TAX APPEAL BOARD OF THE STATE OF DELAWARE

ADEBAYO AYOADE and HARRIET OJOMO,	)	
Petitioners,	)	
v.	)	Docket No. 1681
DIRECTOR OF REVENUE,	)	
Respondent.	)	

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

Altaf Lalani, CPA, for Petitioners

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

DECISION AND ORDER

Petitioners Adebayo Ayoade and Harriet Ojomo appeal from a Notice of Determination denying their protest of a reduction in a requested refund. The Notice of Determination denied the protest on the ground that the protest was filed more than 60 days after the issuance of the notice of proposed assessment and, as a result, was untimely.

Respondent Director of Revenue has moved to dismiss the appeal on the ground the Board lacks subject matter jurisdiction to hear the appeal. For the

reasons set forth below, the Board agrees that petitioners' protest was untimely and the Board lacks jurisdiction over this matter. Accordingly, this matter is dismissed.

FACTS

On March 16, 2016, the Division of Revenue mailed the petitioners a notice of assessment ("Notice of Assessment") that reflected a reduction in petitioners' requested refund for taxes paid during the tax year ending December 31, 2014.

Petitioners contend that on April 24, 2016, their accountant sent a timely written protest (the "April 2016 Protest") to the Division of Revenue challenging the reduction in refund. Respondent has no record of ever receiving the April 2016 Protest. In their March 2, 2017 letter to the Board opposing the respondent's motion to dismiss, the petitioners stated the April 2016 Protest "was sent via regular first class mail and we do not have a way to prove the mailing."

In May 2016, petitioners' accountant called the Division of Revenue and was advised that the Division had no record of receiving the April 2016 Protest. Thereafter, the accountant prepared and mailed a second protest which was dated May 28, 2016 (the "May 2016 Protest"). The Division of Revenue received the May 2016 Protest on June 15, 2016, in an envelope that was postmarked June 10, 2016.

The Tax Conferee issued a Notice of Determination dated October 4, 2016, denying the May 2016 Protest on the ground that it was not timely filed in accordance with Sections 522 and 523 of Title 30 of the Delaware Code.

APPLICABLE STATUTORY PROVISIONS

In pertinent part, Section 523 of Title 30 of the Delaware Code provides that "Within 60 days . . . after the date of the mailing of a notice of proposed assessment . . ., the taxpayer may file with the Director a written protest against the proposed assessment . . . in which the taxpayer shall set forth the grounds upon which the protest is based." 30 *Del. C.* § 523.

In pertinent part, Section 522 of Title 30 of the Delaware Code provides that "Sixty days after the date on which it was mailed . . . , a notice of proposed assessment . . . shall constitute a final assessment of the amount of tax, interest, penalties, additional amounts and additions to the tax specified in such notice, excepting only those amounts as to which the taxpayer has filed a timely protest with the Director under § 523 of this title." 30 *Del. C.* § 522.

Thus, "[t]he failure to protest the assessment within 60 days results in the assessment becoming final. When the assessment is final, the Board lacks jurisdiction to hear a taxpayer's appeal of the assessment." *Simpson v. Director of Revenue*, Dkt. No. 1444, at 5 (Tax Appeal Board Oct. 31, 2007).

ANALYSIS

The May 2016 Protest was filed more than 60 days after the mailing of the Notice of Assessment. It is untimely under Sections 522 and 523 of the Delaware Code. Petitioners do not contend otherwise.

Petitioners do contend that they sent the April 2016 Protest to the Division of Revenue by regular mail but admit "we do not have a way to prove the mailing." As petitioners cannot prove that they mailed the April 2016 Protest, no timely protest was filed and the Notice of Assessment became final pursuant to Sections 522 and 523 of Title 30. 30 *Del. C.* §§ 522, 523. As a result, this Board lacks jurisdiction over petitioners' appeal. *Simpson v. Director of Revenue*, Dkt. No. 1444, at 5 (Tax Appeal Board Oct. 31, 2007).

The Board notes that, notwithstanding petitioners' admission that they have no way of proving the mailing, petitioners presumably could introduce testimony that their accountant sent the April 2016 Protest to the Division by regular mail and that this would be some evidence of the filing of a timely protest. While this possibility might suggest that this matter should not be dismissed and should proceed to an evidentiary hearing, the Board concludes that testimony of this nature, standing alone, would not be sufficient as a matter of law to establish that petitioners timely protested the Notice of Assessment.

The Board reaches this conclusion based on *Director of Revenue v. Stroup*, 611 A.2d 24 (Del. Super. 1992), an opinion which is binding on the Board. In *Stroup*, the Division of Revenue issued a tax assessment against taxpayers for failure to file tax returns. The taxpayers appealed the assessment and the Board concluded that the taxpayers had filed tax returns and reversed the assessment. The Board reached this conclusion based on: (i) Mr. Stroup's testimony that he mailed the returns in question to the Division of Revenue along with checks issued for the taxes due by first class mail; (ii) Mr. Stroup's testimony that his tax returns were prepared by a professional tax advisor; and (iii) Mr. Stroup's testimony regarding his unsuccessful efforts to recover copies of cancelled checks from one of three potentially relevant banks which, if found, purportedly would have evidenced payment of the taxes at issue. Mr. Stroup did not produce copies of the checks before the Board.

The Director of Revenue appealed the Board's determination to the Superior Court where the Board's decision was reversed. After first determining that the evidence described above in (ii) and (iii) was inadmissible or failed to prove that the taxpayers had mailed their returns, 611 A.2d at 26-27, the Court addressed Mr. Stroup's testimony with regard to mailing the returns. With regard to that testimony, the Court stated:

> The Board also relied upon Mr. Stroup's statement that he mailed the returns . . . . The only testimony of the . . . mailing was from Mr. Stroup.
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> While it is clear that no rule or statute prohibits the use of regular first class mail to send state tax returns, the taxpayer potentially acts at his peril if an allegation is made of failure to file and then no records can be found and no envelope or postal receipt can be produced. The complaint here was a failure to file. The Director's evidence was that no record of a filing or payment could be found for 1980 or 1981. As taxpayers and petitioners, the Stroups had the burden of showing filing. *Their claim of mailing, without more, is insufficient.* Therefore, the Board erred.

611 A.2d at 27-28 (emphasis added).

The evidence that petitioners might introduce here, testimony that the April 2016 Protest was mailed to the Division of Revenue, is identical to the evidence found insufficient in *Stroup*. This Board is bound by *Stroup* and concludes that, as a matter of law, petitioners cannot prove they mailed the April 2016 Protest based solely on their or their accountant's testimony. As petitioners cannot prove they mailed the April 2016 Protest through testimony alone and as they admit they have no other evidence to prove they mailed the April 2016 Protest, the Notice of Assessment became final and this Board lacks jurisdiction over petitioners' appeal.

The Board notes that the *Stroup* Court observed that the taxpayers had no facts other than their own testimony to support their claim of mailing. *See Stroup*, 611 A.2d at 28 ("[t]heir claim of mailing, without more, is insufficient.").

Consistent with *Stroup*, if a taxpayer has additional information suggesting he, she or it did mail a document to the Division of Revenue, the Board will consider the allegations or facts of that particular case and reach a conclusion based on the allegations/facts presented. Here, the allegations/facts are insufficient as a matter of law.

For the foregoing reasons, the respondent's motion to dismiss is granted and this matter is dismissed.

SO ORDERED this 30th day of October, 2017.