

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

DWORKIN CONSTRUCTION CO., INC.

for Redetermination of a Deficiency or for
Refund of Personal Income Taxes under
Article 22 of the Tax Law for the Years
1978 through 1981.

DECISION
DTA NO. 804799

Petitioner, Dworkin Construction Co., Inc., 100 Dutch Hill Road, Orangeburg, New York 10962, filed an exception to the determination of the Administrative Law Judge issued on September 3, 1987 with respect to its petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the years 1978 through 1981 (File No. 804799). Petitioner appeared by Michael Zimmerman, Esq. and at the oral argument by its President, Lawrence Dworkin. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq. of counsel).

Petitioner filed a brief on exception. The Division filed a letter in opposition to the exception. Oral argument was heard on March 8, 1988 at the request of the petitioner.

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

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

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

By letter dated July 15, 1983, petitioner requested an abatement of the penalties imposed by the Division of Taxation pursuant to Tax Law sections 685(a)(1) and 685(a)(2) for late filing of returns and late payment of withholding taxes for the years 1978 through 1981. The total amount of disputed penalties was \$7,805.25. The letter described five business transactions, each resulting in severe financial losses to petitioner. The losses were asserted to constitute reasonable cause for failure to comply with the Tax Law.

The Division of Taxation denied petitioner'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."

Petitioner conceded it used State and Federal withholding taxes for its own corporate purposes. Specifically, petitioner's president testified, at page 103 of the record, that, "So, did we use fiduciary funds in order to pay labor and pay subcontractors? The answer is unequivocally yes - we did." Petitioner contended that its use of withheld taxes was necessary to maintain financial solvency and was reasonable and prudent under the circumstances. Petitioner believed its own economic necessity constituted reasonable cause for its failure to pay over withholding taxes due to the State.

Petitioner's financial statements, independently prepared by certified public accountants, established that it was in poor financial condition during the period at issue. Its balance sheet showed a total deficit of \$195,548.00 as of September 30, 1980.

The Internal Revenue Service abated penalties asserted against petitioner for failure to pay over Federal withholding taxes for the period March 31, 1978 through December 31, 1981. In a

letter prepared at petitioner's request, a revenue officer stated that the "penalties were abated for 'reasonable cause' due to the economic distress of the taxpayer."

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

OPINION

Tax Law section 671 requires New York State employers to deduct and withhold a certain amount of personal income tax from wages. Liability for the tax is imposed on the employer pursuant to Tax Law section 675. Additionally, penalties are imposed for failure to file a return and for failure to pay tax shown on a return (Tax Law section 685[a][1] and [2]). If the failure to file or pay is due to reasonable cause and not due to willful neglect, the penalty may be abated (Tax Law section 685[a][1] and [2]).

First, although the abatement of penalty for late payment of Federal tax by the Internal Revenue Service is relevant to the instant inquiry, such decision is not determinative of whether there was reasonable cause for the late payment and filing of New York State withholding taxes and returns.

Petitioner contends that its poor financial condition constituted reasonable cause for its failure to report withholding taxes when due. We disagree and find instead that petitioner's knowing and voluntary payment of other creditors in lieu of payment of tax to the State was conduct that constituted willful neglect to pay tax and, thus, the penalty for late payment may not be waived.

"Willful" has been defined, in the context of the Tax Law section 685(g) penalty for willful failure to collect or pay over withholding taxes, to mean that "the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the government will not be paid over but will be used for other purposes" (Levin v. Gallman, 42 NY2d 32, 34). Petitioner's conduct, the deliberate payment of other creditors with the State's trust funds, is

encompassed within this definition of "willful". Accordingly, such conduct must constitute willful neglect as used in Tax Law section 685(a)(2).

Mere economic difficulties are not an excuse for the failure to pay taxes (see, Wolfe v. United States, 612 F Supp 605; Robinson's Dairy, Inc. v. Commr., 35 TC 601, affd 302 F2d 42). To allow the payment of taxes to be postponed on account of financial difficulties would seriously impede the ability of the State to raise revenue through taxes. Accordingly, we affirm the Administrative Law Judge's imposition of the penalty for failure to pay over withholding taxes pursuant to Tax Law section 685(a)(2).

Petitioner also urges that its financial plight constituted reasonable cause to abate the penalty for failure to timely file withholding tax returns pursuant to Tax Law section 685(a)(1). We disagree. Financial difficulties do not affect the ability of a taxpayer to file a return on time (see, Jones v. Commr., 25 TC 1100, revd on other grounds 259 F2d 300). Therefore, we affirm the Administrative Law Judge's imposition of the penalty for failure to file withholding tax returns on time pursuant to Tax Law section 685(a)(1).

Finally, petitioner contends that the Law Bureau's failure to file an answer within 60 days should result in a dismissal of the late answer as well as summary determination in petitioner's favor pursuant to 20 NYCRR 606.6(a)(4). This section, in effect during the periods in question, provided that:

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 warranted.

Petitioner has not shown that it was prejudiced by the Law Bureau's failure to answer within 60 days and certainly the few days delay involved does not in itself indicate prejudice to the petitioner (cf., Heller v. Chu, 111 AD2d 1007, 1008, a delay of 12 years in itself indicated substantial prejudice). Therefore, we find that petitioner's motion to dismiss the answer and its

motion for a summary determination in its favor were properly denied by the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Dworkin Construction Co., Inc., is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Dworkin Construction Co., Inc. is in all respects denied and the penalties

asserted under section 685(a)(1) and 685(a)(2) of the Tax Law are sustained.

DATED: Albany, New York
August 4, 1988

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner