

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:)
)
GLASS, SASH & DOOR SUPPLY, INC.) OAH No. 11-0478-TAX
)
Corporation Net Income Tax)
Tax Years Ended Jan. 31, 2002, 2003, 2004, 2006)

DECISION

I. INTRODUCTION

Glass, Sash & Door Supply, Inc. (GSD) failed to file timely returns or to make timely payment for four years of Corporation Net Income Tax. Two of the corporation’s officers suffered from serious health difficulties, including dementia, during part or all of the period. The Department of Revenue assessed \$11,106 in penalties for failure to timely file and \$2,777 in penalties for failure to timely pay. This appeal challenges those penalties on the single ground that they should be excused because they were due to a reasonable cause.

GSD has the burden of proof of showing facts that constitute reasonable cause for the late filings and payments. In this case, GSD has left the factual record unclear and has not established circumstances that support abatement of the penalties for any of the tax years. The assessment is therefore upheld.

II. TAX ASSESSED

The penalties at issue in this appeal are as follows:¹

Tax Year Ending	Failure to Timely File	Failure to Timely Pay
January 31, 2002	\$1,121	\$ 280
January 31, 2003	5,758	1,440
January 31, 2004	697	174
January 31, 2006	3,530	883

¹ One further penalty (\$232 for underpayment of estimated tax) was assessed but was not contested.

GSD did not file returns for any of these years until 2010. It made an estimated tax payment for one year, but the amount was apparently insufficient. For each year, the penalties for failure to timely file and failure to timely pay, taken together, apparently represent 25 percent of the unpaid tax liability for that year, which is the combined civil penalty that ordinarily attaches pursuant to 15 AAC 05.210(c). GSD does not challenge the computation of the penalties and does not contest that—unless “reasonable cause” is established—they would be owed.

GSD requested an informal conference to argue that the listed penalties should be excused on the basis of reasonable cause. The informal conference resulted in a decision (ICD) upholding the original assessment.² GSD timely appealed to the Office of Administrative Hearings.

III. FACTS

In an appeal of a tax matter to this office, “[t]he taxpayer bears the burden of proof on questions of fact.”³ Therefore, the factual underpinnings of the assessment will stand unless GSD shows, by a preponderance of the evidence, that they are in error. Many of the findings below, therefore, are drawn directly from the ICD, no evidence having been offered to show that they are mistaken. Beyond the ICD, the parties agreed to submit the case for decision on the basis of a written factual record, consisting primarily of a limited set of documents that GSD attached to its initial request for abatement. Notably, GSD’s officers elected not to testify. This has resulted in a factual record that supplies little detail about the circumstances surrounding GSD’s failures to file and pay tax.

GSD was a family business established by T.S. Dooley in 1952 and incorporated by him in 1961. From 1994 or earlier through the tax years at issue, T.S. Dooley retained 27 percent of the company’s shares, while his two sons, Thomas and Vincent, held 61 percent between them. T.S. was president, his wife Shirley was secretary, Thomas was vice president, and Vincent was treasurer. The four of them were the corporation’s four directors.⁴

² The Informal Conference Decision, dated November 30, 2011, is attached to GSD’s appeal notice.

³ AS 43.05.455(c).

⁴ ICD; biennial reports.

In the late 1990s, Shirley Dooley seems to have been handling most of the day-to-day financial affairs at GSD, although it is not clear whether she or T.S. directly oversaw tax filings.⁵ Shirley was in her seventies and was having significant vision difficulties, as well as other health troubles that sometimes forced her to work from home.⁶ She was unable to handle new accounting software installed just before 2000.⁷ About the same time, she became “unable to participate in preparation” of GSD’s annual reports that had to be filed with the probate court in connection with a conservatorship of some kind.⁸ After “a couple of years,” the firm’s software consultant recommended to T.S. that he fire his wife.⁹ At the direction of other officers, she reduced her role in company finances during 2001.¹⁰ At some point during 2002 her physician noted signs of dementia,¹¹ and she was in generally poor health thereafter.¹² Her work at the company ended in late 2002. Vincent Dooley, the treasurer, took over accounting supervisory duties at that time.¹³

