

State of New Hampshire

Board of Tax and Land Appeals

Paul B. Franklin, Chairman
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Albert F. Shamash, Esq., Member

Anne M. Stelmach, Clerk



Governor Hugh J. Gallen
State Office Park
Johnson Hall
107 Pleasant Street
Concord, New Hampshire
03301-3834

Scott A. Chesley d/b/a C. Chesley Food Service, LLC

v.

Department of Revenue Administration

Docket No.: 25457-11MR

DECISION

The "Taxpayer" appeals, pursuant to RSA 21-J:28-b, IV, the department of revenue administration's ("DRA's") assessment of additional taxes, penalties and interest for the period July 1, 2006 through July 31, 2008 under RSA chapter 78-A (Tax on Meals and Rooms).¹ The board denies the appeal.

As set forth in Tax 209.04, "(t)he appellant shall have the burden to prove the DRA erred in its decision." (See also Tax 201.27(f).) The board finds the Taxpayer failed to meet this burden.

The Taxpayer contests the assessment, penalties and interest because of a belief:

- (1) the DRA acted improperly when it audited the Taxpayer's tax filings and determined additional taxes were due along with penalties and interest; and
- (2) the method on which the DRA relies involves an extrapolation and is unconstitutional

¹ The DRA also assessed certain fees, pursuant to RSA 6:11-a and RSA 80:52-b, for payments made by checks that were returned as uncollectible. On the record presented, the Taxpayer did not challenge these fees, either in the appeal document filed with the board or in the proceedings before the DRA.

because of the authorities cited by the Taxpayer in his "Requests for Findings of Fact And/Or Rulings of Law."

The DRA argued the appeal should be denied because:

- (1) the Taxpayer had a full opportunity during the audit process to provide information from his own books and records to effect a change in the amount of the assessment determined by the DRA's Audit Division, but he did not do so;
- (2) various statutes and regulations (cited in the DRA's "Requests for Findings of Fact and Rulings of Law") require the Taxpayer to keep adequate books and records to support the filings made in remitting the taxes collected from his customers and to produce them for inspection, which the Taxpayer did not do, and these statutes and regulations also authorize the DRA to conduct an audit and to assess additional taxes, interest and penalties in the manner that it did;
- (3) the Taxpayer had a full and fair opportunity to contest the assessments and the proceedings before a DRA Hearing Officer and a petition for reconsideration of the Hearing Officer's decision; and
- (4) the Taxpayer failed to meet his burden of proving the DRA erred or that the Taxpayer is entitled to any relief.

Board's Rulings

The board finds the Taxpayer failed to meet his burden of proving the DRA erred in making the assessment and that he is entitled to relief. The appeal is therefore denied.

The board's authority to hear and decide this appeal is set forth in RSA 21-J:28-b, IV, which provides a right to appeal an adverse DRA determination to either the board or to the superior court following the DRA's determination and denial of a reconsideration petition. The

DRA issued a "Final Order" on November 23, 2010 sustaining the position of the Audit Division regarding additional tax, penalties, and interest due for the period July 1, 2006 through July 31, 2008. The DRA denied the Taxpayer's reconsideration petition on February 17, 2011, making the Taxpayer's March 20, 2011 appeal to the board timely.

In this appeal, the Taxpayer has the burden of proving he is entitled to relief from the DRA's determination and the board is authorized to grant "such relief as may be just and equitable." (See RSA 21-J:28-b, VI.) In Appeal of Steele Hill Development, Inc., 121 N.H. 881, 884 (1981), where the taxpayer challenged the DRA's imposition of a business profits tax, penalties and interest, the supreme court held that "if a tax system is to be effective, the assessments of the taxing authorities must be deemed correct and justifiable, and the burden of overturning the action . . . must be with the taxpayer. (Citations omitted.)"

