

BEFORE THE TAX APPEAL BOARD
STATE OF DELAWARE

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TAX APPEAL BOARD
STATE OF DELAWARE

MCNINCH & CO., NOMINEE)
PARTNERSHIP OF FIRST CHICAGO)
TRUST CO.,)
)
Petitioner,)
)
v.)
)
DIRECTOR OF REVENUE,)
)
Respondent.)

Docket No. 1272

DECISION AND ORDER

Charles J. Durante, Esq. of Connolly, Bove, Lodge & Hutz, for Petitioner

Joseph Patrick Hurley, Jr., Esq., Deputy Attorney General for Respondent.

DATE: February 16, 1999

Upon consideration of the record before the Board and the contentions of the parties in their briefs and at oral argument, it appears to the Board as follows:

1. The issue presented is whether Respondent erred when he determined that Petitioner is not entitled to recover \$39,245 which had been escheated to the State pursuant to Delaware's escheat statute, 12 Del. C. §§ 1101 et seq. Respondent has moved for summary judgment on Petitioner's claim. For the reasons set forth below, Petitioner's claim of error is overruled and the decision of Respondent is upheld. Accordingly, summary judgment is granted in favor of Respondent.

Facts

2. Petitioner is a New York partnership whose business is to serve as a nominee for investors in securities. As a nominee, Petitioner holds in its own name legal title to securities issued by third parties. Those securities are held for the benefit of the actual beneficial owners of the securities. Petitioner's Articles of Agreement precludes Petitioner from holding any equitable or beneficial interest in any securities in which it holds legal title.

3. In 1988, Celanese Corporation merged with American Hoescht Corporation. As a result of the merger, Celanese stockholders became entitled to exchange their Celanese stock for \$245 per share. (See Petitioner's Answering Brief, Ex. A) In order to receive payment, stockholders had to present their Celanese certificates for redemption.

4. At the time of the merger, Petitioner was a nominee record holder, but not a beneficial owner, of Celanese stock. Subsequent to the merger, Petitioner did not submit a claim for payment because it was unable to locate its Celanese certificates. Ultimately, American Hoescht Celanese Corporation, the entity resulting from the merger, delivered the \$39,245 which

Petitioner had not claimed to the State of Delaware pursuant to the escheat statute. See 12 Del. C. § 1201.

5. After the funds were escheated to the State, Quests, Ltd., a locator and recovery agent of unclaimed property, located the funds and Petitioner. On September 2, 1993, Quests submitted a claim to Respondent on behalf of Petitioner claiming entitlement to the entire \$39,245.

6. On September 24, 1993, Respondent requested that Petitioner provide proof that it (or someone on whose behalf Petitioner was acting) is the beneficial owner of the stock that Petitioner held in record name prior to the merger. This request is consistent with Respondent's practice.¹ Petitioner was unable to provide any evidence regarding the identity of the beneficial owner. As a result, Respondent rejected Petitioner's claim.

7. On March 17, 1997, Petitioner filed this action claiming Respondent erred by requiring evidence of beneficial ownership of the underlying Celanese stock. The Board has jurisdiction to hear this matter pursuant to 12 Del. C. § 1146. On January 7, 1998, Respondent moved for summary judgment. Oral argument was heard on September 11, 1998.

Analysis

8. The initial issue before the Board is whether this matter is appropriate for summary judgment. Although Petitioner did not brief this issue, it argued before the Board that the affidavits submitted by Respondent in support of the motion create issues of material fact

¹ From fiscal year 1994 thru fiscal year 1997, Respondent has paid over 2000 claims totaling over \$19.2 million to nominees, brokers and other financial intermediaries who held stock as mere nominees. In order for these nominee/claimants to recover property escheated to the State, Respondent has required claimants to provide proof of beneficial ownership.

which preclude judgment in favor of Respondent. Petitioner did not present any facts, by affidavit or otherwise, which contradict the assertions in Respondent's affidavits and did not seek additional discovery in order to demonstrate there are facts in dispute, see Super. Ct. Civ. R. 56(f). Consequently, our review of the record demonstrates that there are no facts in dispute and that summary judgment is appropriate. See Super. Ct. R 56(b); Moore v. Sizemore, Del. Supr., 405 A.2d 679 (1979) (once moving party establishes there are no material facts in dispute nonmoving party bears burden of introducing evidence demonstrating existence of factual dispute); Frank C. Sparks Co. v. Huber Baking Co., Del. Supr., 96 A.2d 456 (1953) (uncontroverted evidence offered in support of summary judgment must be accepted as true).

