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TEXAS WORKERS COMPENSATION COMMISSION
7551 METRO CENTER DR. STE 100
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18 of 18 DOCUMENTS

NAME: IN RE: * * *

NUMBER: HEARING NO. 41,015

COURT: COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS

CITE: 2002 *Tex. Tax LEXIS 218*

DATE: May 24, 2002

PANEL: [*1]

JACK M. WILHELM, Administrative Law Judge

COUNSEL: ELIAS V. LORENZANA, JR., Representing Administrative Hearings Section

* * *, Representing Petitioner

OPINIONBY: WILHELM

TAXPAYER NO.: * * *

AUDIT OFFICE: * * *

AUDIT PERIOD: 01/01/96 THROUGH 09/30/99

LIMITED SALES, EXCISE AND USE TAX/RDT

COMPTROLLER'S DECISION

PRELIMINARY DISCUSSION:

The Administrative Law Judge ("ALJ") heard this case at an oral hearing on January 23, 2002. * * * represented Petitioner, and presented himself as a witness. Assistant General Counsel **Elias V. Lorenzana, Jr.** represented the Administrative Hearings Section, and presented the testimony of Henry Flynt.

The ALJ took official notice of all records of the Comptroller's office that pertain to the Petitioner and the issues involved in the case. Unless otherwise indicated, all Section references are to Title 2, Texas Tax Code Ann. (Vernon 1992). References to Rules are to sections of Title 34, Texas Administrative Code.

AGREEMENTS OF THE PARTIES:

Subsequent to the hearing, the parties filed the following agreements:

1. Petitioner agreed that it was not entitled to any further credits for taxes paid in Louisiana (February 22, 2002 letter to **Elias V. [*2] Lorenzana**); and
2. The AHS agreed that the audit assessment should be amended to delete any related adjustments associated with the construction invoices related to the * * * --* * *. The AHS further agreed that prorated penalties and prorated interest with regard to this * * * should be deleted from the audit assessment (AHS Second Supplemental Response of March 12, 2002).

This opinion will address only the remaining issues not addressed by the aforesaid agreements.

CONTENTION OF PETITIONER:

Petitioner contends that penalty and interest should be waived.

FINDINGS OF FACT:

1. Petitioner is an insulation contractor.
2. The Comptroller audited Petitioner for limited sales, excise and use tax compliance for the period January 1, 1996, through September 30, 1999. On January 9, 2001, the Comptroller issued the Petitioner a Texas Notification of Audit Results, which included tax, penalty, and interest through the date of the Notice. Errors centered around taxes collected but not remitted, additional taxable sales, and taxable purchases on which no taxes were paid. The Petitioner timely requested a redetermination hearing. The record indicates one or more meetings between [*3] Comptroller personnel and Petitioner, which resulted in an agreed reduction of Petitioner's tax liability.
3. Petitioner was previously audited for the period from March 1, 1988, through April 30, 1995. This prior audit had similar errors relating to adjustments for tax collected but not remitted, additional taxable sales, and taxable purchases.
4. Petitioner's overall error rate in the current audit is significantly less than the prior audit error rate of 100%. Nevertheless, even as amended, the error rate remains high.
5. There is no evidence in the record that the assessment involved unclear or difficult taxability issues.
6. Petitioner presented no evidence of a change in Comptroller policy during the audit period relating to the items assessed in the audit.
7. Petitioner relied upon a CPA, outside accountant, or lawyer for tax advice and preparation
8. Petitioner is a sophisticated taxpayer, maintaining offices in * * *, TX, and * * *, LA, and provides services to large corporate and industrial entities.
9. Petitioner collected but failed to remit taxes in the amount of \$ * * *.
10. Petitioner had 19 late returns during the audit period.
11. Petitioner had incomplete records, [*4] e.g., incomplete job folders. There were missing contracts, bids, invoices, purchase invoices, and summary records necessary to verify the information presented. The auditor had no way to check internal controls. General ledgers, federal income tax returns, and depreciation schedules were never furnished the auditor.
12. Petitioner does not owe deficiencies in other taxes.
13. There is no evidence in the record of advice provided by the Comptroller's office that caused imposition of penalty and interest.
14. Petitioner had no accrual system in place.
15. Petitioner presented no evidence regarding the following: (1) undue delay caused by Comptroller personnel; (2) reliance on advice provided by the Comptroller's office that caused imposition of penalty and interest; or (3) natural disasters.