There is no clear evidence of T.S. Dooley’s health during this period, that is, the period leading up to and including 2002. He reached 80 in 1999, and he would later die with cancer, dementia, and other medical problems in 2006,¹⁴ but the record does not reveal when these health issues began to disable him. One can infer that he was seriously affected by 2004, when he caused GSD to miss a statute of limitations deadline and thereby forfeit a federal tax overpayment of \$25,000.¹⁵

The first missed deadline at issue in this case was April 15, 2002, when GSD should have paid tax for the tax year ending January 31, 2002.¹⁶ The return for the same period was due the following month. By April-May 2002, Shirley Dooley’s challenges were already apparent to the other officers, and steps had been taken to reduce her role. So far as the record reveals, T.S. Dooley may have been unimpaired at this time.

⁵ DOR 004, 010.

⁶ DOR 010-011.

⁷ DOR 011.

⁸ DOR 012-013.

⁹ *Id.*

¹⁰ DOR 005, 007.

¹¹ DOR 014.

¹² *Id.*; DOR 005.

¹³ DOR 005.

¹⁴ DOR 015.

¹⁵ DOR 005.

¹⁶ ICD at 2 n.1.

The next pair of missed deadlines were in April and May of 2003, corresponding to the payment and filing deadlines for the tax year ending January 31, 2003. By this date, Shirley Dooley had left the company and Vincent Dooley, the treasurer, was supervising GSD's accounting functions. T.S. Dooley remained the chief executive and may have been the sole individual expected to attend to taxes, but there is no evidence in the record showing this to be the case, nor any showing why the treasurer would not at least be aware of whether taxes were being attended to. Moreover, the record does not establish that T.S. Dooley was impaired in any way as of 2003.

The remaining missed deadlines were in the spring of 2004 and the spring of 2006. In 2004, the situation was the same as 2003 except that there is, indeed, evidence in the record that T.S. Dooley's mental health was beginning to fail. In 2006, he was in his final illness.

No evidence has been offered to show the role of T.S., Vincent, or Thomas in caring for Shirley Dooley. None has been offered to show the role of Vincent or Thomas in caring for T.S.

No corporate records have been supplied to show what functions the Board of Directors had assigned to various officers. GSD admits that it had no controls in place to ensure timely payment of taxes or filing of returns.¹⁷

GSD made a partial tax payment for 2006 in April of 2006.¹⁸ No evidence has been supplied to show how this payment came about, or why those circumstances did not carry over to the filing of the return due in May of that year or to payments and returns for other years.

For the same periods it failed to file state returns and make state payments, GSD had parallel failures with respect to its federal tax obligations. The Internal Revenue Service assessed penalties parallel to the ones at issue here, totaling approximately \$110,000. A Settlement Officer for the Service subsequently abated those penalties on the following basis: "Reasonable cause established due to the illness and subsequent death of responsible officer."¹⁹

¹⁷ ICD at 3 n.8. The underlying questionnaire on which this finding in the ICD is based is not part of the record.

¹⁸ ICD at 4 n.14.

¹⁹ Record supplementation by Michael Molitor, CPA, Jan. 31, 2012.

IV. ANALYSIS

A. *Burden of Proof*

It has already been noted that, in an appeal of this kind, “[t]he taxpayer bears the burden of proof on questions of fact.”²⁰ As observed in a prior case, “[t]his means that [the taxpayer] needs to put evidence in the record, or point to evidence already in the record, showing that he does not owe the tax assessed.”²¹

B. *Reasonable Cause*

Like many tax penalties, the failure-to-file and failure-to-pay penalties in Alaska law are fundamentally non-discretionary strict liability penalties. In other words, unless an exception is established, the penalty applies, and its amount is fixed by the duration of the delay in compliance. These penalties are deterrents but not punishments, and they are not waived or reduced on the basis of an open-ended inquiry into the amount of “wrongdoing” or lack thereof.

