TAX APPEAL BOARD FOR THE STATE OF DELAWARE

DANNY G. PEREZ, and LISSETTE R. PEREZ,	)	
Petitioners,	)	
v.	)	Dkt. No. 1483
DIRECTOR OF REVENUE	)	
Respondent.	)	

BEFORE: Todd C. Schiltz, Esq., Chairman, Steven R. Director, Esq., Vice-Chairman, Cynthia L. Hughes and Joan M. Winters, CPA, Members

Danny G. Perez and Lissette R. Perez, Pro Se

John S. McDaniel, Esq., Deputy Attorney General for Respondent

DECISION AND ORDER

The issue in this case is whether petitioners Danny G. Perez and Lissette R. Perez have proven that the proposed assessment of taxes, interest and penalties that respondent Director of Revenue seeks to impose on them is erroneous. For the reasons set forth below, the Board finds that petitioners have not carried their burden of proof and that the proposed assessment should be affirmed.

Statement of Facts

This case concerns petitioners' income tax liability for 2004. Petitioners were Delaware residents in 2004.

In 2006, respondent discovered that petitioners had not filed their Delaware personal income tax return for 2004. When a taxpayer fails to file a return, "the Director shall estimate from any available information the taxpayer's taxable amount, and the tax thereon . . . ." 30 *Del.*

C. § 521(b). The process of collecting and reviewing "any available information" in order to estimate petitioners' taxable income proved complex because, in 2004, petitioners operated three businesses in Delaware through two corporations and a limited liability company. Petitioners were the sole owners of each of the entities, either individually or collectively, each entity made substantial payments to or for the benefit of petitioners, and at least one of the entities had elected to be treated as a subchapter S corporation under Internal Revenue Code § 1362. Although one of these entities, Tax Management Service, Inc., was in the business of preparing tax returns, it did not file a Delaware tax return for 2004 and it filed its 2004 federal return twenty-three months late. Another entity, D&L Communications, Inc., never filed its 2004 Delaware return and filed its 2004 federal return four and a half years after the due date. The third entity, Belleza Latina LLC, has never filed Delaware or federal returns for 2004.

Respondent began examining petitioners and their affiliated entities in mid-2006. The examination revealed that neither petitioners nor the entities had a reliable set of accounting books. As a result, in order to estimate petitioners' taxable income, respondent looked to the bank statements of petitioners and their entities, credit card statements, cancelled checks, bills and cash receipts from customers. From this information, respondent reconstructed as best he could the operating income or loss of the three entities that passed those items through to petitioners, and identified direct payments to or for the benefit of petitioners, transfers to petitioners' accounts, and personal expenditures paid for with company funds. This methodology allowed respondent to identify all income and cash that respondent believes is attributable to or was transferred to the petitioners directly or to others for their benefit – *i.e.*, petitioners' estimated taxable income – for 2004.

On March 31, 2008, after investigating petitioners and their entities for almost two years, respondent sent petitioners a notice of assessment, which estimated petitioners' taxable income for 2004 to be $340,529 and the tax thereon to be $19,028. The assessment also imposed penalties and interest of $16,459.

On April 14, 2008, after the issuance of the assessment, petitioners filed an "amended" Delaware personal income tax return, even though it was the first return petitioners filed, which reflected tax due of $8,500 and submitted a check for this amount. Although respondent cashed the check and applied the $8,500 to petitioners' tax liability, respondent concluded that the "amended" return was not an accurate presentation of petitioners' 2004 income or tax liability. For example, petitioners have never produced records to substantiate the income or loss flowing through to them on the "amended" return's Schedule E from the three business entities, nor have they been able to support the itemized deductions listed on Schedule A of the return.

Following the issuance of the assessment and during the pendency of this proceeding, respondent continued to collect facts and information related to petitioners' 2004 income. That additional information caused respondent to make adjustments in the amount of petitioners' estimated income for 2004. Some of those adjustments lowered the petitioners' estimated income and some increased the petitioners' estimated income; however, on a net basis, respondent's post-assessment adjustments increased petitioners' estimated 2004 income from $340,529 to $382,083. If accepted, these adjustments would impose correspondingly higher income taxes on petitioners for 2004.

Analysis

Petitioners contend that the respondent erred when he issued the assessment. Petitioners bear the burden of proof on all issues in this case. 30 *Del. C.* § 526(b).

After considering all the evidence, including documents and testimony presented at a full day evidentiary hearing, and the arguments advanced by both sides, the Board concludes that petitioners have failed to prove that the respondent's proposed assessment is incorrect. The Board has no difficulty reaching this conclusion because: (i) petitioners introduced almost no evidence that related to, and no evidence that credibly demonstrates, the nature and amount of the income they earned in 2004, the nature and amount of their deductions in 2004, or any of the other components essential to establish their 2004 income and tax liability; (ii) the process respondent employed to estimate petitioners' 2004 income and tax liability was reasonable under the circumstances; (iii) petitioners' criticisms of respondents' process and suggestions that there might be errors in petitioners' calculations do not draw the propriety of that process as a whole into question; and (iv) the testimony of Mr. Perez, the only witness who testified for petitioners, was not credible.

Because petitioners failed to file timely returns, respondent was entitled to "estimate" petitioners' taxable income and tax liability. 30 *Del. C.* § 521(b). Respondent has fulfilled that statutory mandate and petitioners have offered no evidence or argument which draws respondent's process or conclusions into question.

While affirming the assessment, the Board concludes that all post-assessment adjustments, both those that lower the petitioners' income and those that increase the petitioners' income, should be disregarded in this case. The issue before the Board is whether the respondent's March 31, 2008 assessment is erroneous. In this instance, where petitioners had not

filed tax returns before the issuance of the assessment, respondent's assessment is by definition not an exact calculation of petitioners' income and tax liability. 30 *Del. C.* § 521(b) (respondent must use any information available to estimate taxpayer's income and resulting tax liability). As the goal in this case, unlike virtually all other tax disputes, is not exact certainty as to income and tax liability, we believe that the proper result is not to adjust the March 31, 2008 assessment to achieve some other estimate of taxes, but to leave the original estimate unchanged.[1]

Conclusion

For the reasons stated, we affirm the respondent's assessment. Respondent is instructed to circulate a proposed form of order to petitioners for review within fourteen (14) days of the date of this opinion. The proposed form of order shall detail the total tax, penalty and interest that petitioners owe as of the date of this opinion for the 2004 tax year, as well as a per diem interest and penalty calculation for each additional day the amounts due pursuant to the order remain unpaid. Tax Appeal Board Rules 19(e) and 20. The parties shall file a joint proposed order for signature by the Board, or, if necessary, separate proposed forms of order, within thirty (30) days of the date of this opinion. Tax Appeal Board Rule 20.

SO ORDERED this 14th day of September, 2011.

Cynthia L. Hughes

Paul C. Sift

Joan M. Winter

Patrick R. Moffa

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[1] Our ruling in this regard should not be viewed as a blanket rule that assessments cannot be adjusted based on facts discovered post-assessment. Different facts, *e.g.*, a case that does not involve Section 521(b), evidence of overreaching by one side or the failure to disclose information prior to the issuance of an assessment, may warrant a different result.