

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

DAVID ORTIZ,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 1838
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

**DECISION AND ORDER**

The issue before the Board is whether petitioner’s appeal from a May 3, 2022 notice of determination must be dismissed as untimely under 30 *Del. C.* §§ 525 and 544. We determine that respondent’s motion to dismiss must be denied because the notice of determination issued in this case did not comply with 30 *Del. C.* § 524. As a statutorily compliant notice of determination has not yet been issued, the sixty day time period to file an appeal with the Board established by 30 *Del. C.* §§ 525 and 544 has not yet begun to run. In fact, as a valid notice of determination has yet to be issued, the issues presented by petitioner’s petition are not yet ripe for review.

**BACKGROUND**

The Division of Revenue determined that the petitioner had overreported deductions on his 2018 personal income tax return and sent petitioner a notice

advising him that he owed additional tax payments. Petitioner protested that assessment.

On May 3, 2022, the Director of Revenue's tax conferee sent petitioner a determination letter that denied the petitioner's protest. Petition ¶3, and exhibit to Petition. The notice of determination stated:

You have protested the proposed assessment of (sic) arising from your overreporting of deductions on your personal income tax returns for the above referenced tax period. The protest of additional tax is denied for the following reason(s):

Exhibit to Petition. The letter is blank after the colon. The letter did not set forth any findings of fact or legal analysis as to why the tax conferee denied the petitioner's protest. The notice of determination also stated:

If you do not agree with this determination, Sections 525 and 544 of Title 30 of the Delaware Code provide that you may seek review of this determination by filing a written Petition with the Tax Appeal Board within sixty days of the date of this notice. If the Tax Appeal Board does not receive your written Petition in the required form within sixty days, Section 525 of Title 30 of the Delaware Code provides that the proposed assessment will constitute a final assessment, and you will have no further rights to review of the proposed assessment.

Exhibit to Petition.

On February 23, 2024, petitioner filed a petition with the Tax Appeal Board. Respondent moved to dismiss the petition on the ground it was not filed within the sixty day window set by 30 *Del. C.* §§ 525 and 544. In response, petitioner contends

that he has “written documentation that dates back to May of 2022” that demonstrates he has acted timely.

### ANALYSIS

Section 523 of title 30 of the Delaware Code requires the Director of Revenue (“Director”) to evaluate any taxpayer protest and decide whether to grant or deny the protest. Section 524 of title 30 of the Delaware Code requires the Director to issue a notice of determination setting forth his decision regarding the protest. Section 524 states, “Written notice of the Director’s determination under § 523 of this title shall be mailed to the taxpayer by certified or registered mail, and such notice shall set forth the Director’s findings of fact and the basis of any determination which is adverse, in whole or in part, to the taxpayer.” A tax conferee, acting on behalf of the Director, almost always fulfills these mandates.

The May 3, 2022 notice of determination that the tax conferee sent to the petitioner did not comply with Section 524. The notice of determination denied petitioner’s protest, but it did not “set forth the Director’s findings of fact and the basis of any determination” as statutorily required.

Respondent cannot rely on a defective notice of determination to start the clock running on petitioner’s time to file a petition with the Board. Under Section 525 and 544 of title 30 of the Delaware Code, a taxpayer must file a timely petition with the Board “seek[ing] review of the Director’s determination” and the Board

must “review” that determination and decide whether to uphold or reject it. Here, neither the petitioner nor the Board can satisfy these statutes because the basis for the Director’s decision is not set forth in the notice of determination. The petitioner cannot appeal from, and the Board cannot review and approve or reject what does not exist. For example, how can the Board determine if the Director abused his discretion when the basis for his decision is not set forth in the notice of determination.<sup>1</sup>

Given the Director has yet to issue a valid notice of determination, the issues presented by petitioner’s petition are not yet ripe and this case is dismissed for that reason. *See XI Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1217 (Del. 2014) (a controversy is ripe when it has “matured to a point where judicial action is appropriate” and a claim is not ripe when it is based on “uncertain and contingent events that may not occur”); *Feldman v. AS Roma SPV GP, LLC*, 2021 WL 3087042, at \*10 (Del. Ch. July 22, 2021) (if a claim is not ripe, a court may not assert subject matter jurisdiction over it).

Unless the parties can otherwise resolve their dispute, the Board directs the Director to issue a compliant notice of determination in response to petitioner’s

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<sup>1</sup> The Board notes that many notices of determination issued by the Director’s tax conferees contain few facts and little analysis. The Board does not condone this practice, which makes it at least difficult for taxpayers and the Board to understand why a protest has been denied. Whether such notices comply with Section 524 is an open issue.

protest. If that determination is adverse to petitioner, he will have sixty days from the date of issuance to file an appeal with the Board. If petitioner elects to appeal that notice of determination, he should file a new petition that commences a new case before the Board.

SO ORDERED this 17<sup>th</sup> day of June, 2024.

Carl C. Selt

Juan M. Winters

M. Lynn Fuller

Robert Slavina / rcs