

**BEFORE THE TAX APPEAL BOARD
OF THE STATE OF DELAWARE**

ANGELA C. AND NICHOLAS T. PHILLIPS)	
)	
Petitioners,)	
)	
v.)	Dkt. No. 1518
)	
DIRECTOR OF REVENUE,)	
)	
Respondent.)	

BEFORE: Todd C. Schiltz, Esq., Chairman, Steven R. Director, Esq., Vice Chairman
 and Joan M. Winters, CPA, Robert Slavin and Sindy Rodriquez, Members

Angela C. Phillips, *pro se* for Petitioners

Jennifer R. Noel, Esq., Deputy Attorney General for Respondent

Pending before the Board is the Director of Revenue’s motion to dismiss for lack of subject matter jurisdiction and, alternatively, for failure to prosecute. For the reasons set forth below, the Director’s motion for failure to prosecute is granted and this case is dismissed.¹

Angela C. and Nicholas T. Phillips filed a petition with the Tax Appeal Board on October 24, 2011.² Petitioners sought a refund of income taxes they allegedly overpaid in 2004. In January of 2012, the Director moved to dismiss the petition arguing that the Board lacked subject matter jurisdiction over the dispute. The Director argued that the Board lacked jurisdiction because Petitioners’ request for a refund was submitted more than two years after they paid the taxes in question and more than three years after their 2004 income tax return was due and, as a

¹ As the case is being dismissed for failure to prosecute, the Board does not address the Director’s motion to dismiss for lack of subject matter jurisdiction.

² Mr. Phillips died in 2012. The Board expresses its condolences to Mrs. Phillips for her loss.

result, was barred by the statute of limitations applicable to refunds set forth in 30 *Del. C.* § 539. Petitioners objected to the motion arguing they had submitted a timely refund request.

At a July 2012 hearing, the Board denied the Director's motion to dismiss on the ground that there was a disputed issue of fact concerning when Petitioners submitted their request for a refund. Specifically, while the Director argued no timely refund request had been submitted, Petitioners' petition expressly alleged that they had submitted a refund request in September 2006 (and a refund request submitted at this time would have been timely) and the Board could not resolve this disputed factual issue on a motion to dismiss.

The Board then scheduled a factual hearing for September 2012 to hear facts concerning when Petitioners filed their request for a refund. Mrs. Phillips attended the July hearing and confirmed that she would attend the September hearing. The Board's secretary thereafter sent Mrs. Phillips notice of the September hearing.

On September 12, 2012, the Board held an evidentiary hearing. Petitioners did not attend the hearing or provide any notice that they would not attend. Petitioners have never explained their absence or offered any evidence to substantiate their claim that they submitted a refund request in September of 2006. The Board proceeded with the hearing and the Director introduced evidence regarding the timeliness of Petitioners' refund request.³

In April of 2013, the Director renewed his statute of limitations motion and alternatively sought dismissal based on Petitioners' failure to prosecute. The Petitioners never submitted a written response to the renewed motion. The Board scheduled a hearing for June 2013 to

³ At the September 2012 hearing and thereafter, the Director conceded that Petitioners had sought a refund of \$258 prior to the expiration of the limitations period (but not in September of 2006) and that, while this refund request was initially disallowed, Petitioners submitted documents supporting the \$258 refund prior to the filing of their petition. Hence, in his renewed motion, the Director requests that the petition be dismissed on the condition that the Board "grant Petitioners' appeal as to the \$258 refund sought prior to the end of the statute of limitations." (Motion to Dismiss at 5).

consider the Director's renewed motion. Mrs. Phillips attended the June meeting telephonically. She was extremely disruptive during the hearing and her conduct made it impossible for the Board to proceed. In an effort to conduct a more civil and productive discussion of the issues raised by the Director's renewed motion, the Board rescheduled the hearing on the motion for July 2013, and ordered Mrs. Phillips to appear in person for that hearing. The hope was that an in person hearing would be more productive. Mrs. Phillips did not attend the July hearing. She did not provide notice to the Board that she would not attend. She has never explained why she did not attend the July hearing. The Director has again renewed his motion, including submitting a renewed memorandum in support of his motion. Petitioners have not responded to the renewed motion.

Although reluctant to do so, this Board can dismiss a petition for failure to prosecute. TAB Rule 16b. Here, Petitioners have failed to prosecute their claims. They have been given the opportunity to present their case and respond to the issues raised in the Director's original and subsequently renewed motion, but they have failed to press their claims. The Director's motion to dismiss for failure to prosecute is GRANTED and this case is dismissed; provided, however, that the Board "grant[s] Petitioners' appeal as to the \$258 refund" to the extent this refund has not already been approved and/or dispersed by the Director.

Carl C. St. John, CHAIRMAN
Chris R. Meyer, vice-Chair
Jean M. Wenten

Robert D. Sloan

Date: October 9, 2013