CONCLUSIONS OF LAW AND DISCUSSION:

Petitioner's contention should be denied.

Section 151.703(a) automatically imposes a penalty on taxes not paid when due. The penalty is imposed incrementally; five percent on taxes not paid when due, and an additional five percent on taxes not remitted within thirty days after they are due. Since most audits cover between three and four years, the penalty [*5] is generally ten percent of the assessed tax.

Section 111.103 provides the Comptroller discretionary authority to waive penalty or interest upon making a determination that a taxpayer exercised reasonable diligence to comply with the tax laws during the audit period.

Under the authority of Section 111.002, the Comptroller promulgated Rule 3.5 setting out certain factors to consider in determining whether a taxpayer exercised reasonable diligence. General Rule 3.5(d) states, "When reviewing an interest waiver request under ... this section or in a contested case, the following factors regarding a taxpayer's account will be considered: (1) undue delay caused by comptroller personnel; (2) reliance on advice provided by the comptroller's office which caused imposition of penalty and interest; and (3) natural disasters."

The record contains no evidence regarding these factors; thus, interest waiver should be denied.

General Rule 3.5(a)(1) provides that "penalty or interest on an audit liability may be waived if the taxpayer exercised reasonable diligence to comply with the tax laws of this state...." General Rule 3.5(c) sets out the factors to be considered when reviewing a request for [*6] penalty waiver as follows:

- (1) the taxpayer's audit history;
- (2) the tax issues involved;
- (3) a change in comptroller policy during the audit period;
- (4) size and sophistication of the taxpayer;
- (5) whether tax was collected but not remitted;
- (6) whether returns were timely filed;
- (7) completeness of records;
- (8) delinquencies in other taxes; and
- (9) reliance on advice provided by the comptroller's office which caused imposition of penalty and interest.

When balanced, the factors strongly weigh toward a finding that, for purposes of waiving penalty, this taxpayer was not exercising reasonable diligence to comply with the State's tax laws. Accordingly, I recommend penalty not be waived.

Specifically, regarding Petitioner's failure to remit taxes that it collected, the Comptroller has previously held that a taxpayer that has collected and not remitted tax has not exercised reasonable diligence. Comptroller's Decision No. 18,874 (1986) and 38,087 (1999).

Last, the Comptroller has previously held that penalty is not generally waived on periods for which returns are filed late. Comptroller's Decision No. 29,537 (1992) and 36,644 (1998).

RECOMMENDATION:

Based upon the findings [*7] of fact, conclusions of law, and discussion contained herein, the ALJ recommends that the audit be upheld, except as amended by the Agreements of the Parties identified above.

SIGNED May 24, 2002.

ORDER OF THE COMPTROLLER

The above decision of the Administrative Law Judge, resulting in Taxpayer's liability as set out in Attachment "A" which is incorporated by reference, is approved and adopted in all respects. This decision becomes final twenty-three (23) days from the date of this Order, and the total sum of the tax, penalty, and interest amounts is due and payable within twenty (20) days thereafter. If such sum is not paid within such time, an additional penalty of ten percent of the taxes due will accrue, and interest will continue to accrue.

If a rehearing is desired, a Motion for Rehearing must be filed with the Administrative Law Judge no later than twenty-three (23) days after the date of this Order, and must state the grounds upon which the motion is based.

RENDERED and ISSUED May 24, 2002.

CAROLE KEETON RYLANDER, Comptroller of Public Accounts of the State of Texas

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