Walter W. Vail and Mary B. Vail
v.
Department of Revenue Administration

Docket No. 8108-89

DECISION

The "Taxpayers" appeal, pursuant to RSA 77:25 (supp. 1988), the "DRA's" imposition of $508.10 in penalties pursuant to RSA 21-J:31 and 33 (supp. 1988) (the Penalties). The Penalties were imposed because the Taxpayers failed to timely file their returns and pay their 1984-1987 interest-and-dividend tax (the Tax). See RSA 21-28-b IV . (Reference to tax years shall be simply stated by year, e.g., "1984.") In this de novo proceeding, the Taxpayers have the burden of showing the DRA's imposition of the Penalties was erroneous. See Tax 203.04(d); Appeal of Steele Hill Development, Inc., 121 N.H. 881, 884-85 (1981) (hereinafter "Steele"). To carry this burden the Taxpayers must show they acted responsibly and not due to willful neglect or intentional violation. See RSA 21-J:31, 33; Steele, 121 N.H. at 884. For the reasons stated below, the Penalties for 1984 and 1985 are refunded, but the Penalties for 1986 and 1987 are affirmed.

Facts

The parties did not dispute the facts as presented by the DRA. See DRA's Memorandum of Law 2. The Taxpayers added a few facts at the hearing. The key facts are that the Taxpayers moved to New Hampshire in 1984, assuming the hype that New Hampshire was tax-free. The Taxpayers, therefore, continued to have their out-of-state accountant prepare their tax returns. Obviously, the Taxpayers' accountant was unaware of this Tax, and no Tax returns were prepared. The Taxpayers' misconception was reinforced when the bank, which Mr. Vail was president of, did not tell him of the Tax when he received

interest and dividends from the bank. In November 1988, the DRA notified the

Taxpayers they had failed to file their 1987 and 1986 Tax returns. The Taxpayers promptly filed their 1986 and 1987 returns. Additionally, the Taxpayers, realizing they had also not filed in 1984 and 1985, filed those returns even though the DRA had not notified them the returns were required. After all the returns were finally completed, the DRA, among other things, imposed the Penalties. The Taxpayers then petitioned the DRA for reconsideration, which denial was appealed here.

The Taxpayers claim the Penalties should not have been imposed because the failure to file was due to excusable neglect, namely:

1)they were misled by the tax-free, New Hampshire hype;
2)they relied upon their out-of-state accountant; and
3)they remedied the problem for 1986 and 1987 upon notice and even remedied the unnoticed 1984 and 1985 problem.

The board finds the first two arguments unpersuasive. First, as state citizens, especially when Mr. Vail is a banker, the Taxpayers should have been aware of the Tax. Second, the accountant's error is imputed to the Taxpayers.

Concerning the third agreement, the board finds it persuasive for 1984 and 1985 but not persuasive for 1986 and 1987. Basically, the board has concluded the legislature intended to provide the DRA and the board with discretion to abate the Penalties when deemed appropriate.

Therefore, the board exercises its discretion and abates the 1984 and 1985 penalties because the Taxpayers, on their own, remedied their noncompliance once they learned of it. This action shows a good faith effort to act responsibly and in accordance with the tax laws. It appears the Taxpayers could have simply responded to the DRA's notice of tax for 1986 and 1987 without filing for 1984 and 1985. Instead, the Taxpayers remedied their failure only to be assessed the Penalties. However, in 1986 and 1987 the DRA, not the Taxpayers, initiated the issue of compliance for which we conclude the Penalties were properly assessed.

Therefore, the DRA shall abate the Penalties paid in 1984 and 1985. The Penalties for 1986 and 1987 are affirmed.

NOTE: The board reminds the DRA that it is supposed to provide the board with the complete file for all appeals. Here, the DRA sent the board an incomplete file. Specifically, the initial tax-due notices were not provided.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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George Twigg, III, Chairman

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Ignatius MacLellen, Esq., Member

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Michele LeBrun, Member

I certify that copies of the within Decision have this date been mailed, postage prepaid, to Walter W. Vail and Mary B. Vail, Taxpayers; V. Hummel Berghaus, Litigation Manager, Department of Revenue Administration; and the Audit Division - Department of Revenue Administration.

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Melanie J. Ekstrom, Deputy Clerk

Date: February 21, 1992