

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VOGUE FASHION SHOPPE,)
)
 Petitioner,)
)
 vs.) CASE NO. 89-5744
)
 DEPARTMENT OF REVENUE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Veronica E. Donnelly, held a formal hearing in the above-styled case on April 12, 1990, in Naples, Florida.

APPEARANCES

For Petitioner: William H. Kaverman, Qualified
Representative
3115 Gulfshore Boulevard North
Apartment #709
Naples, Florida 33940

For Respondent: Vern D. Calloway, Jr.
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

Whether the interest and penalty assessed against the Petitioner for failure to timely pay the corporate intangible property tax due for 1987 and 1988 should be sustained.

PRELIMINARY STATEMENT

On August 31, 1989, the Respondent, Department of Revenue (the Department) issued a Notice of Decision that required Petitioner, Vogue Fashion Shoppe (Vogue) to pay a delinquency penalty and interest on corporate intangible property taxes that had not been timely paid in 1987 and 1988.

By letter dated October 16, 1989, the Petitioner requested a formal administrative hearing to contest the assessment of penalties and interest on the tax payments. It was the Petitioner's contention that the failure to timely pay the taxes was due to reasonable cause and not willful neglect or fraud. Based upon the circumstances surrounding the late payments, the Petitioner seeks a compromise or settlement of the assessment.

During the hearing, the Petitioner presented one witness, Mr. Kaverman, who testified on behalf of the corporation. An exhibit, marked Petitioner's Exhibit

#1, was rejected as hearsay. The Petitioner was allowed to proffer the exhibit into evidence. The Department called one witness and filed one exhibit, which was admitted into evidence.

The transcript of the proceedings was filed on June 7, 1990. A proposed recommended order was timely filed by the Department on June 15, 1990. The Petitioner waived the right to present proposed findings of fact in addition to the case presented at hearing. Rulings on the proposed findings of fact submitted by the Department are in the Appendix of the Recommended Order.

STATEMENT OF FACTS

1. For approximately twenty-eight years, Vogue Fashion Shoppe has operated in Naples, Florida. It has been owned and operated by Wilmar, Inc., a small private corporation that has had the same shareholders and corporate officers since its inception.

2. During the operation of the business, William H. Kaverman, President of Wilmar, Inc., has continuously taken pride in promptly paying all bills and any tax assessments the corporation has received. Traditionally, the corporation has paid its corporate intangible property taxes in January of each year, six months before the taxes are due.

3. In 1987 and 1988, the Department did not mail Vogue the corporate intangible property tax forms as it had done since 1962. When Mr. Kaverman did not receive the forms, he assumed a tax payments were not required in these particular years. As all of the other forms for various local, state and federal taxes continued to arrive, Mr. Kaverman did not seek further information to either confirm to refute his assumption.

4. During an audit in 1989, Vogue learned that the corporation was required to pay corporate intangible property taxes in 1987 and 1988. Once it was established that taxes were due, they were promptly paid. However, the Petitioner, through Mr. Kaverman, believed the penalty and interest of \$564.02 was too severe under the circumstances. Mr. Kaverman, who is eighty years old, has always paid taxes promptly. The failure to pay the taxes in question was an error of omission. Based upon his long-standing reputation and payment habits, a penalty of five percent per month and interest of one percent per month appeared unreasonable to Mr. Kaverman.

5. In good faith, Vogue applied for a compromise of the interest and penalty assessed based upon a long record of compliance and the fact that nonpayment was inadvertent.

6. While the issue of whether or not the penalty and interest should be assessed was pending within the Division of Administrative Hearings, the Department filed a tax warrant in the Public Records of Collier County. This warrant stated that \$584.02 was due and unpaid, is now delinquent, and is subject to collection, as provided by law.

7. Contained within the warrant was an assessment of an additional \$22.00 for the filing of the warrant. The warrant commanded the Clerks of the Circuit Courts and the Sheriffs of the State to levy upon, and sell the corporation's real and personal property, and to pay the Department the money collected from the proceeds. The costs of executing the warrant and the forced sale were also ordered to be paid from the sale of the property.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.57(1) and 72.01, Florida Statutes.

Section 214.40(1), Florida Statutes states:

(1) In case of failure to file any tax return required under laws made applicable to this chapter . . . there shall be added as a penalty to the amount of tax due with such return 5 percent of the amount of such tax, if the failure is not more than 1 month or an additional 5 percent for each month or part thereof during which such failure continues, not exceeding 25 percent in the aggregate. The department may settle or compromise such penalties pursuant to s. 213.21 . . .

Section 213.21, Florida Statutes provides as follows, in pertinent part:

(3) A taxpayer's liability for any . . . interest . . . may be compromised by the department upon the grounds of doubt as to liability for or collecting of such . . . interest. A taxpayer's liability for penalties . . . may be settled or compromised if it is determined by the department that the noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud.

