

Petition

BEFORE THE TAX APPEAL BOARD OF THE STATE OF DELAWARE

DONOVAN C. CARBAUGH,)	
)	
Petitioner,)	
)	
v.)	Docket No. 543
)	
DIRECTOR OF REVENUE,)	
)	
Respondent.)	

Before: Cyric W. Cain, Jr., Joseph J. Longobardi, Jr., Esquire,
Rhett McGriff, Nettie C. Reilly.

Donovan C. Carbaugh, Pro Se.

Stephen R. Spiller, Esquire, Special Counsel for Respondent.

DECISION

Joseph J. Longobardi, Jr., Acting Chairman: On or about April 25, 1972 but certainly before April 30, 1972, the Petitioner filed his Delaware State Income Tax return for the year 1971. During that taxable year the Petitioner was employed in Philadelphia, Pennsylvania, and while there was subject to the Philadelphia City Wage Tax.

In preparing his return for 1971, Petitioner, pursuant to his understanding of 30 Delaware Code 1111, accurately computed a credit against his Delaware State Income Tax for the income tax imposed by the City of Philadelphia. As prepared and filed, his return showed an overpayment of taxes in the amount of \$388.28. That figure was placed opposite the printing on lines 17 and 20 of the return which included the words "to be refunded." The Division of Revenue did not at anytime thereafter up to the date of this Appeal utilize the provisions of 30 Delaware Code 1181 which is as follows:

"1181. Examination of return.

(a) Deficiency or overpayment. As soon as practicable after the return is filed, the State Tax Commissioner shall examine it to determine the correct amount of tax. If the State Tax Commissioner finds that the amount of tax shown on the return is less than the correct amount, he shall notify the taxpayer of the amount of the deficiency proposed to be assessed. If the State Tax Commissioner finds that the tax paid is more than the correct amount, he shall credit the overpayment against any taxes due to this State by the taxpayer and refund the difference.

"(b) No return filed. If the taxpayer fails to file an income tax return, the State Tax Commissioner shall estimate the taxpayer's taxable income, and the tax thereon, from any available information and notify the taxpayer of the amount proposed to be assessed as in the case of a deficiency.

"(c) Notice of deficiency. A notice of deficiency shall set forth the reason for the proposed assessment. The notice may be mailed by ordinary certified or registered mail to the taxpayer at his last known address. In the case of a joint return, the notice of deficiency may be a single joint notice, except that if the State Tax Commissioner is notified by either spouse that separate residences have been established, he shall mail joint notices to each spouse. If the taxpayer is deceased, or under a legal disability, a notice of deficiency may be mailed to his last known address, unless the State Tax Commissioner has received notice of the existence of a fiduciary relationship with respect to such taxpayer."

At the time, the Director's official position was that the Philadelphia City Wage Tax was not a tax included under 30 Delaware Code 1111. A requested Attorney's General opinion, however, suggested the Director was in error and on April 5, 1973, the Division reversed itself and issued Director's Ruling 73-1. That ruling requested those who had already filed returns for the years

1971 and 1972 to claim their refund on form 1048. Petitioner did so on April 30, 1973. On June 28, 1973, the Division allowed the \$388.28 refund but did not include any interest and cited 30 Delaware Code 1199(e). 11 Delaware Code 1199 as effective January 1, 1971 was as follows:

"1199. Interest on overpayment.

"(a) Interest shall be allowed and paid at the rate of 1% per month, or fraction thereof, upon any overpayment in respect of the tax imposed by this chapter. No interest shall be allowed or paid if the amount is less than \$1.

"(b) For purposes of this section and section 1198 of this title:

"(1) any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day, determined without regard to any extension of time granted the taxpayer;

"(2) any tax paid by the taxpayer before the last day prescribed for its payment, any income tax withheld from the taxpayer during any calendar year, and any amount paid by the taxpayer as estimated income tax for a taxable year, shall be deemed to have been paid by him on the fifteenth day of the fourth month following the close of his taxable year to which such amount constitutes a credit or payment.

