \$662.55 for unpaid withholding taxes due from the corporation for the period June 1, 1981 through June 30, 1981. On November 25, 1985 the Division issued a Notice of Deficiency to petitioner in the amount of \$6,501.95 for unpaid withholding taxes due from the corporation. Said deficiency represented a total for various withholding tax periods, i.e.:

<u>Withholding Tax Period</u>	<u>Amount</u>
1/1/77-12/31/77	\$2,044.31
3/1/79-3/31/79	460.15
6/1/79-6/30/79	466.85
12/1/79-12/31/79	814.70
3/16/80-3/31/80	653.95
6/16/80-6/30/80	565.60
9/16/80-9/30/80	567.20
12/16/80-12/31/80	<u>929.19</u>
Total	\$6,501.95

The returns on which the deficiencies were based were all "no remittance" returns, i.e., the returns showed tax due but were not accompanied by payment. The return for the period January 1, 1977 through December 31, 1977 was a dummy return prepared by the Division.

Petitioner made several payments to the Division and the Division executed levies on one of the corporation's bank accounts. The payments by petitioner did not specify what they were to be applied to. The Division applied the payments against outstanding corporation tax, withholding tax, penalty and interest included in a Notice and Demand and penalty and interest accruing subsequent to a Notice and Demand. The allocation between penalty and interest included in a Notice and Demand and penalty and interest accruing subsequent to a Notice and Demand was as follows:

<u>Period</u>	<u>Penalty and Interest Included in a Notice and Demand</u>	<u>Penalty and Interest Subsequent to a Notice and Demand</u>
12/1/77-12/31/77	\$17.87	\$ 635.95
9/1/78-9/30/78	36.64	460.12
12/1/78-12/31/78	<u>18.00</u>	<u>722.68</u>
Total	\$70.51	\$1,818.75

Petitioner disputes the allocation of the payments to the penalty and interest accruing subsequent to a Notice and Demand in the amount of \$1,818.75.

OPINION

The Administrative Law Judge determined that petitioner was entitled to credit against withholding tax in an amount equal to that for which certain payments were applied by the Division to interest and penalty accruing subsequent to the issuance of the notice and demands. The taxpayer had not specified how these payments were to be applied. In concluding that the Division could not allocate such payments to additions to tax in the absence of their statement on a Notice and Demand, the Administrative Law Judge stated that pursuant to Tax Law section 685(l) "the debt of a corporation for interest and penalties is payable only upon 'notice and demand'."

On exception the Division contends that interest and penalty accruing following the issuance of a Notice and Demand for tax, plus interest and penalty to that tax, is not unassessed penalty and interest falling within the scope of Tax Law section 685(l).

We reverse the determination of the Administrative Law Judge.

As support for his conclusion, the Administrative Law Judge relied on the decision in First National Bank in Palm Beach v. United States (591 F2d 1143 [5th Cir 1979]); however, the facts of First National are different in an important respect than those in the instant proceeding. In First National, no assessment of any kind for tax, interest or penalty had been issued to the taxpayer at the time the payments were applied. In the instant case assessments had been made, by means of the issuance of notice and demands, for tax, penalty and interest.

In the case at hand the issuance of a Notice and Demand for the interest and penalty accruing during subsequent periods would serve only an insignificant purpose at best. Since each assessment issued already stated penalty and interest due up to the date of assessment, issuance of a Notice and Demand for the later accruals would impose a redundant process that would be of limited use to the taxpayer and would place a pointless administrative burden on the Division (see, United States v. Krasnow, 548 F Supp 686, 687, interpreting analogous Federal section 26 USC { 6662}). We adopt the Federal rule that timely assessments alone are a sufficient basis for the additions to be collected, which accrue as a matter of course (United States v. Krasnow, supra, at 689 footnote 7, citing

United States v. Edward Zolla, CV 79-4309 [MRP] [C.D. Cal., filed September 10, 1980]). Nothing other than a mere computational update would be served by requiring the Division to issue a Notice and Demand separately for interest and penalty accruing when both have been previously encompassed in an assessment.¹

Since interest and penalty may be properly collectible upon inclusion in an assessment, the interest and penalty accruing subsequent to an assessment is a debt that is due and owing. In the instant case, since a portion of interest and penalty had been included in the assessments for each of the periods at issue, the interest and penalty following each assessment became a payable debt as it accrued. Since each of the assessments preceded the unallocated payment at issue, it follows that the interest and penalty accruing on the assessments was a payable debt prior to the receipt of the unallocated payment.

Thus, we conclude that the Division's allocation of a portion of the unspecified payments to interest and penalty accruing on an assessed tax was proper. This is so because it is well settled that a creditor, the Division in this instance, may allocate a payment among debts owing if the debtor has not indicated his intention (First National Bank in Palm Beach v. United States, *supra*, at 1147).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. Conclusions of law "E" and "F" of the determination of the Administrative Law Judge are reversed; and

¹While a Notice and Demand for additions would serve no purpose here, there are circumstances in which it has some utility. For example, when a taxpayer files late but remits the correct amount with his late return and all that remains is interest and penalty for the late filing, the issuance of a Notice and Demand for the additions to tax would be the manner in which to begin collection proceedings for the additions (United States v. Krasnow, *supra*, at 689).

3. The petition of Jerome Farkas is denied and the notices of deficiency issued on July 30, 1984 and November 25, 1985 are sustained.

Dated: Albany, New York
October 14, 1988

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner