

Stephen R. Stover

v.

Department of Revenue Administration

Docket No.: 17720-99ID

DECISION

The “Taxpayer” appeals, pursuant to RSA 21-J:28-b (Supp. 1996), the “Department of Revenue Administration’s” (DRA) assessment of an RSA 21-J:31 penalty for failure to file, an RSA 21-J:32 penalty for underpayment of estimated tax and the RSA 21-J:28 interest on late payment of the 1996 interest and dividends tax. The Taxpayer requested and DRA agreed the board could decide this matter without hearing based on the parties’ written submittals.

Statement of Facts

The parties agreed DRA’s statement of facts contained in its memorandum of law reasonable summarized the facts of this appeal and, thus, is recited in part below.

Petitioner [Taxpayer] is a 7.41% shareholder of Western Staff Services, Inc. (“Western”). On April 26, 1996, Western declared an S Corporation dividend out of its accumulated adjustments account. It then revoked its S corporation election effective April 30, 1996.

The dividend was scheduled to be paid in four installments on July 15, 1996, October 15, 1996, January 15, 1997, and April 15, 1997. The Petitioner [Taxpayer] issued a \$3,296 credit carryover from his 1995 interest and dividends return as a payment of estimated tax related to the July 15, 1996 distribution. On

or about December 31, 1996, he made a payment of \$7,787 for estimated taxes related to the October 15, 1996 distribution.

The Petitioner [Taxpayer] determined that the two dividend distributions scheduled to occur in 1997 could be considered taxable income in 1996. They were therefore included in the Petitioner's [Taxpayer's] 1996 return. The 1996 return was filed on October 29, 1997, along with a payment of the balance of tax due on the amount of \$9,792. Exhibit A. No request for an extension was filed.

On February 12, 1998, during a routine account reconciliation, the Document Processing Division of the Department issued a tax notice to Mr. Stover for the 1996 return. The tax notice assessed \$948.53 of interest, a \$2,448 failure to file penalty, and a \$1,009.26 underpayment of estimates penalty. Exhibit B. The Petitioner [Taxpayer] requested that Document Processing abate the penalties. On March 18, 1998, Document Processing denied the abatement request.

The Petitioner [Taxpayer] filed an appeal with the Department's Hearing Office. The Petitioner [Taxpayer] waived his rights to an adjudicative proceeding and asked to have the case resolved based on written submissions. Based on the written submissions, the Hearing Officer sustained the Department's assessment of penalties and interest. (alteration to original.)

Summary of Parties' Arguments

The Taxpayer argued that with his payment of \$7,787 on December 31, 1996, he believed 100% of his tax liability had been paid. Therefore, as of the return filing date, April 15, 1997 (RSA 77:18), the Taxpayer did not file a return assuming he was eligible for an automatic seven-month extension on filing a return in accordance with Rev 906.07. Consequently, the Taxpayer argued the October 1997 filing and balance of payment was timely and no penalties and interest are due.

DRA argued that it was not reasonable for the Taxpayer to assume that 100% of his 1996 tax liability had been paid because the DRA's rules, specifically Rev 903.07, are clear that dividends received by a shareholder of a subchapter S corporation are taxable when constructively received by the Taxpayer when the corporation's accumulated adjustments account reflect such a reduction. Consequently, 100% of the Taxpayer's taxes had not been paid

as of the return date, he was not eligible for the automatic seven-month extension to file his return and the penalties and interest assessed are correct.

Board's Rulings

The Taxpayer had the burden to prove that his failure to timely file his return and fully pay his tax liability was due to a reasonable case and not willful neglect. Appeal of Steele Hill Development, Inc., 121 N.H. 881, 884 (1981). Also, in part RSA 21-J:31 reads: "this penalty [for failure to file] shall not be applied in any case in which a return is filed within the extended filing period as provided in RSA 77:18-b, RSA 77-A:9, RSA 77-E:8, RSA 83-C:6, or RSA 84-A:7, or the failure to file was due to reasonable cause and not willful neglect of the taxpayer..." (alteration to original).

While we do not find any willful neglect (i.e., intentional disregard of responsibility) on the part of the Taxpayer, for the reasons that follow, the board finds the Taxpayer did not establish: 1) a reasonable cause for having filed his return late; and 2) a reasonable basis for assuming 100% of the tax liability had been paid by the due date of April 15, 1997, so as to avail himself of the automatic extension of time for filing the return pursuant to RSA 77:18-b and Rev 906.07.

First, the DRA rules and interest and dividends tax forms are quite clear as to how dividends from an S corporation are to be accounted for interest and dividend tax purposes.

Rev 903.07. Post-termination Distributions of Federally Recognized "S" Corporations

(a) Distributions made by "S" corporations:

(1) From the accumulated adjustment account, commonly referred to as AAA, or the previously taxed income, commonly referred to as PTI, categories shall be a dividend for purposes of the interest and dividends tax; and

(2) From the earnings and profits of the corporation accumulated prior to the "S" corporation election being made shall follow the provision in Rev 902.01(a).

(b) Upon termination of "S" corporation status, distributions to shareholders pursuant to Section 1371(e)(1) of the Internal Revenue Code of 1986 shall be taxable dividends upon receipt by the shareholder, either directly or indirectly.

(c) In instances of indirect receipt of distributions, the department shall deem amounts to have been received by the shareholder at the time when evidence of the transfer is acknowledged by a reduction in the accumulated adjustments account.

(d) Decreases in the amount of loans to a shareholder of a Subchapter S corporation with a corresponding reduction in the accumulated adjustment account shall be considered a dividend under the interest and dividends tax as if:

(1) The corporation had distributed money as a dividend to the shareholder; and

(2) The shareholder had returned the money to the corporation in a full or partial payment of an outstanding loan.

(e) Increases in the amount of loans from a shareholder of a Subchapter S corporation with a corresponding reduction in the accumulated adjustment account shall be considered a dividend under the interest and dividends tax as if:

(1) The corporation had distributed money as a dividend to the shareholder; and

(2) The shareholder had returned the money to the corporation as a loan from the shareholder to the corporation.

DRA's interest and dividends tax form (DP-10) has several references on pages 4, 5 and 6 indicating that dividends from S corporations are taxed when constructively received rather than when actually distributed to a shareholder. Consequently, the board finds the DRA's rules and its forms reasonably state how the interest and dividends tax should be calculated on a dividend from an S corporation. A reasonably diligent taxpayer should know, therefore, that 100% of their interest and dividend tax liability is based on their constructive receipt rather than actual receipt of the dividend income.

Second, the Taxpayer submitted no evidence that any explanation was submitted to DRA with his December 31, 1996 payment indicating the basis for why this payment should be construed to be 100% of his tax liability. In fact, the next communication with DRA is the Taxpayer's interest and dividends tax return filed on October 12, 1997, indicating a total balance due of \$9,792. Again, no evidence was provided that any explanation accompanied his return as to why such a substantial amount was still outstanding at that time. Moreover, the Taxpayer never clearly states in either his appeal or his response to DRA's memorandum that his December 31, 1996 payment was calculated on the assumption that the first two dividend distributions received by the Taxpayer in 1996 comprised his entire 1996 tax liability and, thus, his December payment was 100% of his 1996 tax liability. While the Taxpayer alludes to that fact (see Taxpayer's January 25, 1999 appeal letter to the board at paragraph 7), he never makes any such affirmative statement. Even if that were his assumption, the estimated tax does not correspond to the \$11,713 paid in 1996. Such calculation would have resulted in a tax of \$10,692 based on the Taxpayer's first two equal dividend distributions totaling \$216,246 minus a \$2,400 individual deduction multiplied by the tax rate of 5%.

Third, the record contained some evidence that the Taxpayer is not an unsophisticated or novice interest and dividends taxpayer. Paragraph 9 of the Taxpayer's appeal letter indicates the Taxpayer has historically filed all required income tax returns in New Hampshire in a timely manner. Further, while the tax return was signed only by the Taxpayer, the appeal was handled by the senior vice president and treasurer of the S corporation (Wester Staff Services) that declared the dividend for which the Taxpayer was liable to pay an RSA chapter 77 tax. If such service and advice was available at the time of the appeal, it would seem likely that same service and advice was available earlier at the time of filing the return.

In short, the Taxpayer did not comply with the requirement of paying 100% of the total tax due to receive the automatic extension. Also, the Taxpayer did not submit any clear and

convincing evidence to establish a reasonable cause for submitting only approximately 55% of his tax liability prior to April 15, 1997 due date. Thus, the penalties and interest assessed by DRA are appropriate.

Findings of Fact and Rulings of Law

The board responds to the DRA's request for findings of fact and rulings of law as follows.

In these responses, "neither granted nor denied" generally means one of the following:

- a. The request contained multiple requests for which a consistent response could not be given;
- b. The request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted no denied;
- c. The request contained matters not in evidence or not sufficiently supported to grant or deny;
- d. The request was irrelevant; or
- e. The request is specifically addressed in the decision.

Findings of Fact

1. Granted.

Rulings of Law

1. Granted.
2. Neither granted nor denied.
3. Granted.
4. Neither granted nor denied.
5. Granted.
6. Granted.
7. Granted.
8. Granted.

Rehearing and Appeal Procedure

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within thirty (30) 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 in 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. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board's denial.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to Michael Ehresman, Senior Vice President for the Taxpayer; Kathleen Sher, Esq., counsel for the Department of Revenue Administration.

Date: December 31, 1999

Lynn M. Wheeler, Clerk