

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROSS-VIKING MERCHANDISE CORP.	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	
Corporation Franchise Tax under Article 9-A of the	:	
Tax Law for the Year 1985	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on October 25, 1990 with respect to the petition of Ross-Viking Merchandise Corp., 25 Hubb Drive, Melville, New York 11747 for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the year 1985 (File No. 807003). Petitioner appeared by Frederic N. Bruckner, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. Although the Division of Taxation's request for oral argument was granted, the case was submitted to the Tax Appeals Tribunal without oral argument being held.

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

ISSUE

Whether petitioner established reasonable cause and the absence of willful neglect for its failure to timely file its corporation franchise tax returns and timely pay corporation franchise tax owed so that penalties for its late filing and late payment may be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "3(b)" and "4" which have been modified. We also have made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

Petitioner Ross-Viking Merchandise Corp. of Melville, New York was a distributor of batteries and bulbs to supermarkets. For tax purposes it had a fiscal year ending September 30.

As of December 31, 1984, petitioner's stock was acquired by Supermarket Services, Inc. ("SMS") of Linden, New Jersey. SMS was a distributor of non-food items, including health and beauty aids, primarily to supermarkets. The fiscal year of SMS ended March 31. The books of petitioner were transferred over to SMS.

On November 22, 1985, SMS entered into a Chapter 11 bankruptcy proceeding. A disclosure statement by SMS (the "debtor") in the bankruptcy proceedings stated as follows:

"The Debtor's financial difficulties which led to the commencement of the Case on November 22, 1985 were caused by a combination of factors which reduced its working capital and caused it to sustain substantial losses. For the fiscal year ended March 31, 1985, the Debtor sustained an estimated loss of approximately \$17,400,000 (unaudited). Some of the causes for this loss remain unexplained. However, the Debtor's current information suggests that this loss can be attributed to (i) significant inaccuracies in the Debtor's inventory levels and the records maintained in respect thereto and (ii) inadequate accounting procedures, inventory controls, overhead checks and security measures."

We modify finding of fact "3(b)" to read as follows:

In 1985, the auditors of SMS, Touche-Ross, refused to issue an audit report or to prepare tax returns. When asked at hearing why Touche-Ross refused to issue an audit report or to prepare tax returns, Mr. Sidney M. Alekman, petitioner's chief financial officer, testified that:

"They [Touche-Ross] felt that they could not as professionals prepare the tax returns when they had such significant problems with the company's [SMS's] books and

records that they uncovered during the course of the audit."¹

We modify finding of fact "4" to read as follows:

Petitioner filed Federal and State income tax returns for the short period October 1, 1984 through December 31, 1984. Petitioner's income for the period January 1, 1985 through March 31, 1985 was included in a timely filed Federal consolidated tax return of SMS for the fiscal year ending March 31, 1985. Petitioner's income was also included in an incorrectly filed New York State combined return filed by SMS for the same period. These returns were filed by an accountant from Account-Temps, a temporary accounting agency, hired temporarily by SMS.²

The combined report for the period January 1, 1985 through March 31, 1985 was rejected by the Division of Taxation on the ground that the corporations were not similar enough to each other.

Petitioner filed a return for the three-month period ending March 31, 1985 on June 30, 1987. The return reported Federal taxable income for the period of \$2,902,489.00 and computed New York business income before allocation of \$2,916,926.00. Allocated net income was \$1,475,498.00 and net tax due was \$147,550.00. Petitioner claimed a credit of \$141,338.00 and showed a tax due of \$6,212.00. A return was also filed for the Metropolitan Transportation

¹The Administrative Law Judge's finding of fact "3(b)" read as follows:

"(b) In 1985 the auditors of SMS, Touche-Ross, refused to issue an audit report or to prepare tax returns because of the turmoil in the accounting practices of SMS."

We modify this finding of fact to reflect the record in more detail.

²The Administrative Law Judge's finding of fact "4" read as follows:

"Petitioner filed Federal and State income tax returns for the short period October 1, 1984 through December 31, 1984. Petitioner's income for the period January 1, 1985 through March 31, 1985 was included in a timely filed Federal consolidated tax return of SMS for the fiscal year ending March 31, 1985. It was also included in a timely filed combined New York State return filed by SMS for the same period. These returns had to be filed by a certified public accountant hired temporarily by SMS."

We modify this finding of fact to more accurately reflect the record.

Business Tax Surcharge showing a surcharge due of \$25,084.00 and, after a credit of \$24,028.00, a balance due of \$1,056.00.

