

Pitchfork Records, Inc.

v.

Department of Revenue Administration

Docket No. 5406-88

**DECISION**

The "Taxpayer" appeals, pursuant RSA 77-A:14, a penalty imposed by the "DRA" pursuant to RSA 21-J:31 (\$1,765.25 for failure to timely file the return) for the fiscal 1987 tax year. The Taxpayer was also assessed and has paid a penalty imposed pursuant to RSA 21-J:33 (\$706.10 for failure to timely pay the tax), which penalty was not appealed. In this de novo proceeding, the Taxpayer has the burden of showing the DRA's imposition of the penalty was erroneous. See TAX 203.05(c); Appeal of Steele Hill Development, Inc., 121 N.H. 881, 884-85 (1981) (hereinafter referred to as "Steele").

The Taxpayer argues the DRA erred in imposing the RSA 21-J:31 penalty because the DRA cannot impose both an RSA 21-J:31 penalty and an RSA 21-J:33 penalty. For the reasons stated below, we find the Taxpayer failed to carry its burden, and therefore, the Taxpayer's appeal is denied.

The facts are not seriously in dispute. Therefore, the board refers the parties to the DRA's memorandum, which recites the facts. Given these facts, three questions must be answered:

1) Did the Taxpayer's filing of form RP-104 without payment of the estimated tax provide the Taxpayer with an automatic seven-month extension?;

2) Did the DRA err in imposing an RSA 21-J:31 penalty when it had also imposed an RSA 21-J:33 penalty?; and

3) Is the DRA entitled to costs for prosecuting this appeal?.

The board has answered each question in the negative.

Effect of Taxpayer's Filing of the RP-104

To obtain the automatic seven-month extension, a taxpayer must comply with all four requirements of REV 307.07(a). Steele, 121 N.H. at 885-86. The Taxpayer failed to comply with two requirements. First, it failed to file RP-104 by the date for filing the return. The return was due March 16, 1988, since March 15, 1988, was a Sunday. The RP-104 was not filed until March 17, 1988, and therefore, it was not timely filed. Secondly, even if timely filed, the Taxpayer did not remit with the RP-104 any of the estimated taxes. Given these two defects, the Taxpayer was not entitled to, nor did the DRA grant, an extension. Thus, the return was due on March 16, 1988, which deadline was not met. Pursuant to RSA 21-J:31, the DRA imposed a penalty for this untimeliness. We turn now to the Taxpayer's argument on why it is not liable for this penalty.

The RSA 21-J:31 Penalty

The Taxpayer argued the DRA was without authority to impose an RSA 21-J:31 penalty when it had also imposed an RSA 21-J:33 penalty. The Taxpayer tries to support this argument on two grounds: 1) the DRA's earlier decision; and 2) a reading of the applicable statutes.

The Taxpayer's reliance on the DRA's earlier decision is misplaced since the issue in that decision was whether an RSA 21-J:32 penalty (for underpayment of estimated tax) could be imposed along with an RSA 21-J:33 penalty. The prior decision did not address the present issue--the imposition of penalties under RSA 21-J:31 and RSA 21-J:33. We must look, therefore, to the statutes to determine if the Taxpayer's argument holds any weight.

The Taxpayer's only remaining argument is that RSA 21-J:33 II prohibits the double penalty. RSA 21-J:33 II reads in part: "If a penalty is imposed under this paragraph, no addition to tax shall be imposed under this subdivision for the same nonpayment or underpayment." This argument fails because the term "paragraph" limits the applicability of what follows to RSA 21-J:33 II. Thus, the quoted language does not apply to RSA 21-J:33 I. A review of RSA 71-J:31 and RSA 21-J:33 shows there is no prohibition against a double penalty. Moreover, there is no contradiction in imposing two penalties for two distinct failures, one the failure to timely pay and the other the failure to timely file. The DRA is empowered to impose both penalties.

#### DRA's Request for Costs

The board has concluded the imposition of costs against the Taxpayer to be unwarranted in this case. While the board understands the DRA's frustration with this Taxpayer's record of noncompliance, the board has concluded the Taxpayer's appeal here, which was based on a misunderstanding of the DRA's prior ruling, was not completely meritless. The board also appreciates the Taxpayer's frustration at being one of the few small businesses to pay this tax. Nonetheless, the Taxpayer must comply with the existing law. If the Taxpayer has concerns about the existing taxing system,

it may express its concerns to the bodies that change the law, not to the DRA or to this board.

For the above reasons the appeal is denied. The Taxpayer is ordered to pay the RSA 21-J:31 penalty of \$1,765.25 within 20 days of the clerk's date below.

SO ORDERED.

July 30, 1991

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin

Ignatius MacLellan

Michele E. LeBrun

I certify that copies of the within decision have been mailed this date, postage prepaid, to Michael J. Cohen, President of Pitchfork Records, Inc., the Taxpayer, and to Michael J. Norris, Hearing Officer, Department of Revenue Administration.

July 30, 1991

Brenda L. Tibbetts, Clerk