Alaska law does provide, however, that the penalty will not apply “if the taxpayer shows reasonable cause for delay in filing the return or paying the tax.”²² In applying this standard, the Department has committed by regulation to “apply the administrative and judicial interpretations of Internal Revenue Code (IRC) § 6651 and the Treasury Regulation § 301.6651-1(c).”²³ These are federal provisions containing an identical exception for late filings and payments of federal taxes.

At the outset, one should note that Alaska is not bound by the fact that a federal settlement officer has deemed the “reasonable cause” standard to have been met for purposes of federal tax deadlines. Indeed, the ruling of the settlement officer would not bind the IRS itself in a dispute over other tax obligations;²⁴ still less does it bind the Alaska Department of Revenue, which was not a party to the IRS proceedings. Moreover, the reasoning of the settlement officer is opaque, and the nature of the evidence presented to her cannot be discerned from the record offered here.

²⁰ AS 43.05.455(c).

²¹ *In re McMullin*, OAH No. 07-0213-TAX (Office of Admin. Hearings 2008), at 2.

²² 15 AAC 05.200(a) (representing the Department’s application of AS 43.05.220(a)).

²³ 15 AAC 05.200(b).

²⁴ *Tucker v. Commissioner of Internal Revenue*, 135 T.C. 114, 144-149 (U.S. Tax Ct. 2010).

GSD rests its argument in the present case on one of the formal administrative interpretations of IRC § 6651 and the Treasury Regulation § 301.6651-1(c). The interpretation GSD points to is Internal Revenue Manual § 1.2.12.1.2 (formerly § 4562.2), which addresses “Reasonable cause for late filing of return or failure to deposit or pay tax when due” and contains the following key language:

Any sound reason advanced by a taxpayer as the cause for delay in filing a return . . . or paying tax when due, will be carefully analyzed to determine whether the applicable penalty should be asserted. Examples of sound causes for delay which, if established, will be accepted as reasonable cause are shown below:

- A. Death or serious illness of the taxpayer or death or serious illness in his/her immediate family. In the case of a corporation, estate, trust, etc., the death or serious illness must have been of an individual having sole authority to execute the return or make the deposit or payment or of a member of such individual’s immediate family.

The quoted manual section is a codification of Policy Statement P-2-7, issued in 1970, and it has not changed in many years. While it does not have the force of a regulation,²⁵ it represents the Internal Revenue Service’s longstanding, consistent, and formally published reading of the law it administers, and is thus within the sphere of interpretations that Alaska’s Department of Revenue is committed by regulation to use as guidance.

GSD’s argument from the quoted language focuses on the final sentence. GSD points out that all four GSD officers were members of the same family, and therefore, regardless of who had authority to execute a return or make a payment for GSD, that person was either suffering from a serious illness or had an immediate family member—a spouse or a parent—suffering from a serious illness. What GSD overlooks, however, is that it is not enough to establish that there is a qualifying illness. The illness must also be shown to be the “cause” for the late filing or payment.

It is in the area of causation that GSD’s proof is deficient. The deficiency is illustrated by many published decisions, of which the following are a sample.

²⁵ See *Matter of Carlson*, 126 F.3d 915, 922 (7th Cir. 1997).

*Matter of Carlson*²⁶ was a Seventh Circuit case in which the taxpayer, after missing tax filings and payments for three years, relied on the same Internal Revenue Manual section that underlies GSD’s argument. As in this case, the *existence* of a serious illness in the immediate family was beyond dispute: the taxpayer’s son, who lived at home, suffered from a serious and disruptive mental disorder. The court, however, found no basis to abate the late filing and payment penalties, noting a lack of evidence of the “effect” of the illness on those around the son. The Seventh Circuit panel showed great skepticism that an illness could justify year after year of missed filings by individuals who were otherwise apparently able to carry on with their lives, observing:

We believe the type of illness or debilitation that might create reasonable cause is one that because of severity or timing makes it virtually impossible for the taxpayer to comply--things like emergency hospitalization or other incapacity occurring around tax time.²⁷

In a like vein is *Benton Workshop, Inc. v. United States*,²⁸ in which a husband-and-wife family corporation missed tax deadlines during an incapacitating illness of the wife, its president. The court found no basis to abate the penalties in the absence of a demonstration that the wife’s illness actually prevented the vice-president husband from making the requisite filings.

