

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

RECEIVED
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IN THE MATTER OF)
Poppert Milling Inc.)
)
Tax Year 2008)

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
315 JUDICIAL DISTRICT
ANCHORAGE, ALASKA

ORDER GRANTING SUMMARY ADJUDICATION

I. Introduction

This case is the Alaska Corporate Net Income Tax appeal of Poppert Milling Inc. (Poppert Milling). The Alaska Department of Revenue (DOR) made a failure-to-timely-pay penalty assessment of \$424 against Poppert Milling for tax year 2008, which was upheld in an informal conference decision issued on March 4, 2010.

DOR has filed a motion for summary adjudication. Because Poppert Milling's honest mistake, which led to the late payment, does not meet the strict requirements for a showing of reasonable cause to abate the penalties for the late payment, the Division's motion is granted.

II. Procedural Background

Poppert Milling filed this appeal of DOR's informal conference decision to the Office of Administrative Hearings (OAH). DOR then filed a motion for summary adjudication, alleging that no material facts are in issue and that it is entitled to judgment as a matter of law.

Because DOR's motion was filed before the scheduled pre-hearing conference, a status conference was held on March 25, 2010, to ensure that Poppert Milling was aware of the procedural rules that applied to tax appeals before the Alaska Office of Administrative Hearings, including the deadlines for responding to dispositive motions.

Administrative Law Judge Mark T. Handley conducted the status conference. Scott Taylor, Assistant Attorney General, represented the DOR. Poppert Milling was represented by David A. Poppert.

At the status conference, Mr. Taylor explained that DOR's motion had been filed before the scheduled pre-hearing conference because the appeal made it appear that Poppert Milling had misunderstood the informal decision. Mr. Taylor was concerned that Poppert Milling appeared to believe that DOR's position was that Poppert Milling had acted with willful neglect in failing

to timely pay the tax due or that Poppert Milling was not being honest when it explained the circumstances surrounding the late payment. Mr. Taylor hoped that the summary adjudication motion would explain that DOR believes that it was required to assess the penalty even if the facts show that the late payment was not due to negligence and Poppert Milling truthfully explained why the payment was late. Mr. Taylor explained that he hoped that DOR's motion would clarify DOR's position and that Poppert Milling might decide to withdraw its appeal.

At the status conference, Mr. Poppert explained that Poppert Milling had not yet received the motion and did not wish to withdraw its appeal. Mr. Poppert explained that Poppert Milling also did not want the opportunity to respond in writing or orally to the DOR's motion. Mr. Poppert explained that Poppert Milling would rather just have Mr. Poppert's statements at the status conference and in his letter requesting an appeal be taken into consideration before a ruling was made on DOR's motion.

III. Undisputed Facts

Poppert Milling timely requested an extension and filed its 2008 Alaska Corporate Net Income Tax return before the extension deadline. DOR sent Poppert Milling a notice that tax was still due for the 2008 tax year and that estimated payments were due for the 2009 tax year. Poppert Milling misread the notice and did not understand that an additional payment for the 2008 tax year was required. Once Poppert Milling became aware of this mistake it paid both the tax due and the interest. Unfortunately, the payment was not made until several months after it was due. DOR correctly calculated that a failure-to-timely-pay penalty of \$424 would be assessed, absent a showing of reasonable cause, for Poppert Milling's late payment for tax year 2008.¹

IV. Discussion

Summary Judgment

In administrative adjudications such as this tax appeal, the right to a hearing does not require development of facts through an evidentiary hearing when no factual dispute exists.² Summary adjudication in an administrative adjudication uses the same standard as summary judgment in court: if the material facts are undisputed, they are applied to the relevant law and

¹ See DOR's Informal Conference Decision issued on March 4, 2010 & Poppert Milling's Appeal of Penalty Decision, dated March 16, 2010.

² See *Smith v. Dep't of Revenue*, 790 P.2d 1352, 1353 (Alaska 1990).

the resulting legal conclusions determine the outcome. Only if the parties genuinely dispute a material fact is it necessary to hold an evidentiary hearing.³

No Material Facts in Dispute

The material facts in this case are not in dispute. DOR and Poppert Milling agree about the circumstance surrounding Poppert Milling's late payment. Poppert Milling agrees that the payment was late and that DOR correctly calculated the penalty due. DOR is not alleging that Poppert Milling was negligent or acted with willful neglect in paying the tax late. DOR does not dispute that Poppert Milling acted honestly in its interactions with the Division, including its explanation of the reasons for the late payment. The only disagreement between the parties is whether, given these undisputed facts, the penalty should be abated.⁴

Failure to Pay Penalty

Alaska Statute 43.05.220(a) establishes a monthly penalty of five percent of the total tax due for failure to pay the tax when due. The penalties under AS 43.05.220(a) must be added unless there was reasonable cause for the failure to pay. This five percent penalty is added after each thirty days passes without the tax being paid. This penalty cannot exceed 25% of the total tax due.