(5) The department shall establish by rule guidelines and procedures for implementation of this section.

9. The rules promulgated by the Department which provide guidelines for the settlement or compromise of interest and penalties are found in Chapter 12-13, Florida Administrative Code.

10. Rule 12-13.005, Florida Administrative Code, sets forth grounds for finding doubt as to liability for interest payments on taxes owed. A review of the grounds demonstrates that Vogue is not eligible for a compromise of the interest payment under Rule 12-13.005(1)(b), Florida Administrative Code, which reads:

Ignorance of the law or an erroneous belief as to the need to comply with a revenue law does not constitute a reasonable construction or interpretation of the revenue law or rules of the Department unless there are facts and circumstances which indicate ordinary care and prudence were exercised by the taxpayer and there is reasonable doubt as to whether compliance is required in view of conflicting rulings, decisions, or ambiguities in the law.

11. In this case, the evidence presented did not demonstrate that Vogue exercised ordinary care and prudence when the corporation relied on the Department's mailing of forms to indicate that a filing and tax payment were required. Accordingly, the interest assessed on the tax should be sustained.

12. Rule 12-13.007, Florida Administrative Code, sets forth the grounds for reasonable cause for compromise of penalties. The burden upon a taxpayer to show that penalties should be compromised is a lesser burden than the one set forth in the rule regarding the possible compromise of interest. Rule 12-13.007(2), Florida Administrative Code, provides as follows, in pertinent part:

Reasonable cause is indicated by the existence of facts and circumstances which support the exercise of ordinary care and prudence on the part of the taxpayer in complying with the revenue laws of this state. Depending upon the circumstances, reasonable cause may exist even though the circumstances indicate that slight negligence, inadvertence, mistake or error resulted in noncompliance.

13. The facts indicate that Vogue relied on the Department to advise the corporation of the deadlines on filings and tax payments. Although this type of shifting of responsibilities is erroneous, it is clear that this slight negligence by the corporation's eighty-year old president resulted in noncompliance by Vogue. The company's long-standing reputation as a taxpayer who promptly pays all its taxes, and the twenty-five year course of dealings that contributed to the taxpayer's reliance on the Department, should be considered under the particular circumstances of this case. Such factors are allowed to be considered by the Department under Rule 12-13.008(5), Florida Administrative Code, which sets forth the procedures for compromise and settlement. Accordingly, the late reporting penalty of five percent per month, which has been assessed against Vogue, should be compromised. The Hearing Officer recommends a compromise of \$100.00 for each year because this amount is the late reporting penalty charged under Section 199.282(6)(a), Florida Statutes, and it appears fair under the circumstances.

14. Under the circumstances proved at hearing, Vogue should not be responsible for the \$22.00 filing fee on the warrant filed in the Public Records of Collier County, Florida. At hearing, the Petitioner proved that the administrative hearing had been undertaken to review the payment of interest and penalties. Section 214.51(1), Florida Statutes, which relates to collection procedures, provides:

. . . If such tax remains unpaid for 10 days after . . . demand has been made and no proceedings have been taken to review the same, the department may issue a warrant directed to any sheriff . . . commanding said sheriff . . . to levy upon and sell the real and personal property of the taxpayer found within his jurisdiction for the payment of the amount thereof including penalties, interest, and the cost of executing the warrant. . . [Emphasis added.]

Prior to the resolution of this case through the formal administrative hearing process, the Department was without jurisdiction to issue the warrant.

RECOMMENDATION

Based upon the foregoing, it is RECOMMENDED:

1. That Vogue be obligated to pay the interest assessed on the corporation for failure to timely pay the corporate intangible property tax due for 1987 and 1988.

2. That Vogue's penalty assessment be reduced by \$200.00 as a compromise of assessment penalties due to the circumstances surrounding the corporation's late reporting. This reduction reflects the removal of the late reporting penalty by \$100.00 for each year.

3. That Vogue not be required to pay the \$22.00 filing fee for the warrant that was filed by the Department, without statutory authority to do so, the Public Records of Collier County. Any other costs surrounding the warrant, including its removal from the public records, should not be borne by the Petitioner.

DONE and ENTERED this __16th__ day of July, 1990, in Tallahassee, Leon County, Florida.

VERONICA E. DONNELLY
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904)488-9675

Filed with the Clerk of the
Division of Administrative
Hearings this __16th__ day of July,
1990.

APPENDIX TO RECOMMENDED ORDER
IN CASE NO. 89-5744

The Respondent's proposed findings of fact are addressed as follows:

1. Admitted. See HO #1 and #2.
2. Rejected. See HO #3 and #4.
3. Accepted. See HO #4.
4. Rejected. Irrelevant in these proceedings.

Copies furnished:

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