The Taxpayer testified he operates the fourth generation of a family business in food service. This business involves the sale of food and beverages at fairs, concerts, motor speedway races and other public events and the Taxpayer holds four "Meals and Rentals Operators Licenses" for this business. (See DRA's "Findings" Request No. 1.) These four licenses are described as: C. Chesley Food Service; Meadowbrook Concert Facility; Star Speedway; and Hudson Speedway. (Id.)

As an operator, the Taxpayer is required to collect the RSA ch. 78-A tax from his customers at the time of each sale and to pay the collected taxes to the state by the 15th day of each month following the taxable period. See RSA 78-A:6 and RSA 78-A:8 (cited in the DRA's Rulings Request No. 3.) As such, it is a "trustee tax" (in the words of the DRA auditor who testified) -- a tax to be borne by the food and beverage customer, not the operator who is

obligated to collect it on behalf of the DRA. See Cagan's Inc. v. N.H. Department of Revenue Administration, 128 N.H. 180, 183 (1986) ("The meals and rooms tax statute generally places the economic burden of the meals tax on the customer.").

To insure proper collection and receipt of the tax, the statutes require the operator to keep separate "books and records for 3 years in such a manner to insure permanency and accuracy" and to make those records "open for inspection" by the DRA at all reasonable times and authorizes the DRA to conduct "further audits or investigation" if the DRA determines there is a deficiency in the amounts collected and remitted for the tax. (See RSA 78-A:19 and RSA 78-A:11, II and the DRA regulations cited in the DRA's Rulings Requests Nos. 4-6.)

The board finds there is ample evidence to conclude the Taxpayer failed to comply in a timely manner with his obligations under these statutes and regulations and the procedures followed by the Audit Division (detailed in the Final Order at pp. 1-2) were reasonable under the circumstances and in light of the DRA's authority and responsibility to act. The Taxpayer repeatedly failed to answer calls from the DRA after the audit began in January, 2008, failed to attend a scheduled meeting on March 6, 2008, failed to make books and records available for inspection and failed to respond to a hand-delivered June, 2008 document request,² all of which steps were aimed at verifying the accuracy of the RSA ch. 78-A monthly filings and remittances of the taxes he was obligated to collect from customers.

As explained in the DRA's Final Order (pp. 2-7), the Audit Division then issued Notices of Assessment in August, 2009 and the Taxpayer, through his attorney, filed an appeal with the

² An earlier request in April, 2008, sent by certified mail to the Taxpayer's correct address, was refused and sent back to the DRA by the post office after several attempts to deliver it. (See DRA's Final Order, pp. 1-2.)

DRA Hearings Bureau disputing the Notices of Assessment. The Hearings Bureau held its hearing on July 13, 2010. Instead of providing the necessary documents to refute the Audit Division's calculations based on available information or otherwise showing how they were in error either in whole or in part, the Taxpayer instead chose to contend the procedures employed by the DRA under the statutes and its own regulations and the determination of additional tax, penalties and interest owed were "unconstitutional." These contentions involve the general constitutional principles stated in the Taxpayer's Requests For Findings of Fact And/Or Rulings of Law (the "Requests," set forth in Addendum A).

Simply reciting these constitutional principles, however, is insufficient to establish a cognizable claim for relief in this appeal. The appeal statute (RSA 21-J:28, IV) authorizes the raising of "constitutional issues" as grounds for appeal, but the burden of proving unconstitutionality still rests with the Taxpayer and was not met here.³ See, e.g., Baxter It'l. v.

State of New Hampshire, 140 N.H. 214, 216-218 (1995) (affirming dismissal of appeal challenging DRA's authority to assess business profits tax on constitutional grounds).