Reasonable Cause

The definition of "reasonable cause" is found in Alaska Regulation 15 AAC 05.200, which provides:

- (a) The civil penalty under AS 43.05.220 will not be imposed if the taxpayer shows reasonable cause for delay in filing the return or paying the tax.
- (b) A taxpayer who wishes to avoid the penalty established by AS 43.05.220 for failure to file a tax return or pay a tax must make an affirmative showing of all facts alleged as a reasonable cause for his or her failure to file the return or pay the tax on time in a written statement containing a declaration that it is made under penalty of perjury. The statement should be filed with the return or filed with the Department of Revenue as soon as possible thereafter. In determining whether the delinquency was due to reasonable cause and not to willful neglect, the department will apply the administrative and judicial interpretations of Internal Revenue Code § 6651 and the Treasury Regulation § 301.6651-1(c).

³ A fact is not "material" unless it would make a difference to the outcome. *Whaley v. State*, 438 P.2d 718, 720 (Alaska 1968).

⁴ Poppert Milling's Appeal of Penalty Decision & DOR's Motion for Summary Judgment.

(c) Circumstances which may constitute reasonable cause under AS 43.05.220 include, but are not limited to, the following:

- (1) war, riot, rebellion, act of God or other disaster which rendered it impossible to make the filing or payment or which made delay unavoidable in making the filing or payment; or
- (2) acts or omissions by a third party which were beyond the control of the person making the filing or payment and which made delay unavoidable in making the filing or payment; or
- (3) the person took in good faith all steps and precautions reasonably necessary to ensure the timeliness of the filing or payment.

As can be seen from the language of Paragraph (c) in the regulation above, it is difficult to show reasonable cause. There is not reasonable cause when a late payment is the result of a mere miscalculation or clerical mistake.⁵

In its appeal, Poppert Milling implies that part of the lateness of the payment was due to the Division's failure to send follow up notices to the notice that Poppert Milling misread. While a letter from the Division's might have sped up the payment in this case, the duty to a pay tax on time is the taxpayer's responsibility. Another party contributing to circumstances that cause a late payment is generally not enough to show reasonable cause. Poppert Milling cannot show that there was reasonable cause for the late payment based on the undisputed facts because Poppert Milling admits that the late payment was the result of its own oversight. Reasonable cause requires more than a showing that the taxpayer made an honest mistake. In order to demonstrate reasonable cause for a late payment, a taxpayer must be able to show that the circumstances surrounding the late payment were beyond the taxpayer's control.⁶

Absence of Taxpayer's "Willful Neglect" Is Not Reasonable Cause

In its appeal, Poppert Milling cites 15 AAC 05.220(b), the regulation that sets out procedure for filing a claim of reasonable cause for abatement of the failure-to-pay penalty found in Alaska Statute 43.05.220(a) as the part of the basis for DOR's determination that the penalty assessed Poppert Milling should not be abated. Poppert Milling incorrectly concludes that in

⁵ *In the Matter of Taxpayer*, Alaska Department of Revenue Decision No. 89-094, 1989 WL 223090 (October 31, 1989).

⁶ *State, Dept. of Revenue v. DynCorp and Subsidiaries*, 14 P.3d 981, 988 (Alaska 2000) ; *Matter of Taxpayer, Inc.* Alaska Department of Revenue Decision No. 85-1, 1985 WL 15595 (January 31, 1985).

reaching this determination, DOR must have found that Poppert Milling's late payment was the result of Poppert Milling's "willful neglect."

Poppert Milling's conclusion that DOR found that the late payment was due to willful neglect is based on a misreading of the portion of that regulation that directs the DOR to apply federal tax law. The words "willful neglect" in 15 AAC 05.220(b) are not set out as the standard for lack of reasonable cause. The words "willful neglect" are used in the sentence "In determining whether the delinquency was due to reasonable cause and not to willful neglect, the department will apply the administrative and judicial interpretations of Internal Revenue Code § 6651 and the Treasury Regulation § 301.6651-1(c)." This sentence merely incorporates federal interpretations of the reasonable cause abatement requirements into Alaska law.

As can be seen from 15 AAC 05.220(c), which is the next paragraph of regulation, and is the part of the regulation that actually sets out the requirements for showing reasonable cause, there are many situations in which a late payment that was not due to willful neglect would still not be reasonable cause. Although a taxpayer's willful neglect would never be reasonable cause, the failure to have reasonable cause for a late payment does not always mean that the late payment was due to the taxpayer's willful neglect.

