

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

LOUIS and HELEN FUHRMANN,)	
)	
Petitioners,)	
)	
v.)	Docket No. 1814
)	
DIRECTOR OF REVENUE,)	
)	
Respondent.)	

DECISION AND ORDER

This case comes before the Board on petitioners’ motion for reconsideration and to vacate the Board’s June 1, 2023, order dismissing the case for lack of prosecution (“June 1 Order”) and the Board’s June 12, 2023, Order to Show Cause. The issue before the Board is whether a July 6, 2022, letter that the petitioners’ representative submitted to the Board (“July 6 Letter”) is a petition to the Board under Tax Appeal Board Rule VI such that petitioners’ appellate rights before this Board were timely invoked.

We find that the July 6 Letter is not a proper petition before the Board under Tax Appeal Board Rule VI, and that the June 1 Order dismissing the case for lack of prosecution should not be vacated.

FACTUAL BACKGROUND

The pertinent facts are:

1. On June 8, 2022, the respondent issued a Notice of Determination (“NOD”) denying petitioners’ protest of a notice of assessment. The NOD advised petitioners that if they wished to appeal the determination, petitioners had to file “a written Petition in the form required by the Tax Appeal Board” and included a website link to the Tax Appeal Board Rules and form of petition. Respondent’s Response to Motion to Reconsider (“Response”) Ex. 1 at June 8, 2022 letter.

2. In July 2022, an enrolled agent representing the petitioners prepared a letter addressed to the Tax Appeal Board that was dated July 6, 2022. The July 6 Letter referenced the petitioners and stated that they “disagree with the State of Delaware’s position” with regard to the underlying tax issue, and “we would like this letter to serve as our formal written Petition” Response Ex. 1. The July 6 Letter attached the NOD and documents purporting to be petitioners’ 2017 amended and original federal and Delaware state tax returns. The July 6 Letter stated that, in petitioner’s view, their “prior return preparer” erred by listing certain claimed deductions as “Repairs” on Line 14 of their original Schedule E instead of on Line 18 of Schedule E as Depreciable Expenses that are eligible for the “100% Special Depreciation Rule.” The letter did not set forth any background facts supporting these conclusions.

3. The July 6 Letter was sent to the Tax Appeal Board by certified mail on July 19, 2022. *See* Certified Mail Receipt bearing tracking number 7015 0640

0003 7736 6221 attached as an Exhibit to Petitioners' June 23, 2023 letter to the Board and the envelope in which the July 6 Letter was received (copy maintained in the Tax Appeal Board's files), which reflects the same tracking number.

4. The Tax Appeal Board's secretary received the July 6 Letter on July 25, 2022, and dated stamped it with that date. Response Ex. 1. On July 28, 2022, the Tax Appeal Board's secretary sent petitioners' enrolled agent an email acknowledging receipt of the July 6 Letter, but stating that "in order to make a formal appeal before the Tax Appeal Board, you must comply with the provisions of the Board's rules and regulations governing the filing of a formal appeal and the jurisdictional time limitations for such an appeal." Response Exs. 3 and 4. The secretary's July 28 email included a link to the website where the Tax Appeal Board rules and form petitions are located. Response Ex. 4. The July 28 email also attached the form of petition that petitioners should have filed. *Id.* That same day, the enrolled agent sent a reply email stating "Received, thank you." Response Ex. 5.

5. Petitioners did not file anything else with the Tax Appeal Board until September 9, 2022, after the August 8, 2022, deadline for perfecting an appeal from the NOD. On September 9, they did what the Board's secretary advised them to do on July 28: they filed a petition that attempted to comply with Tax Appeal Board Rule VI (summarized below).

6. Thereafter, respondent moved to dismiss the September 9 petition as untimely, and the Board set a briefing schedule on the motion to dismiss that petitioners ignored. Petitioners never responded to the motion to dismiss and on June 1, 2023, the Board issued the June 1 Order dismissing the case for failure to prosecute.

7. On June 5, 2023, petitioners' enrolled agent submitted an email to the Board that attached the July 6 Letter and effectively asked that the Board reconsider its June 1 Order. The Board agreed to reconsider the matter, and this is our decision on that request.

ANALYSIS

8. Petitioners contend that the July 6 Letter was a petition which perfected their right to appeal. Petitioners' June 23, 2023, letter to the Board at ¶8(a) (original petition was filed with the Board on 07/19/2022).