In the absence of basic compliance and cooperation through the timely production of adequate books and records by the Taxpayer, the board finds it was reasonable for the DRA to use other available information, including third party vendor reports from several facilities where the Taxpayer operated his business, to estimate the extent of underreporting of the RSA ch. 79-A tax. The DRA's reasonableness is further reflected in the Audit Division's willingness to give

³ In this regard, the board finds the DRA's reliance on T-Q-S Trust v. Town of Plainfield, BTLA Docket No. 20272-03PT (April 25, 2006) is misplaced. (See DRA Rulings Request No. 1.) That case involved a property tax appeal under RSA 76:16-a, which contains no specific authority (unlike RSA 21-J:28-b, IV) to consider "constitutional issues."

the Taxpayer the benefit of the doubt on the issue of how much of the Taxpayer's unreported sales might have been non-taxable. The Audit Division decided to exclude 13.6848% of the Taxpayer's sales as non-taxable. (See DRA Exhibit No. 1, Tab 5.) Under the DRA's rules, it could have presumed all sales were taxable in the absence of separate and distinct records clearly defining taxable and non-taxable sales. (See DRA Rulings Request No. 6.).

Implicit in the Taxpayer's arguments is the contention the DRA should have been required to wait an indefinite and inordinate amount of time (from the start of its audit in January, 2008 until the present, if not longer⁴ -- almost four years later) for the Taxpayer to find and produce the requested books and records he was required to regularly maintain and make available for inspection. If the Taxpayer had cooperated, the DRA might have been able to determine the proper assessment from his own books and records and would not have had to rely on an extrapolation from available third party vendor information which it determined was

reliable. Given the lack of cooperation by the Taxpayer, the board does not agree the DRA erred in relying on this approach to determine the amount due under RSA ch. 78-A.

Government needs the cooperation of its citizens, including taxpayers, if it is to operate with any degree of efficiency and the statutes at issue in this appeal make it mandatory rather than discretionary to supply that cooperation for taxes collected on behalf of the state. While the Taxpayer mentioned various financial and bookkeeping challenges which made it hard for him to produce the books and records requested by the Audit Division, the DRA was not required to wait indefinitely for that information before making an assessment based on available

⁴ At the hearing, the Taxpayer testified he still did not have all of the records he needed to challenge the DRA's determination but might be able to compile them in the next three or four months.

information. The statute clearly authorizes the DRA to “make an estimate of the tax liability of the operator from any information it may obtain,” as well as to examine a return and “make such further audits or investigation as it considers necessary if it determines there is a deficiency.”

(See RSA 78-A:11, I and II (emphasis added).)

The board finds the Taxpayer failed to show how the general constitutional principles he has cited has applicability to the validity of either these statutes or the corresponding DRA regulations (see, e.g., Rev Pt. 706 (Administration)) and finds they are reasonable on their face. The board also does not agree with the Taxpayer’s argument that, in lieu of making the assessment of additional tax, penalties and interest through the audit process, the DRA should have taken steps to revoke the Taxpayer’s operator licenses or pursue criminal charges against him, other remedies that may be available. The DRA was not required to choose to pursue any other remedy to address the underreporting and underpayment of taxes the Taxpayer was obligated to collect from his customers, especially when those remedies are arguably more draconian and potentially more severe to the Taxpayer and his business.

Aside from his constitutional claims regarding the assessment, the Taxpayer failed to present any specific arguments as to why the penalties and interest amounts computed by the DRA were improper. Under RSA 21-J:33 and RSA 21-J:28, the DRA is authorized to assess such penalties and interest when there is an underpayment of taxes due. (See DRA Ruling Requests Nos. 10 and 11.)

Under the statute governing this appeal, the Taxpayer has not met his burden of proving the DRA erred in the assessment of additional taxes, penalties and interest. The appeal is therefore denied.

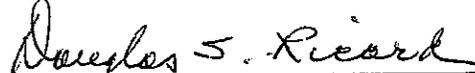
Any party seeking a rehearing, reconsideration or clarification of this Decision must file a motion (collectively "rehearing motion") within thirty (30) days of the clerk's date below, not the date this decision is received. RSA 541:3; Tax 201.37. The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; Tax 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board's decision was erroneous in fact or in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule Tax 201.37(f). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board's denial with a copy provided to the board in accordance with Supreme Court Rule 10(7).

