79-SBE-125

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
SEASIDE EXTENDED CARE CENTER)

For Appellant: Ward M. Gallacher
Accountancy Corporation

For Respondent: Bruce W. Walker
Chief Counsel

Kendall E. Kinyon
Counsel

O P I N I O N

This appeal is made pursuant to section 26077 Of the Revenue and Taxation Code 1/ from the action of the Franchise Tax Board in denying the-claim of Seaside Extended Care Center for refund of a penalty for late payment of tax in the amount of $169.75 for the income year 1975.

1/ All statutory references are to the Revenue and Taxation Code unless otherwise indicated.

Appellant, a California corporation, commenced doing business in this state on April 7, 1971. Its principal business activity is the providing of convalescent care. Appellant elected to file its California franchise tax returns on a calendar year basis. On March 13, 1976, appellant timely requested an extension of time, until June 15, 1976, in which to file its franchise tax return for the income year 1975. Appellant explained therein that its accounting information was incomplete: it indicated further that its total expected tax for the year 1975 was $200, and that $200 in estimated tax had previously been paid. 2/ Respondent granted the extension request.

On June 15, 1976, within the extension period, appellant filed its 1975 return. The return reflected a self-determined tax liability of $5,797, estimated tax prepayments aggregating $2,402 (equal to the amount of tax liability for the previous year), and a balance due of $3,395, which was paid with the return. Concluding that the provisions of section 25934.2 were applicable, respondent thereafter imposed the disputed penalty.

Section 25934.2 of the Revenue and Taxation Code provides, in pertinent part:

> (a) If any taxpayer fails to pay the amount of tax required to be paid under Sections 25551 . . . by the date prescribed therein, then unless it is shown that the failure was due to reasonable cause and not willful neglect, a penalty of 5 percent of the total tax unpaid as of the date prescribed in Sections 25551 ... shall be due and payable upon notice and demand from the Franchise Tax Board.

2/ In the request form provided by respondent and used by appellant, respondent clearly indicated that a remittance should accompany the application if estimated tax payments do not equal the expected tax for the year, and that if tax is underpaid as of the original due date a penalty is assessable.

Section 25551, which is applicable to appellant, provides:

> Except as otherwise provided in this chapter, the tax imposed by this part shall be paid not later than the time fixed for filing the return (determined without regard to any extension of time for filing the return). (Emphasis added.)

During the period in question, section 25402 provided, in pertinent part:

> A reasonable extension of time for filing the return may be granted by the Franchise Tax Board whenever in its judgment good cause exists. 3/

The normal due date for filing appellant's return for the income year 1975 was March 15, 1976. (Rev. & Tax. Code, § 25401, subd. (a).) Since appellant failed to pay $3,393 of its total franchise tax liability for that year until June 15, 1976, respondent's imposition of the penalty for late payment of tax was proper, unless such untimely payment was due to reasonable cause and not due to willful neglect. On the basis of the record before us, there appears to have been no willful neglect on the part of appellant. However, appellant bears the burden of proving that both of those conditions existed. (Rogers Hornsby, 26 B.T.A. 591 (1932); see Appeal of Telonic Altair, Inc., Cal. St. Bd. of Equal., May 4, 1978.) In order to establish reasonable cause, the taxpayer must show that its failure to act occurred despite the exercise of ordinary business care and prudence. (See Sanders v. Commissioner, 225 F.2d 629 (10th Cir. 1955), cert. den. 350 U.S. 967 [100 L.Ed. 839] (1956); Appeal of Cerwin-Vega International, Cal. St. Bd. of Equal., Aug. 15, 1978; Appeal of International Wood Products Corp., Cal. St. Bd. of Equal., Feb. 19, 1974.)

Appellant contends that reasonable cause existed for the untimely payment. It maintains that at the time of requesting the extension the amount of taxable income could not be determined because of the inexperience of the new bookkeeper but that it was expected the taxable income would be approximately the same as in 1974. Consequently, it suggests that additional time should be provided without penalty where, under such circumstances, more time is needed to determine taxable income accurately. Moreover, appellant urges that if good cause existed for granting the extension request, reasonable

3/ Pursuant to the present language of this provision the establishment of good cause is not required.

cause must also have been established for the untimely payment.

The duty of preparing and filing a corporate return and paying tax when due primarily rests upon the responsible executive officers of the corporation and such responsibility is not to be taken lightly. As a general rule, there is an absence of reasonable cause when clerical help fail to pay tax when due; moreover, the fact that business conditions prevent the hiring of sufficient clerical or pro-fessional help to timely compile the necessary information does not, of itself, constitute reasonable cause. (See Pioneer Automobile Service Co., 36 B.T.A. 213 (1937); Appeal of International Wood Products Corp., supra.) That is not to say, however, that under the facts of a particular case there cannot be a showing that the conduct of the responsible corporate officers nevertheless amounted to the exercise of reasonable care suffic-ient to attribute late payment to a reasonable cause. (See, e.g., United Aniline Co., I 62,060 P-H Memo. T.C. (1962), affd. on other grounds, 316 F. 2d 701 (1st Cir. 1963); Hammonton Investment and Mortgage Co., ¶ 59,212 P-H Memo. T.C. (1959), affd. on other grounds, 284 F.2d 950 (3d Cir. 1960).)

In the instant appeal, however, the appellant has offered no evidence that its responsible corporate executives did anything more than delegate the responsibility of paying the tax to a new bookkeeper whose inexperience allegedly pre-cluded timely payment. Consequently, the existence of reasonable cause has not been established. (See also Appeal of Citicorp Leasing, Inc., Cal. St. Bd. of Equal., Jan. 6, 1976; Appeal Of Electrochimica Corporation, Cal. St. Bd. of Equal., Aug. 3, 1970.) Furthermore, despite respondent's printed warning on the extension application form concerning payment require-ments, appellant estimated its expected tax to be the minimum of $200, and stated that amount had previously been paid; when it had actually made estimated tax prepayments aggregating $2,402. This indicates that at the time appellant filed its request for an extension it made no serious attempt to ascertain the amount of its expected tax liability (see also Appeal of Avco Financial Services, Inc., Cal. St. Bd. of Equal., May 8, 1979.)

Moreover, reasonable cause for late payment is not automatically established by the fact that there was good cause for granting an extension. Section 25551 requires payment of the tax not later than the time fixed for filing the return. That section specifies that this will not be altered by any

extension of time for the filing of the return. It was therefore anticipated by the Legislature that a penalty could be imposed notwithstanding the granting of an extension of time for filing. Thus, the "good cause" under the prior law which supported a filing extension operated independently of the "reasonable cause" necessary to avoid the underpayment penalty. The burden still rested with appellant to demonstrate that the failure to pay the entire amount of the tax by the regular due date of the-return was due to reasonable cause.

For the foregoing reasons, we must sustain respondent's action.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Seaside Extended Care Center for refund of a penalty for late payment of tax in the amount of $169.75 for the income year 1975, be and the same is hereby sustained.

Done at Sacramento, California, this 16th day of August, 1979, by the State Board of Equalization.

Chairman

, Member

, Member

, Member

, Member