A Notice of Deficiency for the three-month period ending March 31, 1985 was issued on January 13, 1988 for corporation franchise tax imposed by Tax Law § 209, for penalties under Tax Law § 1085(a)(1) and (2) of \$41,678.75, plus interest of \$17,960.88, for a total due of \$59,639.63. The interest was \$17,360.86 on tax due before a claimed net operating loss carryback and \$600.12 because of late payment.

An additional notice was issued on the same day for the Metropolitan Transportation Business Tax Surcharge imposed by Tax Law § 209-B, for penalties under Tax Law § 1085(a)(1) and (2) in the amount of \$5,953.26 and interest of \$832.91, for a total due of \$6,786.17. The interest was \$730.91 on tax due before the carryback and \$102.00 because of late payment.

We find as an additional finding of fact that:

At the hearing in this matter, the parties agreed that the sole issue in this case was whether reasonable cause existed for abatement of penalties for late filing and late payment of corporate franchise taxes.

OPINION

In his determination below, the Administrative Law Judge cancelled the penalties for late filing and late payment of franchise tax under Tax Law § 1085(a)(1) and (2). The Administrative Law Judge found that because petitioner merely filed an incorrect tax return, such mistake established reasonable cause and a lack of willful neglect for the late filing.

On exception, the Division of Taxation (hereinafter the "Division") argues that because the parties agreed that the sole issue for determination was whether the penalties for late filing and late payment of corporate franchise taxes should be abated, the Administrative Law Judge decided an issue not in controversy by concluding that "the combined franchise tax report filed by SMS timely reported the tax due from Petitioner and thereupon cancelled the penalty" (Division's exception, p. 6). The Division argues that there was no dispute among the parties

with respect to the timeliness of the combined report filed by SMS. Therefore, the Division asserts that the Administrative Law Judge should not have addressed the timeliness of the report.

Furthermore, the Division argues that the penalties assessed pursuant to Tax Law § 1085(a)(1) and (2) should be sustained. The Division contends that petitioner has failed to establish reasonable cause, and not willful neglect for its failure to timely file and timely pay its corporate franchise taxes.

In response, petitioner argues it has established reasonable cause by demonstrating the turmoil in management that existed at the time period in question, the bankruptcy of its parent, SMS, and the financial difficulties of SMS. Furthermore, petitioner argues that the IRS abated the penalties it assessed petitioner based upon reasonable cause for the same mitigating circumstances as set forth above. Petitioner argues that this fact should be given great weight since the underlying facts and penalties involved are identical. Lastly, petitioner asserts that its good tax compliance history should also be given great weight in determining that petitioner did demonstrate reasonable cause, and not willful neglect in its failure to timely file and timely pay its franchise taxes.

With respect to the Division's argument that the Administrative Law Judge decided an issue not in controversy, petitioner contends that to determine whether petitioner established reasonable cause, required the Administrative Law Judge to decide if the reports filed by SMS, on behalf of petitioner, were timely. The fact that the Administrative Law Judge concluded that the combined report filed by SMS was timely filed, yet filed in error, is a factor to consider in determining whether petitioner's failure to timely file the proper return and timely pay its franchise taxes was due to reasonable cause, and not willful neglect. Therefore, petitioner argues that the Administrative Law Judge did not decide an issue that was not in controversy and petitioner urges that the determination of the Administrative Law Judge be affirmed.

We reverse the determination of the Administrative Law Judge for the following reasons.

Preliminarily, it is necessary to address the Division's contention that the Administrative Law Judge decided an issue not in controversy.

The Division assessed penalties upon petitioner for failure to timely file and timely pay franchise taxes. Petitioner is requesting an abatement of the penalties because it argues that its failure to timely file and timely pay was due to reasonable cause and not due to willful neglect. The Division argues that whether the combined report was timely filed by SMS, on behalf of petitioner, is a separate issue which is not in controversy here. The Division argues that because petitioner's petition did not allege that the combined report filed by SMS constituted a "timely" return for purposes of petitioner and because the petition did not allege that reasonable cause existed based on the fact that petitioner "merely" made a mistake in the type of return to be filed, the Administrative Law Judge incorrectly considered this issue. We disagree.

We note at the outset that although we prefer a petition to be more specific, this petition did state that petitioner was requesting an abatement of penalties assessed based upon reasonable cause. We hold that this statement was adequate to raise the issues addressed by the Administrative Law Judge. If the Division was troubled by the lack of specificity of the petition, the Division could have requested further details by making a demand for a bill of particulars pursuant to 20 NYCRR 3000.6.

