

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

UNDERGROUND SUPPLY COMPANY,)
)
 Petitioner,)
)
vs.) CASE NO. 90-0755
)
STATE OF FLORIDA, DEPARTMENT)
OF REVENUE,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Claude B. Arrington, held a formal hearing in the above-styled case on April 19, 1990, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: James E. Cotter
 Qualified Representative
 4460 Northwest 19th Terrace
 Fort Lauderdale, Florida

For Respondent: Lealand L. McCharren
 Assistant Attorney General
 Department of Legal Affairs
 The Capitol - Tax Section
 Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

Whether the delinquency penalty assessed against Petitioner for its untimely filing and payment of its corporate intangible tax return for 1986 should be waived by Respondent.

PRELIMINARY STATEMENT

Following an audit of Underground Supply Company in 1989, Respondent determined that the taxpayer had not filed or paid its intangible tax return for the year 1986. Accordingly, Respondent assessed the tax, interest, and a delinquency penalty against the taxpayer. The taxpayer promptly paid the tax and interest, but it requested that the delinquency penalty be waived. Following Respondent's denial of the request to waive the delinquency penalty, the taxpayer requested this formal proceeding.

James W. Johnson and James E. Cotter appeared at the formal hearing on behalf of Underground Supply Company. They were the officers and owners of Underground Supply Company during the period in question and the parties who would be liable for the payment of the delinquency penalty. Petitioner presented the testimony of Mr. Johnson, but it presented no documentary

evidence. Respondent presented the testimony of Maryann Sullivan, Respondent's tax auditor who conducted the audit on Underground Supply Company, and presented three documentary exhibits, which were accepted into evidence.

A transcript of the proceedings has been filed. Specific rulings on all timely filed proposed findings of fact are in the appendix to this Recommended Order.

FINDINGS OF FACT

1. At the times pertinent to this proceeding, James W. Johnson and James E. Cotter were the officers and owners of Underground Supply Company. In October 1986, Mr. Johnson and Mr. Cotter sold their interest in Underground Supply Company to Ferguson Enterprises. Mr. Johnson and Mr. Cotter remained liable for any contingent tax liabilities following the sale.

2. Underground Supply Company was required by Section 199.042(1), Florida Statutes, to file its corporate intangible tax return for 1986 on or before June 30, 1986. Mr. Johnson, who was the president of Underground Supply Company from 1972 through 1987, knew of the intangible tax filing requirement and had the ultimate responsibility to file tax returns on behalf of the corporation.

3. During an audit conducted by Respondent in 1989, it was determined that Underground Supply Company's corporate intangible tax return for 1986 had not been filed. Following the audit, Underground Supply Company was assessed taxes and interest on the taxes. In addition, a delinquency penalty was assessed pursuant to Section 199.282(3)(a), Florida Statutes. The taxes and interest were promptly paid by Mr. Johnson on behalf of Underground Supply Company. A failure to file penalty was initially assessed against Petitioner pursuant to Section 199.282(3)(b), Florida Statutes, but this penalty was removed by Respondent after it determined that the failure to file penalty was not applicable.

4. The delinquency penalty in the amount of \$1,078.86 was properly calculated and was properly assessed.

5. From 1973 until Mr. Johnson and Mr. Cotter sold their business, one accountant, Mr. Melvin Fancher, performed the accounting services required by Underground Supply Company. From 1973 to August 1985, Mr. Fancher was an independent contractor who performed his services through the various accounting firms with which he was associated. In August 1985, Underground Supply Company hired Mr. Fancher as its in-house accountant. Mr. Fancher was familiar with the books and records of Underground Supply Company and had prepared intangible tax returns on behalf of the company in the past. Underground Supply Company had, prior to the 1986 intangible tax return, promptly filed all of its tax returns and had promptly paid all taxes due of it. The failure to file the 1986 intangible tax return was caused by Mr. Fancher's oversight and by Mr. Johnson's and Mr. Cotter's reliance on Mr. Fancher. The failure to file was an honest error. There was no intention on the part of Mr. Fancher, Mr. Johnson, Mr. Cotter or anyone else on behalf of Underground Supply Company to avoid the payment of the intangible tax for 1986.

6. There was no evidence of extenuating circumstances which caused Mr. Fancher's failure to file the 1986 intangible tax return or for Underground Supply Company's failure to detect such failure. Mr. Johnson did not know why the tax return was not filed and he did not know why the failure to file was not detected prior to the 1989 audit. Although Underground Supply Company

referenced Mr. Fancher's change of status from independent contractor to in-house accountant in August 1985 in an attempt to explain the failure to file the intangible tax return due June 1986, there was no evidence of a connection between the two events.

7. In October 1986 Mr. Johnson and Mr. Cotter sold Underground Supply Company to Ferguson Enterprises. During the examination of the books and records of Underground Supply in connection with the sale, no one discovered the omission to file the 1986 intangible tax return.