Attached as Addendum A hereto are the board's responses to the separate requests for findings of facts and rulings of law submitted by the Taxpayer and the DRA.

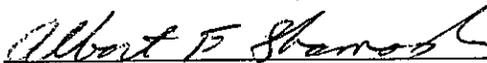
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SO ORDERED.

BOARD OF TAX AND LAND APPEALS



Douglas S. Ricard, Member

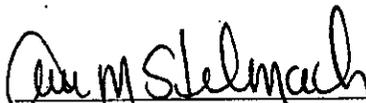


Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Patrick M. Carron, Esq., 13 Chapel Street, Concord, NH 03301, counsel for the Taxpayer; and Kathryn E. Skouteris, Assistant Revenue Counsel, DRA, 109 Pleasant Street Concord, NH 03301.

Date: *October 21, 2011*



Anne M. Stelmach, Clerk

Addendum A

The parties' requests for findings of fact and rulings of law are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in bold face. With respect to the proposed findings and rulings, "neither granted nor denied" generally means one of the following:

- a. the request contained multiple requests for which a consistent response could not be given;
- b. the request contained words, especially adjectives or adverbs, that made the request overly broad or narrow so that the request could not be granted or denied;
- c. the request contained matters not in evidence or not sufficiently supported to grant or deny;
- d. the request was irrelevant; or
- e. the request is specifically addressed in the decision.

TAXPAYER'S REQUESTS FOR FINDINGS OF FACTS AND/OR RULINGS OF LAW

1. "All men are born equally free and independent. Therefore, all government, of right, originates from The People, is founded in concept, and instituted for the general good." *Article Part 1, Article 1*, of the New Hampshire constitution.

Granted, but noting the typo in the second line (consent instead of "concept").

2. The State needs an actual rational basis for taxation. Cagan's Inc. V. New Hampshire Dept. Of Revenue Admin., 126 N.H. 239(1986).

Granted.

3. "All men have certain natural, essential, and inherent rights – among which are - the enjoying and defending life and liberty; acquiring, possessing, and protecting property; and in a word, of seeking and obtaining happiness." *Article I', Part 1, Art. 2*, of the New Hampshire constitution.

Granted, notwithstanding several minor punctuation errors.

4. "Equality of rights under the law shall nor be denied or abridged by this State on account of race, creed, color, sex, or national origin." *Article I', Part 1, Art. 2*, of the New Hampshire constitution.

Granted, but noting the typo in the first line (not instead of "nor")

5. The first step in due process analysis is to determine whether a legally protected interest has been implicated. *In Re: Stapleford*, 156 N.H. 260(2007).

Granted.

6. Whether the due process clause of the New Hampshire constitution requires additional procedural safeguards is determined by balancing three factors: 1. The private interest affected by the official action; 2. The risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and 3. The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *In Re: Father, 2006-360, 155 N.H. 93(2007)*.

Granted.

7. "Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property." *Article 1', Part 1, Art. 12*, of the New Hampshire constitution.

Granted.

8. The New Hampshire constitution requires that taxation be just, uniform, equal, and proportional. *Tennessee Gas Pipeline Co. V. Town of Hudson, 145 N.H. 598(2000)*.

Granted.

9. The right to property is a fundamental right under the New Hampshire constitution. *Thomas Tool Services, Inc. V. Town Of Croydon, 145 N.H. 218(2000)*.

Granted.

10. Because the right to property is a fundamental right in New Hampshire, all subsequent grants of power, including the taxing power, are limited as to how these grants of power affect this fundamental right, under the takings clause of State constitution. *Thomas Tool Services, Inc. V. Town Of Croydon*, 145 N.H. 21 8(2000).

Granted.

11. "The right of The People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." 4th Amendment of The United States constitution.

Granted.

12. "Nor be deprived of life, liberty, or property, without due process of law." 5th Amendment of The United States constitution.

Granted.

13. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. 14th Amendment, Section 1 of The United States constitution.

Granted.

14. "Nor shall any State deprive any person of life, liberty, or property, without due process of law." 14th Amendment, Section 1 of The United States constitution.

Granted.

15. "Nor deny to any person within its jurisdiction the equal protection of the laws."

14" *Amendment, Section 1 of The United States constitution.*

Granted.

DRA'S REQUESTS FOR FINDINGS OF FACTS AND/OR RULINGS OF LAW

I. FINDINGS OF FACT

1. The Petitioner is Scott A. Chesley d/b/a C. Chesley Food Service, LLC ("Chesley") with a business address of 52 Graham Road, Concord, New Hampshire and with a primary business activity of mobile food service, selling food and drink at fairs and other events. This matter involves four Meals & Rentals Operators Licenses that he holds, including License # 036368 (C. Chesley Food Service); License # 049568 (Meadowbrook Concert Facility); License # 049569 (Star Speedway); and License # 049570 (Hudson Speedway). See Petitioner's Appeal.

Granted.

2. In January 2008, the DRA (through its Audit Division) made several attempts to contact Chesley to schedule an audit of his Meals & Rentals ("M&R") tax returns for the tax periods January 1, 2007 through December 31, 2007. Throughout the audit process, Chesley failed to appear at the scheduled audit, failed to return telephone calls from the DRA Auditor (Robert LaBrecque), and failed to accept a demand for records sent via certified mail from the DRA Auditor. See Testimony of Robert LaBrecque and DRA Exhibit 1.

Granted.

3. After the DRA Auditor had Chesley served with a second demand for records dated June 16, 2008, Chesley, through his representative at the time (Lisa Hepworth), provided the DRA with some records for the 2006 tax periods and informed the DRA that two computer failures and a flood destroyed the records for 2007 and 2008. See Testimony of Robert LaBrecque and DRA Exhibits 2 and 8.

Granted.

4. In January 2009, the DRA Auditor received a voicemail from Ms. Hepworth stating that she no longer represented Chesley. See Testimony of Robert LaBrecque.

Granted.

5. Thereafter, Chesley provided the DRA with no additional documentation and, on March 30, 2009, the DRA Auditor provided Chesley with proposed notices of assessments that calculated the proposed M&R tax due for 5/2006 to 7/2008 based on information obtained from New Hampshire International Speedway ("NHIS"), which included Chesley's actual sales from the NHIS September 2007 Race, and information obtained from the DRA Collections Division, which included Chesley's actual sales from the 2007 Deerfield Fair, and reducing those amounts by the percentage of non-taxable sales from the NH Motor Speedway 2008 Race, which was derived from the information provided by Levy Restaurants, to calculate Chesley's M&R tax due for September 2007 and applying the difference between the tax reported and the tax assessed to be due to each of Chesley's licenses for the entire audit period. See Testimony of Robert LaBrecque and DRA Exhibits 3, 4 and 5.

Granted.

6. After Chesley failed to respond to the proposed notices of assessments, on August 5, 2009, the DRA Auditor sent final Notices of Assessment for the tax periods of 7/1/2006 to 7/31/2008 to Chesley via certified mail, which were returned to the DRA after the standard three delivery attempts by the US Post Office. See Testimony of Robert LaBrecque and DRA Exhibit 6.

Granted.

7. On September 14, 2009, the DRA was able to hand delivery copies of the final Notices of Assessment to Chesley during a meeting at the DRA with the DRA Collection Division. See DRA Exhibit 7.

Granted, noting the typo in the word "deliver" in the first line.

8. For the tax periods 7/1/2006 to 7/31/2008, Chesley provided the DRA with limited documentation for 2006 and no documentation for 2007 and 2008, including no copies of tax returns filed through the E-File system, no cash receipts, no sales documentation, no cash disbursements, no purchase information, no general ledgers, no complete cash register tapes including the summary and final register reading information, no bank statements with all enclosures for all business and personal accounts, and no documents required to support entries in any of accounting records. See Testimony of Robert LaBrecque and DRA Exhibit 8.