A taxpayer who does not willfully neglect his duty to timely pay his taxes will not be able to show that there is reasonable cause for the late payment if there was at least one reasonable step that the taxpayer could have taken that would have prevented the delay. The use of the term "willful neglect" in 15 AAC 05.220(b), is therefore misleading to the extent that it implies that the failure to timely pay penalty only applies to taxpayers who willfully neglect to pay their taxes on time. This implication is not correct. Even careful taxpayers, such as Poppert Milling, who make honest mistakes that lead to a late payment, are subject to the late payment penalty.

Absence of Taxpayer Negligence Is Not Reasonable Cause

DOR did not assert that Poppert Milling was negligent in failing to timely pay. As discussed above the requirement for showing reasonable cause are very strict. In addition to including circumstances when a taxpayer did not willfully neglect the duty to timely pay taxes, there are circumstances when a taxpayer who was not negligent in failing to timely pay taxes would still not be able to show reasonable cause for a late payment. If the taxpayer's actions or inactions that caused the late filing were consistent with the behavior of a prudent and reasonable

person the late payment would not be caused by the taxpayer's negligence. A taxpayer acting in a reasonable and prudent manner might still make a late tax payment, however, under circumstances that were not beyond his control.

DOR Did Not Assess Additional Penalty for Negligence

If DOR had concluded that the late payment was due to Poppert Milling's negligence, DOR could have assessed another penalty, in addition to the failure-to-pay penalty that it did assess. The Alaska Regulation for this additional penalty provides:

15 AAC 05.220. Additional penalty for negligence or intentional disregard

- (a) A negligence-or-intentional-disregard penalty will, in the department's discretion, be assessed in addition to a penalty for failure to file, failure to pay, or civil fraud.
- (b) If it is determined by the department that a tax deficiency or part of a tax deficiency is due to negligence or intentional disregard of a law or a regulation without intent to defraud, then a penalty of five percent will be assessed and collected. The penalty is computed on the total amount of the tax deficiency, even if the determination relates to only a part of the deficiency.
- (c) Negligence is the failure to do something which a prudent and reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; it is also doing something which a prudent and reasonable person would not do.
- (d) Intentional disregard of a law or a regulation without intent to defraud is the failure to comply with governing laws and regulations when the taxpayer has knowledge of the pertinent laws and regulations and does not have specific intent to evade the payment of tax. An error or honest difference of opinion does not constitute intentional disregard.
- (e) Negligence or intentional disregard may be demonstrated by any relevant evidence, including but not limited to the following:
 - (1) the taxpayer has substantially deviated from the statutes or regulations in reporting income or claiming deductions after being advised by the department of the proper methods of reporting;
 - (2) the taxpayer has failed to keep adequate records;
 - (3) the taxpayer has exaggerated deductions unsubstantiated by facts; or the taxpayer has not justified an understatement of income.

As can be seen from the language above, a taxpayer whose failure to timely pay a tax was the result of the taxpayer's willful neglect of the duty to pay the tax on time could be subject to the additional penalty for negligence, as well as the failure-to-timely-pay penalty. Acting with willful neglect that results in the late payment of a tax is something a prudent and reasonable person probably would not do.

It may be inferred from the fact that DOR did not assess this additional negligence

penalty against Poppert Milling that it is unlikely that DOR found that the late payment was caused by “willful neglect” or assumed that Poppert Milling was “willfully negligent.” Similarly, it does not necessarily follow from fact that DOR did find that there was not “reasonable cause” for the late payment, that DOR determined that Poppert Milling was “a liar” and “willfully did not pay” its taxes, as Poppert Milling suggests in its appeal.⁷

V. Conclusion

The undisputed fact surrounding the circumstances of Poppert Milling’s honest mistake that caused the late payment do not meet the legal requirements to show reasonable cause for the late payment. DOR’s motion for summary adjudication is GRANTED. DOR’s Informal Conference Decision issued on March 4, 2010 is AFFIRMED.

DATED this 10th day of June 2010.

By:

Mark T. Handley
Administrative Law Judge

NOTICE

1. This is the hearing decision of the Administrative Law Judge under Alaska Statute 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.⁸
2. A party may request reconsideration in accordance with Alaska Statute 43.05.465(b) within 30 days of the date of service of this decision.
3. 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.⁹

⁷ See Poppert Milling’s Appeal of Penalty Decision.

⁸ Alaska Statute 43.05.465(f)(1).

⁹ Alaska Statute 43.05.470.

4. 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.¹⁰
5. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Statute 43.05.480 within 30 days of the date of this decision becomes final.¹¹

DATED this ____ day of April 2010.

By: _____
Mark T. Handley
Administrative Law Judge

¹⁰ Alaska Statute 43.05.470(b).

¹¹ Alaska Statute 43.05.465 sets out the timelines for when this decision will become final.