

Castle in the Clouds, Inc.

v.

Department of Revenue Administration

Docket No.: 12872-92BP

DECISION

The "Taxpayer" appeals, pursuant to RSA 21-J:28-b IV, the department of revenue administration's (DRA) final April 19, 1993 order wherein the DRA assessed a \$6,449 business-profits tax plus a late-payment charge (LPC) and interest. For the reasons stated below, the appeal for abatement is denied, but the LPC is abated.

The Taxpayer has the burden of showing the DRA's determination was incorrect. TAX 209.04. We find the Taxpayer failed to show the DRA erred in its assessment of the tax, but the Taxpayer showed the DRA erred in assessing the LPC.

Facts

The facts are not in dispute, and the board refers the parties to the DRA's memorandum of law. There are certain key facts that will be listed below.

- 1) Taxpayer's fiscal year (FY) is July 1 to June 30.
- 2) In FY 1990, the Taxpayer claimed a \$95,962 net operating loss (NOL) carryover from FY 1989. The DRA calculated the Taxpayer's FY 1989 NOL carry

over for FY 1989 as \$16,773. This disagreement is the basis of the Taxpayer's appeal.

3) In FY 1989, the Taxpayer had the following:

- a) taxable income of \$601,773;
- b) allowable expenses of \$618,933; and
- c) an NOL of \$16,773.

4) In the first six months of FY 1989 (July 1 to December 31), the Taxpayer made a \$79,000 profit (income minus expenses).

5) In the second six months of FY 1989 (January 1 to June 30), the Taxpayer had a \$95,962 operating loss (income minus expenses).

Issue

The parties disagreement concerns the proper amount of NOL carryover from FY 1989. The determination of this disagreement centers around construing the statute that allows NOL carryovers. Prior to January 1, 1989, taxpayers were not entitled to NOL carryovers. Thus, if a business had incurred an NOL in a particular year, none of that NOL could be carried forward to a subsequent year to offset a profitable year. Effective January 1, 1989, RSA 77-A:4 XIII was enacted and allowed a NOL carryover. RSA 77-A:4 XIII states as follows.

A deduction for the amount of the net operating loss carryover determined under section 172 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX; provided, however, that in calculating such net operating loss carryover, the election permitted under section 172 (b) (3) (C) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX shall not be allowed. A net operating loss shall be apportioned in the year incurred according to RSA 77-A:3 and such apportioned net operating loss may only be carried forward for the 5 years following the loss year. The amount of net operating loss generated in a tax year that may be carried forward may not exceed \$250,000. In the case of a business organization not qualifying for treatment as a subchapter C corporation under the United States Internal Revenue Code, such deduction shall be the amount that would be determined under section 172 of the United States

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Internal Revenue Code as defined in RSA 77-A:1, XX if the business organization were a subchapter C corporation and as limited by this section. A deduction for the amount of the net operating loss carryover shall be limited to losses incurred on or after January 1, 1989. (Emphasis added.)

The parties' dispute the meaning of the last sentence of RSA 77-A:4 XIII, which is underlined above (the Disputed Provision). The Taxpayer argued the Disputed Provision authorized the Taxpayer to have a FY 1989 NOL carryover of \$95,962 even though the actual FY 1989 NOL was only \$16,998. The Taxpayer claimed the Disputed Provision required the Taxpayer to separately calculate the NOL for the second six months of FY 1989 because that second six months coincided with the January 1, 1989 effective date of RSA 77-A:4 XIII.

The DRA argued RSA 77-A:4 XIII required a 12-month period, and thus argued the Taxpayer's calculation of the 1989 NOL carryover was incorrect because the \$95,962 was only the loss for a six-month period not for the entire 12-month FY. The DRA pointed out that for the first six months of FY 1989 the Taxpayer showed a \$79,000 net profit. The DRA's arguments were detailed in their memorandum.

Discussion

The board finds the Disputed Provision required the Taxpayer to calculate the NOL carryover based on a 12-month FY, not on a 6-month period. The board's conclusion is simply this -- the deduction period must match the taxable period, and both are 12-month periods. The Disputed Provision merely places a limit on the amount of the deduction; it does not establish a new method or different period to calculate the deduction. In other words, under

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RSA 77-A:4 XIII, the Taxpayer should have calculated its NOL based on a 12-month FY, but the amount of NOL carryover should have been limited to the losses incurred on or after January 1, 1989. Thus, the Taxpayer's FY 1989 NOL was \$16,773. The DRA then assumed all of this loss was incurred due to expenses and deductions after January 1, 1989. Thus, the DRA properly calculated the FY 1989 NOL carryover as \$16,773.

The board's conclusion is supported by the business profits tax (BPT) structure and it is consistent with reading all parts of the BPT statute together. Reviewing the BPT law in its entirety demonstrates that the BPT is based on a 12-month FY. See RSA 77-A:1 V (definition of tax period). Furthermore, the determination of a NOL under the United States Internal Revenue Code (IRC) is based on a 12-month FY. Thus, the Disputed Provision, with its January 1, 1989 effective date, must be read in the context of the BPT's and the IRC's 12-month taxable period. This requires a rejection of the Taxpayer's argument.

Late Payment Charge

The Taxpayer requested abatement of the RSA 21-J:33 LPC, asserting the Taxpayer's error was based on a good-faith reading of RSA 77-A:4 XIII and not based on "willful neglect or intentional disregard of laws or rules***." The board agrees; the Taxpayer's actions were not based on "willful neglect or intentional disregard of laws***." Therefore, the board orders an abatement of the LPC.

Rehearing Motion

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A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within twenty (20) days of the clerk's date below, not the date this decision is received. RSA 541:3; TAX 201.37. The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; TAX 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board's decision was erroneous in fact or law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule TAX 201.37(e). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Paul B. Franklin, Member

Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Eugene P. Leone, Jr., Esq., Attorney for Castle in the Clouds, Inc., Taxpayer; and V. Hummel Berghaus, VI, Esq., Department of Revenue Administration.

Dated: March 15, 1994

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Valerie B. Lanigan, Clerk