

BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
Bank of America Tower
101 North First Avenue - Suite 2340
Phoenix, Arizona 85003
(602) 528-3966

THOMAS J. BURNS,

Appellant,

vs.

ARIZONA DEPARTMENT OF REVENUE,

Appellee.

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) Docket No. 1804-99-S
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)
) NOTICE OF DECISION:
) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW
)

The State Board of Tax Appeals, having considered all evidence and arguments presented, and having taken the matter under advisement, finds and concludes as follows:

FINDINGS OF FACT

The Arizona Department of Revenue (the "Department") audited Thomas J. Burns ("Appellant") for the period July 1, 1990 through December 31, 1995 ("Audit Period"). During this time, Appellant leased commercial property to a corporate entity in which he was an officer, director and majority shareholder. That entity, in turn, leased 50% of the property to another corporation in which Appellant was an officer, director and majority shareholder. Appellant did not have a transaction privilege tax license and did not remit transaction privilege tax to the Department during the Audit Period. The Department determined that Appellant was engaged in the business of leasing commercial property and assessed tax on the amounts Appellant recorded as rent in his receipts journal. The Department also assessed penalties for failure to timely file returns and pay tax and interest.

Appellant paid the assessed tax, but now timely appeals the imposition of penalties and interest to this Board.¹

¹ At the hearing before the Board, Appellant argued that the Department's audit overstated his gross rental receipts and that the amount of interest and penalties originally imposed should be reduced accordingly. Appellant offered no evidence to support this bare assertion; therefore, the Board will not address the issue.

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DISCUSSION

The issue before the Board is whether the interest and penalties imposed may be abated.

Penalties may be imposed when a person “fails to make and file a return” and “fails to pay the tax within the time period prescribed” A.R.S. § 42-1125(A) and (D) (formerly A.R.S. § 42-136(A) and (D)). The penalties may be abated if the taxpayer can establish that the failure to timely file and pay was “due to reasonable cause and not due to wilful neglect.” *Id.* “Reasonable cause” is defined by statute to include “situations in which the taxpayer had a reasonable basis to believe that the tax did not apply to the business activity” A.R.S. § 42-2062 (C) (formerly A.R.S. § 42-139.12(C)). Additionally, courts have defined “reasonable cause” to mean the exercise of ordinary business care and prudence. *Daley v. U.S.*, 480 F.Supp. 808 (D.N.D. 1979).

Appellant argues that the penalties at issue should be abated because he relied upon the advice of a certified public accountant (“CPA”). Appellant contends that, during the Audit Period, a CPA reviewed the tax reporting of both the corporate entities and Appellant’s personal taxes. Appellant initially submitted a sworn affidavit stating that the CPA was aware that Appellant was reporting rental income on his personal income taxes, but nevertheless failed to advise him of the applicable transaction privilege tax. During the proceedings before the Department, the Department argued that reasonable cause existed only if the CPA was *specifically asked* about transaction privilege tax liability. Appellant subsequently submitted another sworn affidavit stating that he *specifically asked* the CPA if the commercial lease transaction was subject to transaction privilege tax and was told by him that it was not.²

“When an accountant or attorney *advises* a taxpayer on a matter of tax law . . . it is reasonable for the taxpayer to rely on that advice.” *United States v. Boyle*, 469 U.S. 241, 249 (1985). However, given the conflicting statements made by Appellant – each under oath – and the lack of any other evidence to support Appellant’s assertion (such as sworn testimony or subpoenaed records from the CPA), the Board finds that Appellant has not sufficiently established that he relied on the advice of a

²At the hearing before the Board, Appellant stated that he did not specifically ask about the transaction privilege tax until after the audit at which time the CPA stated he was unaware of the tax.

1 CPA. Therefore, Appellant has not proven that his failure to timely file returns or pay transaction
2 privilege tax was due to reasonable cause and not wilful neglect.

3 The interest at issue may not be abated because it represents a reasonable interest rate on the
4 tax due and is made part of the tax by statute. See A.R.S. § 42-1123(A); see also *Biles v. Robey*, 43
5 Ariz. 276, 30 P.2d 841 (1934).

6 CONCLUSIONS OF LAW

7 1. Appellant has not proven that his failure to timely file returns or pay transaction privilege tax
8 was due to reasonable cause and not wilful neglect; therefore the penalties at issue may not be abated.
9 A.R.S. § 42-1125(A) and (D).

10 2. Because the interest assessed represents a reasonable interest rate on the tax due and is
11 made part of that tax by statute, it may not be abated. See A.R.S § 42-1123(A); see also *Biles v. Robey*,
12 43 Ariz. 276, 30 P.2d 841 (1934).

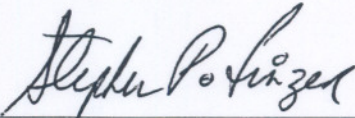
13 ORDER

14 THEREFORE, IT IS HEREBY ORDERED that the appeal is denied, and the final order of the
15 Department is affirmed.

16 This decision becomes final upon the expiration of thirty (30) days from receipt by the taxpayer
17 unless either the State or taxpayer brings an action in superior court as provided in A.R.S. § 42-1254.

18 DATED this 18th day of April, 2000.

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20 STATE BOARD OF TAX APPEALS

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23 _____
24 Stephen P. Linzer, Chairman

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26 SPL:ALW
CERTIFIED

27 Copies of the foregoing
28 mailed or delivered to:

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