8. Respondent denied Petitioner's request to waive the delinquency penalty, but it did review and revise the assessments, which resulted in a reduction of Petitioner's liability. Respondent's letter of December 14, 1989, which notified Petitioner of its final decision provided, in pertinent part, as follows:

Section 213.21, F.S. grants the Department authority to settle or compromise penalty if there exists a reasonable cause as to the delinquent payment of tax due. The burden of showing the existence of reasonable cause and the absence of willful neglect is on the taxpayer. See Florida Administrative Code, Rule 12-3.007.

It is the position of the Department that the mistake of not filing a return due to a change in your CPAs is not an extenuating or unusual circumstance and does not meet the criteria of reasonable cause as provided by the rule cited above. The statute provided for an amnesty program in 1987 which gave relief to taxpayers who had not filed their intangible tax returns in prior periods. Accordingly, the revised assessment is sustained.

CONCLUSIONS OF LAW

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

10. The intangible personal property tax is an annual tax which, pursuant to Section 199.042(1), Florida Statutes, is due and payable on June 30 of each year.

11. Section 199.282(3)(a), Florida Statutes, provides in pertinent part, as follows:

If any annual ... tax is not paid by the due date, a delinquency penalty shall be charged. The delinquency penalty shall be 5 percent of the delinquent tax for each calendar month or portion thereof from the due date until paid, up to a limit of 25 percent of the total tax not timely paid.

12. Pursuant to Section 213.21(3), Florida Statutes, the Department may settle or compromise a delinquency penalty if "it is determined by the department that the noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud. ..."

13. Rule 12-13.002(7), Florida Administrative Code, provides that the term "willful" as that term is used in the revenue laws means:

In relation to an act or omission which constitutes a violation of the revenue laws of this state "willful" means with actual knowledge or belief that such act or omission constitutes such violation and with intent nevertheless to commit or cause such act or omission

14. The failure to file the 1986 intangible tax return was not caused by "willful negligence, willful neglect" as the term is used in the revenue laws. There is no contention that the failure to file was a product of "fraud."

15. The remaining issue is whether Petitioner established "reasonable cause" for its failure to file the 1986 intangible tax return.

16. Under the facts of this case, Respondent's reference to the amnesty program that was in effect from January - June 1987, as a reason for denying the waiver is unpersuasive. Petitioner was unaware that the 1986 return had not been filed until 1989, and it had no reason to attempt to take advantage of the amnesty program in 1987.

17. Rule 12-13.007, Florida Administrative Code, is entitled "Grounds for Reasonable Cause for Compromise of Penalties" and provides, in pertinent part as follows:

(1) The Executive Director or the Executive Director's designee will make a determination of whether the taxpayer's noncompliance was due to reasonable cause and not to willful negligence, willful neglect, or fraud based on the facts and circumstances of the specific case. The standard used in this determination shall be whether the taxpayer exercised ordinary care and prudence and was nevertheless unable to comply. The burden shall be upon the taxpayer to affirmatively show, in writing, that the taxpayer's noncompliance was due to reasonable cause. A mere statement that noncompliance was due to reasonable cause, or a mere showing of the absence of willful negligence, willful neglect, or fraud, is insufficient for compromise and settlement of penalty. The taxpayer must demonstrate that noncompliance was due to reasonable cause by supporting evidence which indicates the taxpayer exercised ordinary care and prudence under the circumstances.

(6) Reliance upon another person to comply with filing requirements, or to obtain information, or to properly prepare returns or reports, may be the basis for reasonable cause, depending upon the circumstances. Noncompliance due to nonperformance of a ministerial-type function, inadvertent misplacement of returns, reports, or information, or the failure of the taxpayer's agent to properly prepare or file returns or reports may each be the basis for reasonable cause where the taxpayer establishes that adequate procedures or steps for complying existed; that the person

responsible for performing the function ordinarily performed the task properly; and, that extenuating or unusual circumstances prevented compliance.

18. Respondent has interpreted the statutes and regulations under which it operates as not authorizing a waiver of the delinquency penalty under the circumstances of this case. Great deference is afforded state agencies in the interpretation of the statutes and rules under which they operate and will be deferred to so long as the agency is within the range of possible interpretations. National Federation of Retired Persons v. Department of Insurance, 553 So.2d 1289 (Fla. 1st DCA 1989).

19. Petitioner established that it had previously filed all tax returns required of it and that its failure to file the 1986 intangible tax return was the result of an oversight by Mr. Fancher, upon whom the company relied to make such filings. However, Petitioner failed to establish the procedural safeguards that it had in place to prevent such oversights and it failed to establish that extenuating or unusual circumstances prevented Mr. Fancher's or the company's compliance with the requirement that Underground Supply Company file its 1986 intangible tax return in a timely fashion. Consequently, Petitioner has failed to establish that it is entitled to the waiver of the delinquency penalty.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that Respondent enter a final order which denies Petitioner's request for a waiver of the delinquency penalty assessed for the failure to timely file the 1986 intangible tax return.

DONE AND ENTERED this __21st__ day of May, 1990, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Hearing Officer
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
904/488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this __21st__ day of May, 1990.

APPENDIX TO THE RECOMMENDED ORDER IN CASE 90-0755

The post-hearing submittal filed by Petitioner contained no proposed findings of fact.

The proposed findings of fact submitted by Respondent are adopted in material part by the Recommended Order.

Copies furnished:

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