Secondly, the attempt to file a combined report, even though such report was incorrectly filed by SMS on behalf of petitioner, is a relevant factor which must be considered in order to determine whether petitioner's mistaken belief that the combined report was properly filed amounts to reasonable cause and not willful neglect for its failure to timely file separately. Thus, we agree with the Administrative Law Judge that petitioner's attempt at filing a combined report is an important factor in determining reasonable cause.

Next, we reject the Administrative Law Judge's determination that the penalties in this case should be cancelled based on petitioner's mistake in filing the incorrect form.

Tax Law § 1085(a)(1) and (2) impose penalties for failure to file a return or for failure to pay the amount required to be shown on a return required under Article 9-A of the Tax Law on or before the prescribed date unless it is established that such failure is due to reasonable cause and not due to willful neglect. Therefore, in order to abate penalties, petitioner must establish reasonable cause.

Tax Law § 211(4) states, in pertinent part, that:

"In the discretion of the commissioner of taxation and finance, any taxpayer, which owns or controls either directly or indirectly substantially all the capital stock of one or more other corporations, or substantially all the capital stock of which is owned or controlled either directly or indirectly by one or more other corporations or by interests which own or control either directly or indirectly substantially all the capital stock of one or more other corporations, may be required or permitted to make a report on a combined basis covering any such other corporations and setting forth such information as the commissioner may require."

20 NYCRR 6-2 discusses the requirements for filing a combined report. These requirements include: the requirement of stock ownership or control, that the group of corporations is engaged in a unitary business, and if reporting on a separate basis distorts the activities, business, income or capital in New York State of the taxpayers (20 NYCRR 6-2.1; 6-2.3). 20 NYCRR 6-2.4(a) states, in pertinent part, that:

"A taxpayer must make a written request for permission to file a combined report The request must be received by the Tax Commission not later than 30 days after the close of its taxable year. A report filed on a combined basis does not constitute a request for permission to file a combined report."

There is absolutely no evidence in the record to demonstrate that petitioner reasonably believed that it fulfilled the requirements set forth in the Tax Law and regulations to be able to file a combined franchise tax report. Accordingly, in the absence of demonstrating any factors which would indicate reasonable cause, we cannot abate the penalties.

Next, we must decide whether the circumstances surrounding petitioner's parent, SMS, established reasonable cause for petitioner's failure to timely file and timely pay its franchise taxes.

Petitioner contends that the turmoil in management, the bankruptcy of SMS, and the financial difficulties of SMS, amount to reasonable cause and not willful neglect for its failure to timely file and pay its franchise tax. Furthermore, petitioner argues that we should give great weight to two additional factors. The first factor is that the Internal Revenue Service (hereinafter the "IRS") abated similar penalties it had assessed upon petitioner based upon the same underlying facts. Secondly, petitioner urges that we give great weight to the fact that petitioner has a good tax compliance history.

We conclude that petitioner has failed to demonstrate reasonable cause. Primarily, petitioner has failed to establish how the financial and managerial difficulties of SMS excused petitioner's late filing and late payment of its franchise taxes. The taxes due for the period in issue were due in June, 1985. SMS did not enter bankruptcy until November, 1985. Moreover, petitioner did not pay the taxes owed until June 30, 1987. There is no explanation provided by petitioner to account for its two year delay in paying the taxes owed. Furthermore, the testimony elicited from Mr. Alekman indicated that SMS's books and records were clearly in a state of confusion long before the bankruptcy (see, Tr., pp. 33-36). Merely stating that SMS was having financial and managerial difficulties does not sustain petitioner's burden to demonstrate reasonable cause and not willful neglect in its failure to comply with the requirements of Tax Law.

Secondly, petitioner argues that great weight should be given to the fact that (1) the IRS abated similar penalties based on the underlying facts and (2) petitioner's good tax compliance history.

Although the IRS abated penalties assessed upon petitioner, we have to determine whether, based on the New York State Tax Law and its accompanying regulations, petitioner established

reasonable cause. As stated above, petitioner has not introduced any evidence to show that its actions were reasonable based upon the circumstances. With respect to petitioner's good tax compliance history, although we do give weight to such a factor, petitioner's good tax compliance history alone is not determinative (Matter of McDonnell Douglas Corp., Tax Appeals Tribunal, May 4, 1989). Accordingly, based on the facts presented in this case, we conclude that petitioner failed to sustain its burden in demonstrating reasonable cause pursuant to Tax Law § 1085(a)(1) and (2). Therefore, the notices of deficiency are sustained.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Ross-Viking Merchandise Corp. is denied; and
4. The notices of deficiency dated January 13, 1988 are sustained.

DATED: Troy, New York
August 8, 1991

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner