

The Wentworth, An Elegant Country Inn

v.

Department of Revenue Administration

Docket No.: 18028-00CS

DECISION

The "Taxpayer"¹ appeals, pursuant to RSA 21-J:28-b, IV, the Final Order of the "Department of Revenue Administration" (DRA) issued January 11, 2000, (the "Final Order") regarding certain assessments, including interest charges and failure to pay and late filing penalties, imposed with respect to the Communications Services Tax (the "CST") prescribed in RSA 82-A. The board held a de novo hearing on the merits of the appeal on August 22, 2000. The Taxpayer has the burden to prove that his failure to timely file his return and fully pay his tax liability was due to a reasonable cause and not willful neglect. Further, under TAX 209.04, the Taxpayer has the burden to show the DRA erred in its determination of the tax, interest and penalties. For the reasons stated below, the appeal is denied.

¹ Fritz Koepfel testified he is a sole proprietor doing business as "The Wentworth, An Elegant Country Inn"; this business has its own employer identification number and has been treated by the DRA throughout this appeal as the named "Taxpayer" of record.

The Taxpayer argued the assessments were not correct because:

- (1) the business was purchased in March 1991, shortly after the new CST was enacted in 1990 (to take effect in 1991);
- (2) the Taxpayer was unaware of the CST until it came to his attention in 1995 during the course of a routine DRA audit pertaining to the rooms and meals tax;
- (3) the CST was not well publicized and is much more complicated and onerous to comply with than the rooms and meals tax; and
- (4) since the Taxpayer did not collect the CST from the business' guests, it is unfair to require him to pay taxes imposed on others (the guests), given the Taxpayer's limited role as collection agent, in the first instance, and then charge interest and penalties on the uncollected taxes.

The DRA argued the assessments were correct because:

- (1) interest on unpaid taxes is mandatory under the statutory authority granted to the DRA and cannot be waived;
- (2) the penalties should be applied because the Taxpayer has not met the burden of establishing he qualifies for the limited statutory exceptions (such as "reasonable cause" and no "willful neglect"), these exceptions pertain to forces outside of the Taxpayer's control and require much more than mere lack of knowledge about the CST or the burden of compliance;
- (3) no dispute exists that returns were not filed from 1991 through 1995;
- (4) the DRA has no responsibility for notifying an individual taxpayer of the existence of the CST or the need to collect and remit the tax;

(5) after the CST was enacted by the Legislature in 1990, the DRA went through the required rule-making procedures to implement the CST, with full participation in that rule-making process by representatives of the hospitality industry of which the Taxpayer is a part;

(6) the Taxpayer had both in-house staff employees and outside (CPA) tax compliance and advisory services at its disposal; and

(7) even after the Taxpayer claims it became aware of the CST, there was an additional period of five quarters of noncompliance with the continuing reporting and payment obligations.

Board's Rulings

For all taxes administered by the DRA, RSA 21-J:28-b, IV provides that a taxpayer may appeal to the board (or to the superior court) the “correctness of the commissioner’s actions.”

The commissioner in this case issued a Final Order on January 11, 2000. The Final Order sustained an assessment by the Audit Division for nonpayment of the CST, failure to pay and late filing penalties and interest. The Taxpayer argued, without success, that the penalties and interest should be waived because the Taxpayer was “unaware of the tax, that there was no intentional disregard for the law . . . and that it was paying taxes that was never collected from customers from its own resources.” See Final Order at 3. The Taxpayer then filed a timely appeal of the Final Order with the board.

Based on a computer generated worksheet submitted by the DRA, it appears the Taxpayer still owed \$610.67 in unpaid CST taxes (for the period from 1991 through 1997) and a larger residual (\$1,350.19) consisting mainly of late filing charges and interest, for a total of \$1,960.86 (as of February 15, 2000).

The Taxpayer's failure to pay or file quarterly returns pertaining to the CST was discovered by the DRA Audit Division "as a result of a rooms and meals tax audit." DRA "Memorandum of Law" (Memorandum) at p. 1-2.² "At the end of 1997," the Taxpayer was offered an opportunity to pay the CST deficiency or "take advantage of the tax amnesty program then in effect." Memorandum at p. 3. According to the DRA, the "Taxpayer restated its belief that all penalties and interest should be waived because it had not intentionally disregarded the law." Id.

After reviewing the parties' respective positions, the board affirms the decision of the DRA. This decision rests on a lack of sufficient justification for the Taxpayer's position in both the tax statutes and the case law.

A. The Failure to Pay Penalty

RSA 21-J:33, I provides: "penalties shall be imposed for failure to pay taxes when, and as, due . . . if the failure to pay is due to willful neglect or intentional disregard of laws or rules, but without intent to defraud, the penalty shall be equal to 10 percent of the amount of the nonpayment or underpayment." The Taxpayer on this appeal no longer appears to contest the specific amounts of CST computed by the DRA, but rather bases his appeal on the ground that there is no "willful neglect or intentional disregard of laws or rules."

Personal unawareness of the taxes, however, is not a sufficient ground to satisfy this standard. In Appeal of Steele Hill Development, Inc., 121 N.H. 881 (1981), the taxpayer was

²The Memorandum is not paginated, but consists of 10 pages.

assessed failure to pay penalties in connection with the lack of timely filing a return and nonpayment of the business profits tax. In that case, the supreme court upheld the DRA's determination, and the board's ruling, that such penalties were correctly imposed. The court noted the burden remains with the taxpayer who challenges either the underlying assessment or "the imposition of additions and penalties rather than the underlying tax liability." *Id.* at 885. The court found the penalty for late filing not "unjust or unreasonable" even though the taxpayer had applied for an extension to file (which the DRA denied) as its justification for non-imposition of the penalty.

In this case, at best the Taxpayer asserts no more than that he was unaware of the CST and that compliance requires "ridiculous" amounts of time and paperwork that bear no reasonable relation to the amount of tax to be collected in the business. Unfortunately, these considerations do not make the taxes unjust or unreasonable, in the words of the Steele Hill case, and do not permit the conclusion that the Taxpayer cannot be charged with "willful neglect or intentional disregard of laws or rules," in the words of the statute.

The Taxpayer is a knowledgeable innkeeper and is a member of the New Hampshire Hospitality Association. This association was aware of the CST when it was enacted into law and participated in the rule-making process. Since the CST applies to all innkeepers who charge guests for use of communications equipment, the Taxpayer should have had constructive, if not actual, knowledge of its passage and effect. Failure to keep informed of the law, despite having the services of in-house staff and an outside CPA, therefore must be viewed as "willful neglect." As to the alternative test ("intentional disregard"), the board notes the Taxpayer, even

after being informed of the CST, chose not to pay it for five more quarters and to date has not paid the underlying CST due for 1991 through 1997.

B. The Late Filing Penalty

RSA 21-J:31 provides a further penalty for failing to file a return when due but states “This penalty shall not be applied in any case where the failure to file was due to reasonable cause and not willful neglect.” The board has already addressed the issue of “willful neglect.” The board also finds the Taxpayer had no “reasonable cause” to fail to file the required CST quarterly returns. See Steel Hill, supra. Filing returns and paying taxes, however burdensome, is simply a cost of doing business, a cost which reasonably prudent people will pass on to their customers, as necessary. The board notes the Taxpayer did levy a 25 percent surcharge on communications (telephone and fax) services used by his guests.

According to the federal authorities cited by the DRA, reasonable cause requires the Taxpayer to “demonstrate that it exercised ‘ordinary business care and prudence,’ but was still unable to file the return on time.” Memorandum at p. 6. Absent compelling facts not present here, professed ignorance of a universal tax to be collected by all businesses within the hospitality industry does not reflect ‘ordinary business care and prudence.’

C. Interest Charges

Unlike the other two assessments, the imposition of “interest on amounts not paid when due” is not a penalty. Interest on unpaid tax assessments is “mandatory,” not discretionary, as the DRA correctly points out. Memorandum at p.5. RSA 21-J:28 requires no finding of

culpability to collect interest. Since the Taxpayer has not questioned the specifics of the interest computation, the determination by the DRA of the amount owed, including interest charges, is upheld.

D. Summary and Further Proceedings

In summary, the board finds the Taxpayer has failed to prove the lack of “correctness” in the DRA’s CST determinations and the appeal is therefore denied.

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

Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to The Wentworth, Taxpayer; and Kathleen J. Sher, Esq., Counsel for the Department of Revenue Administration.

Date: October 2, 2000

Lynn M. Wheeler, Clerk

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FINAL ORDER

The board has reviewed the Taxpayer's letter dated October 29, 2000, whose stated purpose is "to request a rehearing motion [sic]," with regard to the board's Decision dated October 2, 2000 (the "Decision"). The board will consider this "request" in the context of TAX 201.37 governing "Motions for Rehearing or Clarification." The board has also reviewed the objection filed by the Department of Revenue Administration (the "DRA") on November 9, 2000 (the "Objection").

In its letter, filed within the 30 days prescribed in RSA 541:3 and TAX 201.37(a), the Taxpayer requests "as much time as possible . . . to find a competent lawyer," presumably beyond this 30-day deadline. The board does not have authority to waive or extend statutory deadlines and cannot waive the application of its own rules in this case. The board notes the Taxpayer chose not to retain a lawyer for either the proceedings held before the DRA, which

culminated in a Final Order dated January 11, 2000, or the hearing on its appeal of that Final Order held by the board on August 22, 2000, and apparently has still not done so. The board will therefore treat the Taxpayer's letter of October 29, 2000 as a motion for rehearing (the "Motion").

The Motion attempts to raise three questions regarding the board's Decision, but fails to meet the criteria set forth in TAX 201.37(d) and RSA 541:3. This rule and statute require the Taxpayer to demonstrate "good reason" for a rehearing, including a showing "that the [b]oard overlooked or misapprehended the facts or the law and such error affected the [b]oard's decision." For the reasons stated here and in the DRA's Objection, the Motion must be denied.

The Taxpayer first questions the statement in the Decision that the Taxpayer was no longer contesting "the specific amounts of CST [Communications Services Tax, see RSA 82-A] computed by the DRA." The Taxpayer's letter dated February 9, 2000 to the board appealing the DRA's Final Order questions the "reasonable cause" and "willful neglect" determinations which resulted in "penalty and interest charges" and states: "We would like to appeal the final order and pay only the tax due." No mention was made in this appeal document of any question regarding the tax due.

While the Taxpayer may never agree with the DRA's actual computation of tax still due (\$610.67), the Taxpayer had an obligation³ to articulate and present this issue in its appeal to the board and at the DRA hearing, but failed to do so. In these proceedings, the Taxpayer focused

³See TAX 209.02 (requirement to state "grounds for the appeal" in filing written appeal with the board) and REV 203.01 (requirement to state "specific relief" sought by taxpayer in redetermination, reconsideration and abatement requests to DRA).

on the correctness of the failure to pay and late filing penalties and accrued interest charges imposed by the DRA, rather than the amount of the underlying tax itself. In its written submission to the DRA dated November 5, 1999, the Taxpayer summarized its position by asking the DRA “to abate all penalties and interest that have accrued.” Even at the hearing before the board, the Taxpayer confirmed its willingness to pay the tax, but indicated it was appealing to obtain a waiver of the penalties and interest assessed.

The Taxpayer next questions statements in the Decision concerning the New Hampshire Hospitality Association (“NHHA”), of which the Taxpayer is a member, and its apparent knowledge of the CST following its enactment in 1990. The DRA testified at the hearing that representatives of the NHHA participated in the rulemaking process pertaining to the CST and the Taxpayer now states he has a letter from the DRA to the NHHA explaining how to compute the tax. Whether the Taxpayer personally knows “any members of the NHHA or Executives of the NHHA . . . [who] participated in the rule-making process of the CST” is not relevant to the issue of whether the Taxpayer can be deemed to have had actual or constructive knowledge of the tax as a matter of law.

The third and final Taxpayer question concerns the issue of quarterly CST returns. DRA Exhibit A, which the Taxpayer failed to object to, clearly shows that CST returns for five quarters (ending December 31, 1995 through December 31, 1996) were filed late and without payment on April 15, 1997 (along with the CST return for March 31, 1997). The Taxpayer now asserts, and the DRA disputes, that “no tax dollars were due” with respect to these returns. This dispute, however, did not relieve the Taxpayer of its obligation to file timely returns for each of

these periods, which occurred after contact with the DRA and payment on January 8, 1996 of partial CST amounts owed for the preceding four years ("9/30/91 - 9/30/95").

In summary, the board finds each of the issues raised in the Motion lacks merit and finds no "good reason" to grant the Taxpayer's request for a rehearing. The Motion is therefore denied.

Pursuant to RSA 541:6, any appeal of this order by the Taxpayer to the supreme court must be filed within thirty (30) days of the date on this order.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to: The Wentworth, Taxpayer; and Kathleen J. Sher, Esq., Counsel for the Department of Revenue Administration.

Date: December 1, 2000

Lynn M. Wheeler, Clerk