

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

MICHAEL L. KURE, )  
 )  
 Petitioner, )  
 )  
 v. ) Docket No. 1679  
 )  
 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

David R. Paul, CPA, for Petitioner

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

**DECISION AND ORDER**

On December 7, 2015, the Director of Revenue (“Respondent”) mailed a Notice of Proposed Assessment (the “Notice”) to Michael L. Kure (the “Petitioner”). The Notice informed Petitioner that his 2014 tax return, which was due on April 30, 2015, had not been received until October 15, 2015, and that he was being assessed \$732.72 in interest and penalties due to the untimely filing of the return. The Notice further stated that “A WRITTEN PROTEST REGARDING THIS PROPOSED ASSESSMENT SETTING FORTH THE GROUNDS IN (sic) WHICH YOUR PROTEST IS BASED MAY BE FILED WITH THE DIRECTOR

OF REVENUE BY DEPOSITING YOUR PROTEST IN THE U.S. MAIL OR BY PHYSICAL DELIVERY TO THE DIVISION OF REVENUE BY OTHER MEANS WITHIN 60 DAYS OF THE DATE OF THIS NOTICE.” The Notice was delivered to the Petitioner on December 15, 2015.

In February 2016, Petitioner’s representative mailed a letter to the Delaware Division of Revenue requesting an abatement of the assessed penalties. The letter stated that the “income that generated the tax liability came from a K-1. There was no way to know during the year that there would be a tax due until the K-1 was received. The tax due was paid. We are just requesting an abatement of the penalty that you assessed.” The letter was dated February 5, 2016, but the envelope in which the letter was mailed was postmarked February 8, 2016. The Division of Revenue’s tax conferee received the letter on February 16, 2016.

On September 14, 2016, the tax conferee sent Petitioner a notice of determination denying the requested abatement. The notice of determination stated that Petitioner’s protest of the proposed assessment had not been submitted within 60 days after the mailing date of the Notice and, as a result, the assessment had become final and was not subject to further review.

Thereafter, Petitioner filed a timely petition with this Board. Respondent has moved to dismiss the petition on the ground that the assessment became final

and un-appealable as a result of Petitioner's failure to protest the Notice within 60 days of its mailing and, as a result, this Board lacks jurisdiction over this matter.

Section 523 of Title 30 gives taxpayers 60 days to file a written protest to a notice of proposed assessment. 30 *Del. C.* § 523. Section 522 of Title 30 provides that a notice of proposed assessment becomes final if a protest is not filed within the 60 day period. 30 *Del. C.* § 522. Section 551(a) of Title 30 provides that if a "document required to be filed . . . is . . . delivered to the United States mail . . . the date of the United States postmark . . . shall be deemed to be the date of delivery . . ." 30 *Del. C.* § 551(a).

This Board has previously explained the effect of a taxpayer's failure to protest a proposed assessment within 60 days:

The failure to protest the assessment within 60 days results in the assessment becoming final. When the assessment is final, this Board lacks jurisdiction to hear a taxpayer's appeal of the assessment.

*Simpson v. Director of Revenue*, Tax Appeal Board Dkt. 1444 at 5 (Oct. 31, 2007).

*See also Smallwood v. Director of Revenue*, Tax Appeal Board Dkt. 1655 at 2 (May 11, 2016) (dismissing petition for lack of jurisdiction when taxpayer failed to protest notice of proposed assessment within 60 days).

Here, Petitioner's protest was postmarked more than 60 days after the Notice was mailed. Under the clear terms of the Sections 522, 523 and 551 and our prior

decisions, the protest was untimely, the proposed assessment became final and this Board lacks jurisdiction to hear Petitioner's appeal.

Petitioner contends that because Petitioner did not receive the Notice until December 15, 2015, and because the protest was postmarked February 8, 2016, the protest was submitted within the 60 day period set by Section 523. This is incorrect. Section 523 expressly states that a taxpayer must file a protest "[w]ithin 60 days . . . after the date of the mailing of a notice of proposed assessment . . . ." 30 *Del. C.* § 523. Thus, the date of mailing, not the date of receipt, is what controls and the fact Petitioner submitted a protest within 60 days of receiving the Notice is not sufficient.

Petitioner further contends that: (a) he did not send the Notice to his accountant-representative when he received it; (b) Petitioner's February 8, 2016 protest was submitted in response to a January 19, 2016 bill Petitioner received from the State of Delaware; and (c) because the protest was submitted within 60 days of the issuance of the bill, the protest is timely. Again, the 60 days begins to run upon the mailing of the notice of proposed assessment, not the issuance of a bill seeking collection. The fact Petitioner filed a protest within 60 days of receiving the January 19, 2016 bill is irrelevant.

**Petitioner failed to timely protest the Notice. As a result, the assessment became final and the Board lacks jurisdiction over this appeal. This matter is hereby dismissed.**

*Paul C. Siff*

*[Handwritten Signature]*

*Dennis M. Winter*

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*Robert W. Slavin*

**Date:** June 21, 2017

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