

TAX APPEAL BOARD OF THE STATE OF DELAWARE

BUILD VENTURES, LLC)
)
 Petitioner,)
)
 v.) Docket No. 1658
)
 DIRECTOR OF REVENUE,)
)
 Respondent.)

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

Emmanuel G. Fournaris, Esq. and Shannon L. Dawson, Esq., Gordon, Fournaris
& Mammarella, P.A., for Petitioner

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

DECISION AND ORDER

Petitioner Build Ventures, LLC (“Petitioner”) appeals the August 5, 2015 Notice of Determination issued by the Director of Revenue denying the Petitioner’s request for a refund of income taxes and penalties Petitioner paid in the amount of \$116,771 for its 2009 taxable year. The Director of Revenue has moved to dismiss the petition arguing that the Petitioner’s claim for refund is barred by the limitations period established in 30 *Del. C.* § 539.

For the reasons set forth below, the Director of Revenue’s motion to dismiss is granted.

STATEMENT OF FACTS

The following facts are taken from the petition, the documents attached to the petition and the tax returns filed with the State of Delaware that are attached to the parties’ briefing on the motion to dismiss.

Petitioner was incorporated as a Delaware entity in 2005. Petitioner never conducted any business in the State of Delaware. Prior to 2009, Petitioner was treated as a single member

limited liability company for tax purposes and its business activity was reported on the personal income tax returns filed by the Petitioner's sole member on tax returns filed with the Internal Revenue Service and the California Franchise Tax Board.

In 2009, Petitioner sold all or substantially all of its assets to a third party. On or about February 23, 2011, Petitioner filed Form 1100S, "S Corporation Reconciliation and Shareholder Information Return" (the "Return") with the State of Delaware for the 2009 tax year. The Return states that Petitioner is a California entity with a Los Angeles, California mailing address. Line 8 of the Return is where the Petitioner was to list the "[t]ax due on behalf of non-resident" Line 8 of the Return reflects taxes due to the State of Delaware of \$104,483. Additional penalties raised the total amount due to \$116,771, an amount the Petitioner paid to Delaware at the time it filed the Return. The Return reflects that it was prepared by a third party tax professional and is signed by Andrew Steuer, the president and sole member of the Petitioner, under the statement "Under penalties of perjury, I declare that I have examined this return . . . and to the best of my knowledge and belief it is true, correct and complete."

Thereafter, the California Franchise Tax Board audited Mr. Steuer's 2009 California tax return. On that return, he claimed an "Other State Tax Credit" of \$111,926 for amounts Petitioner paid to Delaware. The California Franchise Tax Board rejected this credit because neither Petitioner nor Mr. Steuer ever conducted any business in Delaware. Thus, the California Franchise Tax Board found that Petitioner owed taxes to California, not Delaware, and disallowed the claimed \$111,926 credit that was based on taxes paid to Delaware.

On or about August 25, 2014, Petitioner filed an amended "S Corporation Reconciliation and Shareholder Information Return" (the "Amended Return") with the State of Delaware. The Amended Return states that Petitioner is a Delaware entity with a Los Angeles, California

mailing address. The Amended Return seeks a refund of the entire \$116,771 paid to Delaware in 2011.

On November 20, 2014, the Petitioner sent the Director of Revenue a letter stating:

For the 2009 tax year, due to erroneous advice, [the Return] was filed with the State of Delaware Department of Revenue. As you will notice on Schedule A of the [R]eturn, on Column B, it is reported that the net gain on the asset sale and the net operating loss where (sic) conducted in Delaware, this is incorrect. The payment made to Delaware for the corresponding tax was incorrect.

Mr. Steuer has since been audited by the California Franchise Tax Board for the period in question. One of the main issues being presented by the auditor is that Mr. Steuer claimed an "Other State Tax Credit" based on the payment made to the Delaware Department of Revenue. The CA Franchise Tax Board cannot accept this credit because as I previously stated above, Build Ventures, LLC and Mr. Steuer never conducted any business in the state of Delaware thus negating the "Other State Tax Credit." Mr. Steuer is now being asked to pay the correct income tax to the correct state.

Upon receipt of the Audit Issue Presentation Sheet [from the California Franchise Tax Board], we filed [the Amended Return] to reflect that for the 2009 tax year, Build Ventures, LLC did not have any Delaware income. We also filed Form 200-C to request a refund for the incorrect payment.

