

STATE OF MAINE
KENNEBEC, ss.

MAINE BOARD OF TAX APPEALS
DOCKET NO. BTA-2019-9

[CORPORATE TAXPAYER],

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

[Corporate Taxpayer] (the “Company”) appeals from the penalty portion of a sales and use tax assessment made by Maine Revenue Services (“MRS”) for the period [month, year 1], through [month, year 3]. After considering the facts presented and the applicable law, we uphold the assessed penalty in full.

I. Background

At all relevant times, the Company was a Maine corporation and registered Maine retailer selling tangible personal property and services at retail.¹ The Company collected Maine sales tax on its sales of tangible personal property and remitted the collected tax to MRS with its sales tax returns. It did not collect tax on its sales of services, however, because those were not subject to the tax. All of the Company’s sales of services were prepaid by the customer.

A. Record keeping

In [year 1], the Company purchased a new a point of sale record keeping computer program (the “POS System” or the “System”) for sales and income tax purposes and to manage its inventory. For taxable sales, the system would compute the sales tax, record the Company’s

¹ For the period at issue, the Company’s taxable sales of tangible personal property and its nontaxable sales of services each constituted approximately 50% of its total sales.

gross receipts, and update the Company's inventory records. For nontaxable sale of services, however, the System would generate a "credit memo," and when the service was fully performed, the System would generate an offsetting internal "receipt." The System also generated a "Sales Tax Liability" report that the Company used to prepare its sales tax returns.

B. Sales tax reporting

As a registered Maine retailer, the Company was required to file sales tax returns "on a form prescribed" by MRS and to "report the total sale price of *all* sales made during the preceding calendar month." 36 M.R.S. § 1951-A(1) (emphasis added). According to the form prescribed by MRS, the Company was required to report, for each reporting period, its total ("gross") sales, its nontaxable "exempt sales," and its total "taxable sales" upon which the tax would then be computed. *See, e.g.*, MRS Form ST-7 (applicable period). In practice, however, the Company simply entered the "taxable sales" amount from the POS System onto the Company's returns as both its taxable sales and, erroneously, as its total sales. The Company then remitted sales tax to MRS on the reported "taxable sales" amount at the correct rate. As a result, the Company did not compare the its actual taxable sales against its actual total sales when preparing its returns.

C. Audit

MRS subsequently initiated a first-time audit of the Company's sales and use tax compliance. Upon examination, the auditor found that the Company had reported less than one-half of its taxable sales in each reporting period. The auditor determined that the Company's POS System incorrectly categorized certain sales as nontaxable, marked certain sales as negative amounts, and did not compile accurate reports. The auditor found that these reporting issues were not the result of fraud or purposeful negligence on the part of the Company. Upon

completion of the audit, MRS issued the subject assessment for tax, interest, and substantial understatement penalties in the total amount of \$[amount]. This appeal followed.

On appeal, the Company explained that the POS System had treated the credit memos from sales of nontaxable services as though they were returns of tangible personal property on which sales tax had been paid, artificially reducing the taxable sales in the bookkeeping system, along with the applicable tax. The Company does not dispute that it understated the tax due on its returns and does not challenge the tax or interest portions of the assessment. The Company argues, however, that its reliance on the POS System in preparing its returns constitutes reasonable cause for abatement of the assessed penalty. It is the Company's burden to show that abatement is warranted. 36 M.R.S. § 151-D(10)(F). We consider the matter on appeal de novo. *Id.* § 151(2)(G).

II. Discussion

A. Penalty Abatement

A substantial understatement penalty is imposed where a taxpayer files a return that understates his or her Maine tax liability by 10% or \$1,000, whichever is greater. 36 M.R.S. § 187-B(4-A). MRS must waive or abate such penalty, however, "if grounds constituting reasonable cause are established by the taxpayer." *Id.* § 187-B(7). As provided by section 187-B(7), "reasonable cause includes, but is not limited to, the following circumstances:"

- A. The failure to file or pay resulted directly from erroneous information provided by the Bureau of Revenue Services;
- B. The failure to file or pay resulted directly from the death or serious illness of the taxpayer or a member of the taxpayer's immediate family;
- C. The failure to file or pay resulted directly from a natural disaster;
- D. A return that was due monthly was filed and paid less than one month late and all of the taxpayer's returns and payments during the preceding 12 months were timely;

- E. A return that was due other than monthly was filed and paid less than one month late and all of the taxpayer's returns and payments during the preceding 3 years were timely;
- F. The taxpayer has supplied substantial authority justifying the failure to file or pay; or
- G. The amount subject to a penalty imposed by subsection 1, 2, 4-A, or 5-A is de minimis when considered in relation to the amount otherwise properly paid, the reason for the failure to file or pay and the taxpayer's compliance history.