9. Turning to the merits of the dispute, we also find that Respondent is entitled to summary judgment as a matter of law.

10. By statute, Respondent has "full and complete authority to determine all ... claims" for property escheated to the State. 12 Del. C. § 1146(b). A fundamental aspect of the Respondent's "authority" is the ability to decide whether a claimant has submitted sufficient proof to support a claim. Of course, such determination is subject to appeal. Id.

11. In this instance, Respondent exercised its authority and determined that Petitioner's claim must be denied because it presented no proof of beneficial ownership. Respondent's conclusion is consistent with the facts, the established legal principles regarding the return of lost and escheated securities, see Merrill Lynch v. North European Royalty Trust, Del. Supr., 490 A.2d 550, 563 (1985) ("where brokerage houses are concerned, only proof of beneficial ownership will fulfill the petitioner's burden of showing ownership with reasoned certainty"); Delaware v. New York, 507 U.S. 490, 502 (1993) (nominee serving as record owner

has no ownership interest in escheated property it previously held for the benefit of another), and furthers the purpose of abandoned property law, which is to safeguard lost property for the benefit of the individual or entity to whom it belongs. See 12 Del. C. § 1144(a) (State Escheator must exercise care and custody over property "for the benefit of those entitled to receive the same..."); Epstein, Unclaimed Property Law § 107 (1984).

12. Petitioner raises two arguments in opposition to Respondent's motion. First, Petitioner contends Respondent is not entitled to summary judgment because Petitioner is the "owner" of the funds under Delaware escheat law. Section 1198(7) of Title 12 defines owner as:

"Owner," in addition to its commonly accepted meaning, shall be construed to particularly mean and include any person, as hereinbefore defined, having the legal or equitable title to property coming within the purview of this statute.

12 Del. C. § 1198(7) (emphasis added). Relying on this definition, Petitioner argues it, as the holder of legal title to the Celanese shares, is the "owner" of the property and therefore the \$39,245 should be returned to it.

13. The fundamental flaw in Petitioner's argument is that the escheat statute does not mandate that property escheated to the State be returned to its "owner." Rather, the statute provides that anyone asserting a claim for escheated property can file a claim for the property and that "[t]he State Escheator shall possess full and complete authority to determine all such claims" 12 Del. C. § 1146(a)-(b). In accordance with its duty, the State Escheator, Respondent, determined that Petitioner's status as the "owner" of the Celanese stock does not entitle it to recover the \$39,245 absent proof that Petitioner (or someone on whose behalf Petitioner is acting) is the beneficial owner of the underlying Celanese certificates. As the statute does not

necessarily entitle a claimant who merely satisfies the definition of "owner" to recover escheated property, whether Petitioner is an "owner" is not controlling under the facts of this case.²

14. Second, Petitioner argues that mandating proof of beneficial ownership constitutes a regulation and, because Respondent did not adhere to the requirements of the Administrative Procedures Act when adopting the purported regulation, Respondent cannot condition Petitioner's claim on proof of beneficial ownership. We disagree. By requiring proof of beneficial ownership Respondent has not adopted a regulation which is subject to the Administrative Procedures Act. Rather, Respondent merely has resolved a claim based on the evidence presented to it. Resolving fact intensive claims necessarily establishes guidelines as to when escheated property will be returned to claimants; however, such resolutions do not create regulations which must be adopted pursuant to the Administrative Procedures Act.

15. Moreover, even if requiring proof of beneficial ownership could be construed as a regulation for purposes of the Administrative Procedures Act, Respondent was not required to adhere to the procedural requirements of the Act prior to adopting the regulation. See 29 Del. C. § 10113(b)(6) (regulations which codify case law can be adopted without adhering to requirements of Administrative Procedures Act) and Merrill Lynch, 490 A.2d at 563 (permissible to require proof of beneficial ownership before delivering property to mere record owner).

² Petitioner's contractual and fiduciary obligations to the unknown beneficial owner do not further Petitioner's claim that as the "owner" it is entitled to the sale proceeds. Private contractual and fiduciary obligations neither enhance Petitioner's rights as a "owner" under the Delaware escheat statute nor limit the Respondent's authority to resolve claims under that statute.

16. For the foregoing reasons, Respondent's Motion for Summary Judgment GRANTED in full.

SO ORDERED.

Cynthia Hugh James

James C. City

OK

J. P. H. Condy

Regina C. Doolzie