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TAX APPEAL BOARD OF THE STATE OF DELAWARE

MAGNESS CONSTRUCTION CO.  
Petitioner

v.

DIRECTOR OF REVENUE,  
Respondent.

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Dockets No. 738, 789

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Before: Joseph S. Yucht, Esquire, Chairman; John H. Cordrey, Esquire, Vice Chairman; Harry B. Roberts, Regina C. Dudziec, and David C. Eppes, Members.

Petitioners: William J. Martin, Esquire.

Respondent: J. Patrick Hurley, Jr., Esquire, Deputy Attorney General.

The matter before the Board in this case is the Petitioner's Motion to Compel Answers to Interrogatories. Petitioner has requested that the Respondent provide it with certain information, and Respondent has argued that the information is not discoverable.

The larger case at issue involves penalties assessed against Petitioner for failure to timely pay gross receipts and income taxes. The taxes themselves, and the related interest assessments, have been paid and are not at issue.

Petitioner has argued that they have been treated unfairly; that they were not treated in the same manner as similarly situated taxpayers with respect to partial abatement of penalties. Specifically, Petitioner argues that a policy exists or existed in which the Division of Revenue regularly abated a portion of penalties if requested to do so as part of settlement negotiations with respect to a case. Petitioner contends that this alleged policy was not followed in their case, resulting in inequitable treatment. In order to prove their argument, Petitioner has asked Respondent to produce certain data about partial penalty abatements in other cases.

Respondent contends that no such policy has ever existed. Respondent further argues that the data in question is not discoverable because, A) the information is privileged tax data, B) the Petitioner has not borne the burden necessary to compel production of the documents and C) the information requested is not relevant.

## PETITIONER'S ARGUMENT

Petitioner contends that there has been an abuse of discretion on the part of the Director of Revenue; that this amounted to arbitrary and capricious action; and that it was fundamentally unfair to treat this taxpayer differently than others.

Petitioner contends that the information sought is not privileged or alternately can be adequately protected. The interrogatories in question request raw data about penalty abatements as well as explanations for the actions taken in each case. Taxpayers identities would not be disclosed in the data presented. Further, much of the case is related to gross receipts taxes, and these taxes are not covered under 30 Delaware Code Section 1241, which prohibits disclosure of certain tax data.

Petitioner further argues that, if they can demonstrate that a policy existed, and that it wasn't followed in this case, that this would constitute evidence, or could lead to evidence that an inappropriate abuse of discretion took place.

With regard to relevance, Petitioner agrees that the Board is bound by the Rules of The Superior Court of the State of Delaware. Under these rules, information is deemed relevant if it may lead to discovery of additional evidence which can be used to discovery of additional evidence which can be used at a hearing on the merits of the case. Petitioner contends that the existence of non-existence of a policy (formal or informal) with respect to penalty abatement is clearly relevant to his case, and that they can only establish existence of such a policy by looking at data on prior penalty abatements. In order to meet the burden of a prima facie case that the information is relevant, Petitioner points to two memoranda written by high officials of the Division of Revenue with respect to the Petitioner's case. These memoranda seem to imply that senior personnel from the Division of Revenue were ready to enter into penalty negotiations with Petitioner, but were subsequently overruled by the Director of Revenue. One memorandum states that "...the recently appointed Director of Revenue had his own thoughts regarding penalty compromise and it would be necessary for the taxpayer to confer directly with (him) on the matter." The other memorandum, in reference to a telephone call from Petitioner's accountant states "In particular, the emphasis of the conference was to arrive at a mutually agreeable amount of penalties, and that we could probably reach an agreeable compromise on the penalties, predicated on the taxpayer being able to pay the agreed figure in full." The memorandum further states "...I advised the Director that I was going to compromise and abate some penalties to close the case. The Director asked me for more information and subsequently directed me not to compromise any penalties in this case on the basis that the non-filings were to (sic) flagrant to support any compromise."

Petitioner contends that the reference to settlement negotiations in the memoranda and the subsequent intervention in this matter by the Director of Revenue may have constituted an abuse of discretion, and that the information Petitioner has requested is therefore clearly relevant to their case.

#### RESPONDENTS ARGUMENTS

Respondent counters that the information requested is only relevant with respect to the abuse of discretion argument, which is, simply stated, a selective prosecution argument. In order for selective prosecution to be proved, one must first prove selection and then prove improper motive. The party requesting material must make a prima facie case showing that others similarly situated were not prosecuted, and that there was a decision to prosecute and, second, the selection was improperly motivated. Respondent argues that, even if Petitioner could demonstrate selection, he would be unable to demonstrate improper motive. There is nothing improper about the Director of Revenue assessing the full statutory penalties against a taxpayer who has flagrantly disobeyed the tax laws.