Granted.

II. RULINGS OF LAW

1. The Board of Tax and Land Appeals “has no jurisdiction to hear and decide constitutional issues.” T-Q-S Trust v. Town of Plainfield, BTLA Docket No. 20272-03PT (April 25, 2006).

Denied.

2. The appellant shall have the burden to prove the DRA erred in its decision. See Tax 209.04.

Granted.

3. RSA Chapter 78-A imposes a tax upon certain meals and requires an operator to collect the taxes and pay them over to the State on or before the 15th day of the month following the taxable period. As a Meals and Rentals license holder, Chesley is an operator. See RSA 78-A:6 and RSA 78-A:8.

Granted.

4. Chesley is responsible for maintaining separate books and records for his businesses “for 3 years in such a manner to insure permanency and accessibility for inspection by the commissioner and his authorized representatives.” See RSA 78-A:19 and Rev 706.01. Specifically, Chesley is required to maintain cash receipts; sales; cash disbursements; purchases; general ledgers; complete cash register tapes including the summary and final register reading information; bank statements with all enclosures for all business and personal accounts; the meals and rentals worksheet required for those operators using Telefile; a printed copy of each of the returns as submitted through the E-File system; and any other source documents required to

support entries in any of accounting records. See Rev 706.01(a). These documents must be clear and legible and include the dates they were created. See Rev 706.01(c).

Granted.

5. If the DRA determines that the records maintained by the operator are not adequate for the purposes of making an accounting to the State for tax collection liability, the Department shall determine a tax liability based upon any and all available records pursuant to RSA 78-A:11, including physical observation by DRA personnel of actual sales; and deny the operator commission available under RSA 78-A:7, III. See Rev 706.01(e).

Granted.

6. Chesley is required to maintain separate and distinct records that clearly define taxable versus non-taxable sales. See Rev 706.01(f). If such separate records are not maintained, the DRA shall presume all receipts are taxable unless evidence is presented as to the purchase and sale of nontaxable items. See Rev 706.01(g). Such evidence shall include: (1) Vendor invoices showing the purchase price paid by Chesley, for the nontaxable items purchased during the audit period; (2) the beginning and ending inventory amounts for each nontaxable item sold; and (3) Chesley's pricing policies regarding the markup of purchase prices to arrive at the selling price. See Rev 706.01(h).

Granted.

7. Chesley failed to maintain separate books and records for his businesses in violation of RSA 78-A:19 and failed to maintain books and records in accordance with Rev 706.01.

Granted.

8. As a result of Chesley's failure to maintain separate books and records for his businesses and his failure to maintain books and records in accordance with Rev 706.01, the DRA properly determined Chesley's tax liability based upon any and all available records, which included third party vendor information.

Granted.

9. In addition, Chesley failed to present evidence as to the purchase and sale of nontaxable items. Despite this failure, the DRA reasonably calculated the amount of non-taxable sales based on the third party information it received, rather than issue assessments based on the presumption that all receipts were taxable.

Granted.

10. RSA 21-J:28 provides that interest is required to be assessed. Therefore, the DRA's assessment of interest was proper. See RSA 21-J:28.

Granted.

11. RSA 21-J:33 provides for a penalty assessment against any taxpayer who fails to pay tax when due unless the failure to pay was due to reasonable cause and not willful neglect. Chesley has not met his burden of proving that his failure to pay was due to reasonable cause and not willful neglect. Therefore, the DRA's assessment of penalties was proper. See RSA 21-J:33.

Granted.

12. Chesley failed to meet his burden of proving that the DRA erred in its decision because he has no records to show that the DRA's calculations are incorrect. Therefore, the DRA's Final Order issued on November 23, 2010 should be upheld as the DRA's tax assessments and methodology were reasonable and proper.

Granted.