Similarly, in *Regina Felton, PC v. Commissioner of Internal Revenue*,²⁹ the sole shareholder of a corporate filer relied on the illness and death of her mother in 2002 as reasonable cause for failing to file until January of 2004. The Tax Court noted that the failure to file extended “beyond the duration” of the family crisis, and found that in that context causation was not demonstrated.³⁰

The same pattern may be seen closer to home in *In re Keystone Associates, Inc.*,³¹ an Alaska corporation income tax case involving another husband-and-wife family corporation in which one of the two officers had an indisputably disabling illness. While noting that the situation “arouses compassion,” the administrative law judge was unable to abate the late filing and payment penalties in the absence of a persuasive showing that

²⁶ *Id.*

²⁷ *Id.* at 923.

²⁸ 104 A.F.T.R.2d 2009-6034 (E.D. Ark. 2009).

²⁹ 2006 WL 2679986 (U.S. Tax Ct.).

³⁰ *Id.* at *5.

³¹ OAH No. 06-0556-TAX (Office of Administrative Hearings 2008) (2008 WL 8186220).

the other officer, the spouse, was likewise prevented by those circumstances from attending to the tax duties.³²

The *Regina Felton* case is particularly telling for GSD's fact situation. Even if the mental and physical decline of the elder Dooleys paralyzed the corporation while it was occurring, the fact remains that none of the missing returns or payments was made good until 2010, eight years after Shirley Dooley stopped working for the company and four years after T.S. had died. Reasonable cause persists only as long as the inability to comply persists.

Moreover, GSD has not shown that there was, as a legal matter, ever a time when the corporation could not have complied. If the treasurer and vice president were fully occupied in caring for their parents, reasonable cause might exist while they were so occupied, but the sparse record does not show that they ever were. Instead, it suggests that the parents may have been unwilling to share information and oversight with their sons—notwithstanding that the sons were majority shareholders and board members—and the sons were, through love and deference, reluctant to force the issue. These considerations are natural, even admirable, but they do not render a corporation unable to comply.

In short, the proof GSD has submitted does not establish reasonable cause for the corporation to delay until 2010 in meeting eight tax deadlines that fell in the 2002-2006 period.

V. CONCLUSION

No basis has been demonstrated to disturb the assessment, and accordingly that assessment is affirmed.

DATED this 12th day of March, 2012.

By: Signed
Christopher Kennedy
Administrative Law Judge

³² *Id.* at 5.

NOTICE

This is the decision of the Administrative Law Judge under AS 43.05.465(a). Unless reconsideration is ordered, this decision will become the final administrative decision 60 days from the date of service of this decision.

A party may request reconsideration in accordance with AS 43.05.465(b) within 30 days of the date of service of this decision.

When the decision becomes final, the decision and the record in this appeal become public records unless the Administrative Law Judge has issued a protective order requiring that specified parts of the record be kept confidential. A party may file a motion for a protective order, showing good cause why specific information in the record should remain confidential, within 30 days of the date of service of this decision.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 43.05.480 within 30 days after the date on which this decision becomes final.

Certificate of Service: The undersigned certifies that on March 12, 2012, this document was mailed to the following: Michael Molitor, CPA, representative for Glass, Sash & Door Supply, Inc.; R. Scott Taylor, AAG; Hollie Kovach, Tax Division, Department of Revenue.

By: Signed
Kim DeMoss/Jessica Ezzell

[This document has been modified to conform to the technical standards for publication.]