With respect to privilege, Respondent argues that in order to overcome a presumption of privilege, Petitioner must show that the information is clearly relevant, and that it is not readily obtainable from other sources. Respondent contends that the Petitioner could use affidavits and live testimony to establish that the alleged policy exists or existed.

Finally, Respondent argues that compliance with the request would be burdensome and costly, and that the Board should adopt a policy that the Division of Revenue will not be put to this expense on the basis of bold assertions particularly where other avenues of discovery exist.

#### DISCUSSION

##### PRIVILEGE

Respondent has argued that the information requested is not discoverable because the information is privileged tax data. Petitioner contends that the data requested is merely a compilation of data and that the identities of specific taxpayers would not be revealed nor could they be surmised. The Board agrees that the information requested would not reveal any confidential tax return data. Abstracts of tax return information are commonly published by the federal and state governments for informational purposes. The Board feels that the data requested is of the nature of a statistical abstract, that no compromise of privacy would result from the release of the data and that no harm would be done to the administration of the tax laws by the release of data of the type requested.

## RELEVANCE

Petitioner and Respondent agree, as does the Board, that the Rules of the Superior Court of the State of Delaware with respect to discovery proceedings are binding in this case. Rule 26(b) (1) states:

"In general, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action... including the existence, description, nature, custody, condition and location of any books, documents or other tangible things...It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Respondent argues that the Petitioner must establish relevance and that to do so he must establish a prima facie case that selective prosecution existed. Selective prosecution involves two tests: 1) selection, and 2) improper motive. The Board feels that this argument is too restrictive. In effect, Respondent is arguing that the Petitioner must prove the larger case at hand in order to establish discovery right. The Board feels that the duty of the Petitioner is to establish a prima facie case that some form of unwritten policy existed with regard to abatement of penalties. Black's Law Dictionary defines prima facie case as:

"Such as will prevail until contradicted and overcome by other evidence...Courts use concept of prima facie case in two senses: (1) in sense of plaintiff producing evidence sufficient to render reasonable a conclusion in favor of allegation he asserts; this means evidence is sufficient to allow his case to go to jury, and (2) courts used prima facie to mean not only that plaintiff's evidence would reasonably allow conclusion plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it."

By introduction of the two memoranda discussed earlier, Petitioner has met this burden. These memoranda provide reasonably sufficient evidence that officials at the Division of Revenue were prepared to enter into settlement negotiations as a matter of course prior to the intervention of the Director. It would be reasonable to infer from the discussions in the memoranda that the officials who wrote the memoranda felt that they were using "standard operating procedure" when they discussed abatements with representatives of the Petitioner. The Respondent has not offered any evidence to rebut that inference.

## BURDEN

The Respondent contends that compliance with Petitioner's discovery requests would result in an undue burden on

the Division of Revenue. Specifically, the Division would be required to pull files for up to 59,000 cases over a ten-year period to comply with the discovery requests. The Board does not take lightly the substantial investment of time that would be required.

Petitioner, on the other hand, rightfully points to a basic tenant of discovery:


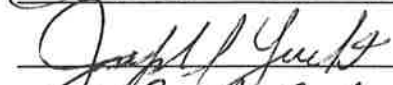
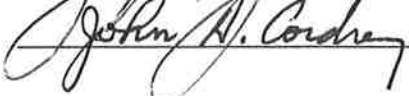
"An interrogatory is not objectionable simply because it calls for information which is not readily available to the answering party and, if interrogatories are relevant, the fact that they involve work, research, and expense is not sufficient to render them objectionable."

In this case, the issues are somewhat clouded by the fact that the data requested involves confidential tax data of individuals. If this were not the case, Petitioner would merely be granted access to the files and could then compile the data desired at his own expense. However, since the underlying files contain data that is privileged, such access is not possible. The Board does not feel that the Petitioner's discovery rights should be limited merely because the data he requires is imbedded in files which are subject to privilege.

On the other hand, the Board does not condone the concept of Petitioner going on a fishing expedition at considerable State expense. The Board is also concerned that Petitioner has not exhausted all other possible means of discovery, such as taking depositions of current and former Division of Revenue employees and of tax practitioners.

The Board feels limited in the extent to which it will direct the methods of discovery. On the other hand, there are legitimate concerns of both parties regarding the discovery options available. Petitioner has legitimate concerns about testimony and affidavits from practitioners and Division of Revenue employees. The Board generally agrees that the information requested is discoverable. However, Respondent has legitimate concerns about the cost of compiling the requested data. Accordingly, the Board orders that Respondent shall comply with the discovery requests for years 1981 and 1982. Further, if Respondent requires that any additional years be provided, Petitioner shall reimburse Respondent for any reasonably incurred costs of complying with such discovery request.

IT IS SO ORDERED THIS 11th DAY OF MAY, 1989

  
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