9. In pertinent part, Tax Appeal Board Rule IV provides that:

6a. An appeal from the Director of Revenue shall be initiated by filing a petition with the secretary of the Board.

6b. Failure of a petitioner to comply with this rule or with Rule III shall be grounds for dismissal of the proceeding for failure properly to prosecute.

6c. Form of Petition:

1. The petition shall be substantially in accordance with Form A shown in the appendix.
2. It shall be complete in itself so as fully to state the issues.

3. The petition shall contain:
 - A. A caption.
 - B. Proper allegations showing jurisdiction of the Board.
 - C. A statement of the amount of the deficiency of liability determined by the Director of Revenue or the amount of refund which petitioner has claimed, and which claim has been denied by the Director of Revenue, the nature of the tax, the taxable period involved and the amount thereof in controversy.
 - D. Clear and concise statements of each and every error which the petitioner alleges to have been committed by the Director of Revenue in the notice of the deficiency or denial of refund. Issues in respect of which the burden of proof is or may be by statute placed upon the Director of Revenue will not be determined, and will not be considered raised by the petitioner in the absence of assignments of error in respect thereof. Each assignment of error shall be numbered.
 - E. Clear and concise statement of the facts supporting each assignment of error upon which the petitioner relies.
 - F. A prayer setting forth the relief sought by the petitioner.
 - G. The signature of the petitioner or that of his counsel.
 - H. A copy of the Notice of Assessment of the deficiency or liability or claim for refund if any, and a copy of the Notice of Determination of the Director of Revenue upholding the assessment of tax or denying petitioner's application for a refund with accompanying statements, if any, so far as material to the issues set forth in the assignments of error shall be appended to the petition.

Tax Appeal Board Rule VI.

10. The July 6 Letter does not attach the underlying notice of assessment issued by the Director of Revenue. It is not in accordance with Tax Appeal Board Form A, and petitioners concede that it does not contain a caption, allegations

regarding the Board's jurisdiction, the amount of the deficiency of liability determined by the Director of Revenue, a clear and concise statement of every error that the petitioners allege the respondent committed in the NOD, or a clear and concise statement of the facts supporting each assignment of error upon which the petitioners rely. Response at ¶16 (listing deficiencies on July 6 Letter) and Petitioners' June 23, 2023, letter to the Board at ¶16 (noting petitioners' agreement with the statements in paragraph 16 of the Response).

11. These deficiencies are pervasive and demonstrate a lack of compliance with Rule VI. Such non-compliance is grounds for dismissal. Tax Appeal Board Rule 6b. In prior rulings, this Board has dismissed petitions that have far fewer deficiencies. *Wiant v. Director of Revenue*, Dkt. No. 816 at 3 (Tax Appeal Board October 12, 1984) (dismissing petition pursuant to Rule VI because it lacked a notice of assessment and a concise statement of the facts); *Williams v. Director of Revenue*, Dkt. No. 814 at 3 (Tax Appeal Board July 13, 1984) (Tax Appeal Board lacked jurisdiction when petition was not timely filed due to failure to attach notice of assessment as required by Rule VI: failure to satisfy Rule VI means "no proper or valid or sufficient petition was filed" with the Tax Appeal Board).

12. While errors of this nature could be remedied by directing the petitioners to submit an amended petition, a power the Board has under Tax Appeal

Board Rule 6i,¹ petitioners were already given that chance by the July 28 email and ignored it. The Board prefers to resolve disputes on the merits. Nevertheless, where, as here, petitioners ignored Rule IV notwithstanding clear notice that they had to comply with it before the time to appeal passed, the appropriate result is to find the July 6 Letter deficient and that no appeal was timely filed before the Board.

13. For these reasons, the June 1 Order is not vacated, and this case is dismissed for failure to prosecute.

SO ORDERED this 18th day of July, 2023.

Paul C. Staff

Robert W. Slavin

John M. Winter

Robert W. Slavin

Mr. Lynn Fuller

¹ Rule 6i states:

The Board, upon motion of either party in which good cause is shown, or upon its own motion, may order a further and better statement of the nature of the claim or defense or of any matter submitted in any pleadings. Such a motion filed by a party shall point out the defects complained of and the details desired. If such order of the Board is not obeyed within 15 days or within such other time as the Board may fix, the Board may strike the pleading to which the motion was directed or may make such other orders as it may deem just.