Because Maine tax law does not provide a definition of "reasonable cause," the Company urges us to rely on the principles and examples discussed in the analogous federal tax regulations. Specifically, the Company contends that it exercised sufficient "effort to assess its own proper tax liability," which, according to the regulations, is "the most important factor" in the reasonable cause analysis. 26 C.F.R. § 1.6664-4(b)(1). The Maine Law Court has observed that when interpreting statutes, "we are required to give words their 'plain and natural meaning' and construe them in accordance with their 'natural import in common and approved usage.'" *Great Northern Nekoosa Corp. v. State Tax Assessor*, 540 A.2d 770, 772 (Me. 1988) (quoting *Moyer v. Board of Zoning Appeals*, 233 A.2d 311, 317 (Me. 1967)). Furthermore, when construing a statutory term that is undefined in the statute itself, the Maine courts "often rely on the definitions provided in dictionaries" to determine the plain meaning of the term. *Apex Custom Lease Corp. v. State Tax Assessor*, 677 A.2d 530, 533 (Me. 1996) (citations omitted). Using this approach, the term "reasonable" refers to that which is "fair, proper, or moderate under the circumstances." Black's Law Dictionary 1379 (9th ed. 2009).

In the present case, the Company reported as taxable and remitted tax on less than 50% of its taxable sales, which we find to be a significant variance. Additionally, the Company did not report its total sales separately from its taxable sales on its returns as was required. Had it done so, the inaccuracy of the POS System's reporting would have been readily apparent to the

Company. Moreover, the Company did not provide an explanation for its failure to follow this simple but important filing requirement. Accordingly, we find that the Company has not met its burden to show that it had reasonable cause for underreporting and underpaying the tax contained in the assessment. No waiver or abatement of the substantial understatement penalties on this basis is warranted.

B. MRS Penalty Policy

According to MRS, substantial understatement penalties are “generally” not imposed on audits where, as in the present case, the taxpayer had not previously been subject to an audit. *See* Pinkham, Jason W. and Maine Department of Administrative and Financial Services, “*Administrative Policies Affecting Penalties on Audits. Husson University 2015,*” at 3 (2015). *Revenue Services (Taxes) Documents. 6.* https://digitalmaine.com/mrs_docs/6 (hereinafter, the “Policy”). This Policy was in effect for at least the latter part of the subject audit period. At the Appeals Conference, MRS explained that it did not excuse the Company from penalties under the Policy because of the magnitude of the tax understatement and the trust-fund nature of the taxes involved.² Although there are several consequential factors that appear in the Policy, the two factors identified by MRS, above, are not among them.

On appeal, the Company first argues that it is MRS’s burden to “demonstrate a legitimate reason for its failure to follow its own written policy.” The Company does not point to any authority shifting the burden of proof to MRS on this issue and we are aware of none.

Consequently, we find that it is the Company’s burden to show that, despite its Policy, MRS improperly imposed the penalty at issue. 36 M.R.S. § 151-D(10)(F) (“Except when otherwise

² Maine tax law provides that sales taxes collected by a retailer “constitute[s] a special fund in trust for the State Tax Assessor.” 36 M.R.S. § 177(1).

provided by law, a petitioner has the burden of proving, by a preponderance of the evidence, that the assessor has erred in applying or interpreting the relevant law.”).

The Company next contends that it is entitled to a waiver of the subject penalty because, according to the terms of the Policy, the penalty is “generally” not imposed on a tax liability resulting from a first-time audit. In support of its position, the Company compares the first-time audit provision of the Policy with the provisions addressing first-time issues arising in subsequent audits. As the Company points out, while the penalty is “generally” waived for first-time audits, the penalty is only “typically” waived on a first-time issue arising in a subsequent audit:

Unlike the first time audit policy mentioned previously, which is more universally applied, the individual facts of a case determine whether the penalty is waived on a first time issue.

Policy at 4. According to the Company, this language prevents MRS from imposing the penalty unless a written exception to the Policy otherwise provides otherwise. We disagree.

The term “generally” is not defined in the Policy. Again, we turn to the dictionary for the plain language definition of the word.

“[G]enerally” is an adverb that means “in most cases” or “usually.” <https://www.lexico.com/en/definition/generally>. Synonyms include “normally,” “ordinarily,” and “commonly.” *Id.* “Generally” does not mean “always,” “in every case,” or “without exception.”

MRS’s Comments dated February 13, 2020, at 1-2. We find that the plain language of the Policy does not limit MRS’s ability to impose the substantial understatement penalty on tax liability resulting from a first-time audit.

The Company has not met its burden of showing that MRS incorrectly imposed the subject penalty. No adjustment to the assessment on this basis is warranted.

III. Decision

Based on the evidence presented and the applicable law, we uphold the penalty portion of the assessment in full. No adjustment is warranted.

The Board may, in limited circumstances, reconsider its decision on any appeal. If either party wishes to request reconsideration, that party must file a written request with the Board within 20 days of receiving this decision. Contact the Appeals Office at 207-287-2864 or see the Board's rules, available at <http://www.maine.gov/boardoftaxappeals/lawsrules/>, for more information on when the Board may grant reconsideration. If no request for reconsideration is filed within 20 days of the date of this proposed decision, it will become the Board's final administrative action. If either party wishes to appeal the Board's decision in this matter to the Maine Superior Court, that party must do so within 60 days of receiving this decision. During the 60-day period in which an appeal may be filed with the Superior Court, the Company may contact Maine Revenue Services at 207-624-9595 for the amount of tax that is currently due, together with any interest or penalties owed. After that 60-day period has expired, Maine Revenue Services will contact the Company with an updated amount of tax and any interest or penalties due at that time.

Issued by the Board: August 19, 2020