

BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
100 North 15th Avenue - Suite 140
Phoenix, Arizona 85007
602.364.1102

NATIVE ENVIRONMENTAL, LLC,

Appellant,

vs.

ARIZONA DEPARTMENT OF REVENUE,

Appellee.

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) Docket No. 1986-10-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

Native Environmental, LLC ("Appellant") is an Arizona company that performs asbestos and mold removal, lead-based paint and microbial remediation and general debris removal services for residential, commercial and industrial properties in Arizona and several other states. Appellant began business operations in Arizona in January 2001. Between the periods of January 2001 and March 2006, Appellant timely filed transaction privilege tax returns and paid transaction privilege tax to the Arizona Department of Revenue ("Department") for 57 out of 63 reporting periods.¹ At issue before the Board now is the period of April 2006 through March 2008 in which Appellant did not timely file returns or pay tax.

On June 23, 2008, Appellant voluntary (i.e., without audit or demand) filed the returns due for these periods and subsequently paid the tax due pursuant to a payment plan agreement entered into with the Department. Appellant made the final payment of tax and interest under the payment plan in

¹ Late filings and late payments occurred during this time period for May, July, August and September of 2004, and February and March 2006. The September 2004 return was post marked one day after the delinquency date. Both the May 2004 and August 2004 returns were postmarked six days after the delinquency date. The July 2004 return was postmarked 17 days after the delinquency date. The February 2006 return was postmarked May 23, 2006, 56 days late, and the March 2006 return was postmarked August 12, 2008, more than two years late.

1 February 2009. The payment plan did not include \$72,188.45 in late filing and late payment penalties
2 determined to be due by the Department. Appellant had submitted a written request for abatement of
3 these penalties when it filed the returns, alleging that its non-compliance was due to a misunderstanding
4 between its office manager and an independent CPA, with each believing that the other was filing the
5 returns and paying the tax.

6 On January 13, 2009, the Department denied Appellant's request for penalty abatement.
7 Appellant appealed the denial to the Office of Administrative Hearings ("OAH"). The OAH reversed the
8 Department's denial and granted penalty abatement based on the fact that nine other taxing jurisdictions
9 waived or abated similarly imposed penalties.² The Department's Penalty Review Section appealed the
10 OAH decision to the Director of the Department who reversed the decision and upheld the penalties
11 originally imposed. Appellant now timely appeals to this Board.

12 DISCUSSION

13 The issue in this appeal is whether the late filing and late payment penalties imposed by the
14 Department should be abated. Appellant argues that the penalties at issue should be abated because it
15 voluntarily complied in filing the returns at issue and paid the back tax, has a prior history of timely filing
16 and paying, and nine other jurisdictions abated similar penalties. The Board agrees.³

17 A.R.S. § 42-1125(A) provides that if a taxpayer fails to file a return on or before the due date, a
18 penalty "shall be added to the tax" unless the failure is due to reasonable cause and not due to willful
19 neglect. Similarly, A.R.S. § 42-1125(D) provides that if a person fails to pay the tax within the time
20 prescribed, a penalty "shall be added to the amount shown as tax" unless the failure is due to reasonable
21 cause and not due to willful neglect.

22 Arizona generally follows the federal interpretation of reasonable cause. See Ariz. Dep't of
23 Revenue, General Tax Ruling ("GTR") 04-2 (Oct 14, 2004). A reasonable cause determination requires
24

25 ² Eight Arizona cities fully abated and one partially abated late filing and/or late payment penalties imposed for the time period at issue under the Municipal City Tax Code.

³ The Board's decision is split, 2-1. See dissenting opinion, *infra* at fn 5.

1 consideration of the specific facts and circumstances of each case.⁴ While there is no definitive list of
2 factors establishing reasonable cause, as a general rule, abatement is appropriate when the taxpayer
3 exercises ordinary business care and prudence but is unable to comply with its tax obligations. Internal
4 Revenue Manual ("IRM") § 20.1.1.3.1(1). A taxpayer's compliance once it discovers its failure is a factor
5 that should be considered. *Id* § 20.1.1.3(5).

6 The Board has reviewed the facts of this case and finds that Appellant's failure to timely file and
7 pay due to a misunderstanding between its office manager and an independent CPA does, in fact,
8 constitute reasonable cause and not willful neglect. Accordingly, considering Appellant's voluntary
9 compliance and past filing history and the abatement of similar penalties by nine Arizona cities, the Board
10 concludes that the abatement of the penalties at issue is appropriate.⁵

11 CONCLUSIONS OF LAW

12 Appellant is not liable for the penalties assessed. See A.R.S. § 42-1125; IRM §§ 20.1.1.3.1(1)
13 and (5).

14 ORDER

15 THEREFORE, IT IS HEREBY ORDERED that the appeal is granted, and the final order of the
16 Department is vacated.

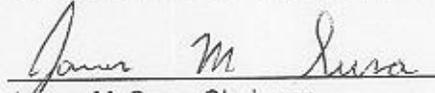
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20 ⁴ *Id.*; see also U.S. Treas. Reg. § 1.664-4(b)(1) (all facts and circumstances must be considered for determining reasonable cause
21 with respect to federal accuracy related penalty) and 301.6651-1(c) (reasonable cause for late payment requires an analysis of all
the facts and circumstances.)

22 ⁵ The dissenting opinion of Board member, Amy.W. Fellner, follows: The fact that Appellant voluntarily came forward and
23 acknowledged its failure to timely file returns and pay tax is truly commendable, and the Department's decision to not abate the
penalties, when it was within its discretion to do so, is regrettable. However, the Board is charged with applying the law and has no
24 such discretion. Reasonable cause exists when the taxpayer uses reasonable and prudent business practices but fails to comply
with its tax obligations due to circumstances beyond its control. GTR 4-2. The filing of a tax return or payment of tax when due is a
25 personal, nondelegable duty of the taxpayer. *Ferrando v. United States*, 245 F.2d 582 (9th Cir. 1957). The failure to timely file or
pay is not excused by a taxpayer's reliance on an agent, and this reliance does not constitute reasonable cause. *United States v.*
Boyle, 105 S. Ct. 687 (1985). Further, while Arizona generally follows the federal interpretation of similar or identical statutory
language (See, *People of Faith, Inc. v. Arizona Dep't of Rev.*, 171 Ariz. 140, 829 P.2d 330(App. 1992), the same does not apply to
interpretations of municipal code provisions by cities or other political subdivisions of the State of Arizona. The abatement letters of
the nine cities involved do not provide any information concerning the reasons for penalty abatement and do not support a finding of
reasonable cause under A.R.S. § 42-1125. Finally, although a history of timely filing and paying is one of several factors to be
considered when determining reasonable cause under GTR 04-2, a good filing history, by itself, does not allow for the abatement of
penalties. For the reasons stated, I find there is no reasonable cause to abate the penalties imposed for Appellant's late filings and
late payments; therefore, I respectfully dissent from this decision.

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

3 DATED this 24th day of MAY, 2011.

4 STATE BOARD OF TAX APPEALS

5 
6 James M. Susa, Chairman

7 JMS:ALW

8 CERTIFIED

9 Copies of the foregoing
10 Mailed or delivered to:

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