On August 5, 2015, the Tax Conferee sent the Petitioner a Notice of Determination, denying the requested refund. In pertinent part, the Notice of Determination stated:

The time allowed to file a claim for refund is governed by the provisions of the applicable statute of limitations enacted by the Delaware General Assembly. A statute of limitations is a statute prescribing limitations to the right of action on certain described causes of action; that is, declaring that no suit or claim shall be maintained on such causes of action unless brought within a specified time period after the right accrued. Virtually all states have such statutes.

In Delaware the statute of limitations applicable to a claim of refund or revision of taxes is Section 539 of Title 30 of the Delaware Code. That statute provides that:

Claim for credit or refund of an overpayment of any tax imposed by this title or Title 4 shall be filed by the taxpayer within 3 years from the last date prescribed for filing the return (or in the case of license fees or taxes under Part III of this title, 3 years from the expiration date of the

license to which such overpayment relates) or within 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in the preceding sentence for the filing of a claim for credit or refund, unless a claim for credit or refund is filed with the Director by the taxpayer within such period.

Unless a claim is filed with the Division of Revenue within the period of limitations, the statute quoted above specifically prohibits the Division of Revenue from paying a refund. The last date to file a refund (sic) the taxpayer's 2009 taxable year was Monday, April 15, 2013. Notwithstanding that the taxpayer's claim may have merit, since it was not filed until August 25, 2014, the Division of Revenue must follow the mandate of the law, and deny the claim.

Thereafter the Petitioner filed its appeal to this Board. The Director of Revenue then moved to dismiss the petition arguing, consistent with the Notice of Determination, that the Petitioner's request for a refund was untimely under 30 *Del. C.* § 539.

Petitioner responded to the motion by arguing that the limitation period established by Section 539 does not apply to its claim because, by its express terms, Section 539 applies only to “[c]laim[s] . . . for . . . refund of an overpayment of any tax imposed by [Title 30] or Title 4,” 30 *Del. C.* § 539, and, Petitioner contends, its “claim for refund does not involve a claim for refund of a tax imposed by Title 30 or Title 4 of the Delaware Code,” Petitioner's Answering Brief at ¶ 19. Specifically, Petitioner argues that (i) because it is a limited liability company that is taxed as a pass-through entity and earned no income in Delaware in 2009 and its sole member resided in California in 2009, Petitioner owed no tax to Delaware in 2009, (ii) because it owed no tax to Delaware in 2009, its request for a refund is not a request of a refund of a tax imposed by Title 30 or Title 4 of the Delaware Code, and (iii) because it is not seeking a refund of a tax imposed by Title 30 or Title 4 of the Delaware Code, its request for a refund is not time barred by Section 539.

ANALYSIS

Section 537(a) of Title 30 of the Delaware Code provides that “[i]n the case of any overpayment, the Director, within the applicable period of limitations, may credit the amount of such overpayment . . . against any liability . . . imposed by the tax laws of this State on the person who made the overpayment, and the balance shall be refunded by the Director to such person.” 30 *Del. C.* § 537(a).

Section 539(a) of Title 30, in turn, sets the period of limitations applicable to a claim of refund. It provides that:

Claim for credit or refund of an overpayment of any tax imposed by this title or Title 4 shall be filed by the taxpayer within 3 years from the last date prescribed for filing the return (or in the case of license fees or taxes under Part III of this title, 3 years from the expiration date of the license to which such overpayment relates) or within 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in the preceding sentence for the filing of a claim for credit or refund, unless a claim for credit or refund is filed with the Director by the taxpayer within such period.

30 *Del. C.* § 539(a).¹

Thus, by statute, a request for a refund of overpayment must occur within the applicable period of limitations. Under Section 539, Petitioner was required to file a claim for a refund not

¹ Although the parties refer to Section 539 as a statute of limitations, technically speaking it is a statute of repose. Both statutes of repose and statutes of limitations establish limitations periods, but there is a difference between the two. A statute of repose “limits the time within which an action may be brought and is not related to the accrual of any cause of action . . . [because] the period contained in a statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether an injury has resulted.” *Admiral Holding v. The Town of Bowers*, 2004 WL 2744581, at *2 (Del. Super. Oct. 18, 2004) (citation omitted). In comparison, a statute of limitations begins running on an accrual of a claim. *Id.* Here, the limitations periods established by Section 539 begin to run when an event occurs: the tax return is due or the tax is paid.