"(c) If any overpayment of tax imposed by this chapter is refunded within 3 months after the last date prescribed (or permitted by extension of time) for filing the return of such tax or within 3 months after the return was filed, whichever is later, no interest shall be allowed under this section of overpayment.

"(d) No interest shall be allowed during the period of delay on a refund delayed by the action or by the inaction of the taxpayer."

That law was amended by 58 Delaware Laws C257 and approved July 10, 1971 by adding a paragraph (e) which is as follows:

"(e) If any refund of any overpayment of tax arising out of a claim for refund or amended return is made within 3 months after the date such claim or amended return is filed, no interest shall be allowed on such overpayment."

and further amended by C358 and approved March 29, 1972 by substituting the words "thirtieth day" for the words "fifteenth day" in paragraph (b) (2). The statute was further amended by C30 Laws 1973 effective April 26, 1973 to read as follows:

"(b) Limitations.

"(1) No interest shall be allowed on any overpayment of less than one dollar (\$1.00).

"(2) Interest shall be allowed on any overpayment commencing with the 46th day after the last date prescribed for filing the return of such tax, or in case the return is filed after such last date, the 46th day after the return is filed.

"(3) In the case of an overpayment resulting from the filing of a claim for refund or an amended return, interest shall be allowed commencing with the 46th day after such claim or amended return is filed.

"(4) If the Secretary of Finance or his delegate determines that the refund of any overpayment is unreasonably delayed because of an action or inaction by the taxpayer, no interest shall be allowed during such period of delay.

"(c) Early return and advance payments.

For purposes of this section and Section 1198:

"(1) Any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day.

"(2) Any tax paid by the taxpayer before the last day prescribed for its payment shall be considered as being made on such last day.

"(3) The last day prescribed for filing the return or paying the tax shall be the 30th day of the fourth month following the close of his taxable year regardless of any extension of time granted the taxpayer.

"(4) Any income tax withheld from the taxpayer during any calendar year and any amount paid by the taxpayer as estimated income tax for a taxable year shall be deemed to have been paid by him on the

thirtieth day of the fourth month following the close of his taxable year with respect to which such tax constitutes a credit or payment."

The issues to be resolved by this appeal are (1) Is a taxpayer required to file a specific written claim for refund if his completed, accurate and timely filed return shows a refund is due; (2) Does the opinion of the Division interpreting a statute which later proves incorrect stay the allowance of interest on refunds due; (3) What statute was applicable to determine the computation of interest on the 1971 return filed April 25, 1972.

The first issue was resolved by an admission by the Respondent at trial. In response to a question as to whether a separate, written claim for refund is necessary if a completed, accurate, timely filed return shows a refund is due, the Respondent answered no. And this Board so holds.

The second issue presents the problem of deciding whether the opinion of the Division can thwart the interest provisions of 30 Delaware Code 1199. In this case, the taxpayer's construction of the statute was that which was finally opted. Should his interest run from the time the applicable statute allows interest on his timely filed return or should it run from some time after the Director finally agrees the taxpayer is correct. The answer to the almost rhetorical question is obviously the former; interest should run from the time the applicable statute allows interest on the taxpayer's timely filed return. To rule otherwise would give the Director the ability to control interest payments, thwart the intent of §1199 and possibly lead to a flagrant and improper disregard for the rights of our citizens.

The statute under which interest should be calculated is §1199(c) as found in Volume 12, 1970 Supplement Phamphlet of the Delaware Code. That statute is as follows:

"(c) If any overpayment of tax imposed by this chapter is refunded within 3 months after the last date prescribed (or permitted by extension of time) for filing the return of such tax or within 3 months after the return was filed, whichever is later, no interest shall be allowed under this section on overpayment."

Under the provisions of that section of the statute and read in conjunction with paragraph (a), one is led to the unmistakable conclusion that interest mustbe allowed from the date the 1971 return was due because the refund was not made within 3 months. That statute was in effect and applicable to Petitioner's return as of April 30, 1972. The obligation of the State was fixed as of that date by 1199(c). No amendments subsequent thereto but before any refunds were made should alter that obligation.

It is so ordered.

J. J. Hubbard
Brett McGriff
Nettie C. Reilly
Cyril W. Cain

Date Aug 15, 1974