Notably, “the running of a statute of repose will extinguish both the remedy and the right” and because a “statute of repose is a substantive provision, it relates to the jurisdiction of the court; hence ‘any failure to commence the action within the applicable time period extinguishes the right itself and divests the . . . court of any subject matter jurisdiction.’” *Cheswold Volunteer Fire Co. v. Lambertson Const. Co.*, 489 A.2d 413, 421 (Del. 1985) (citations omitted).

later than the later of (a) three years after the due date of the return, or (b) two years after the tax was paid. Here, three years after the April 1, 2010 due date for the Petitioner's 2009 S-corporate return is April 1, 2013. Petitioner paid the tax it claimed to be due on the Return on February 23, 2011, and two years after that date is February 23, 2013. April 1, 2013 is later than February 23, 2013, and therefore Petitioner had to submit a claim for a refund no later than April 1, 2013.

Petitioner did not submit a claim for a refund until it filed its Amended Return on or about August 25, 2014. This request for a refund was outside the period of limitations established by Section 539(a) and cannot be refunded by the Director under Section 537.

Petitioner does not contend that its claim for a refund was timely under Section 539. Rather, Petitioner contends that the limitations period established by Section 539 does not apply to its request because Section 539 only applies to “[c]laim[s] . . . for . . . refund of an overpayment of any tax imposed by [Title 30] or Title 4,” 30 *Del. C.* § 539, Petitioner owed no tax to Delaware for 2009 and, therefore, Petitioner is not seeking a refund of any tax imposed by Title 30 or Title 4 of the Delaware Code. Petitioner's Answering Brief at ¶ 19. We disagree.

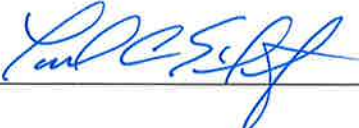
On or about February 23, 2011, Petitioner filed its Return and paid Delaware a tax that is imposed by Title 30 of the Delaware Code. The Return states that Petitioner owes taxes and penalties of \$116,771 to Delaware. The Return further reflects that it was prepared by a third party tax professional, is signed by Petitioner's president and states that “to the best of my knowledge and belief it is true, correct and complete.” Petitioner's November 20, 2014 letter to the Director of Revenue admits that the payment accompanying the Return was a “payment made to Delaware for the corresponding tax” Petitioner now seeks a refund of the taxes and penalties it paid. The fact Petitioner now contends (perhaps correctly) that it never should have paid the taxes or penalties at issue does not change the fact it paid taxes and penalties imposed by

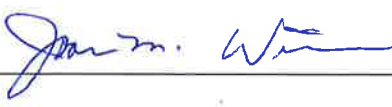
Title 30 and that it now seeks a refund of those taxes and penalties. As Petitioner is seeking a refund of taxes and penalties imposed by Title 30, Section 539 applies to its claim.


This conclusion is supported by the fact that Petitioner has not identified any other period of limitations applicable to its refund claim. Sections 537 and 539 require a claim for refund to be filed within the limitations period. If Section 539 does not establish the limitations period here, then some other limitations period applies and would have to be evaluated to determine if Petitioner's claim for refund is timely. Given the language of Section 539 and the structure of Title 30, we do not believe another limitation period applies, but Petitioner has not identified any other applicable limitations period or explained why his claim for a refund is timely under it. The absence of an alternative limitations period supports the application of Section 539 here.

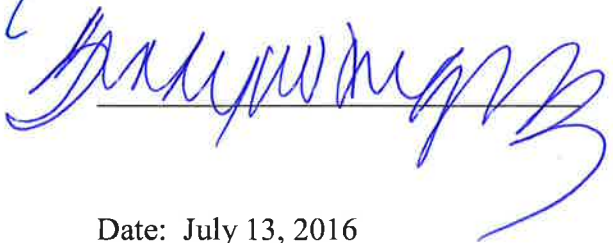
We are sympathetic of the Petitioner's case. It appears to have been the victim of erroneous advice and its decision to wait until after the conclusion of the California Franchise Tax Board audit to seek a refund in Delaware has resulted in it paying taxes to two states. While we lament this outcome, we cannot ignore the limitations period applicable to claims for refund enacted by the General Assembly.

For the foregoing reasons, Petitioner's petition is dismissed.









Date: July 13, 2016