



In accordance with said Superior Court Order this Board held a hearing wherein the sole issue was whether or not the abatement or suspension of penalties is in the best interest of the State of Delaware. The Petitioner argued that it was and the Respondent argued that it was not.

The facts of this case are not in dispute and were stipulated by the parties. Petitioner owned and operated a gas station at 2007 Newport Gap Pike, Wilmington, Delaware and held a merchant's license for the years 1975 through 1979 pursuant to 30 Del. C. §2101. Petitioner paid the basic license fee of \$50.00 for each of said years as required by 30 Del. C. §2905(a), but did not pay the additional fee based on gross receipts required by 30 Del. C. §2905(b). Respondent conducted an audit in 1980 and as a result issued to Petitioner a notice of assessment for the period April 1, 1975 through December 31, 1979, as follows:

Tax	\$35,822.90
Interest	9,879.85
Penalty	<u>29,742.64</u>
	\$75,445.39

After Respondent made the aforementioned assessment against Petitioner, Petitioner retained counsel who informed Petitioner that in his opinion the Respondent could not legally collect said taxes. Based upon Petitioner's counsel's opinion, Petitioner has declined to pay the taxes, interest and penalties and filed a petition before this Board.

Petitioner argued that Chapter 29 of Title 30 of the Delaware Code was constitutionally defective because the General Assembly had passed no general laws under which the license tax provided

for in 30 Del. C. Chapter 29 could be collected. This Board declined to rule on the constitutionality of the statute since it has no authority to rule a statute unconstitutional. Accordingly we held that the taxes were validly imposed and we also declined to abate the interest and penalties. On appeal, the Superior Court held that the collection of the tax provided for in 30 Del. C. §2905 and the imposition of interest thereon do not violate the Delaware Constitution. But, the Superior Court did rule that any abatement or suspension of penalties imposed must rest upon a finding by this Board that the abatement or suspension is in the best interest of this State and since this Board made no findings on this issue of abatement or suspension of penalty, the matter was remanded back to this Board for appropriate findings.

The Board finds that it would not be in the best interest of the State of Delaware to abate or suspend the imposition of penalties for the following reasons:

1. The fact that the Petitioner contended, in good faith, that the taxes were unconstitutional does not mean that there is no reason to impose a penalty when the taxes are found to be constitutional. Petitioner has cited no authority which supports the proposition that "good faith" ought to be equated with the best interest of the State. The general rule is to the contrary.

"While there is some authority for the view that a taxpayer who fails to pay a tax because of honest doubt as to his liability for the tax, or because of his contention made in good faith that he is not liable for it, is not chargeable with interest and penalties imposed upon delinquent taxpayers, the general rule is that this liability for a penalty or for interest cannot be avoided upon the ground of the taxpayer's

belief or contention entertained or made in good faith that he is not liable for the payment of the tax. The penalty is imposed for failure to pay taxes when due, and the rule in most jurisdictions is that even though one in good faith litigates his liability to a tax until after it is due and payable, he is liable for the penalty or interest imposed upon delinquent taxpayers if the decision is adverse to him." 72 Am. Jur. 2d, State and Local Taxation, §861.

2. The Board does not believe that the Petitioner acted in good faith between the years 1975 and 1979. A person who timely challenges the constitutionality of a statute can be said to act in good faith. A person who pays the taxes imposed and then litigates the constitutionality of the statute also acts in good faith. But one who pays a portion of a tax and does not pay or contest the validity of the other portion until an assessment is made against him by the Respondent, cannot be said to act in good faith when he now challenges the constitutionality of said statute. The challenge comes too late. The after assessment conduct of Petitioner will not excuse conduct which was not found to be good faith conduct occurring prior to the assessment.

3. The Board further finds that it is in the best interest of the State to encourage the timely payment of taxes and to punish those who do not pay on time. An abatement or suspension of penalties in the case at bar would not serve those purposes, but would only serve to encourage the non payment of taxes to the detriment of the State.

Accordingly, we hold that the abatement or suspension of penalties in this case is not in the best interest of the State of

Delaware. Thus we affirm the Respondent's assessment of penalties against Petitioner is the amount of \$29,742.64.

IT IS SO ORDERED.

Joseph S. Gault  
Nettie C. Reilly  
Agnes W. Gair  
Harold B. Kohler

Dated: July 13, 1984

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

RECEIVED

JUN 27 1983

TAX APPEAL BOARD

RICHARD BROWN, t/a )  
DICK'S ESSO, )  
 )  
Petitioner below, )  
Appellant, )  
 )  
v. )  
 )  
DIRECTOR OF REVENUE, )  
 )  
Respondent below, )  
Appellee. )

Civil Action No. 82A-SE-10

Submitted: January 24, 1983  
Decided: April 27, 1983

O R D E R

Decision On Appeal From Decision Of Tax Appeal Board Dated September 10, 1982 Upholding The Imposition Of Tax Interest And Penalty Made By Division Of Revenue - Affirmed In Part; Reversed And Remanded In Part

This 27th day of April, 1983:

It appears that:

1. Appellant Richard Brown, t/a Dick's Esso [appellant], who owned and operated a gas station at 2007 Newport Gap Pike, Wilmington, Delaware, held a merchant's license for the years 1975 through 1979, as required by 30 Del.C. §2101. During that period, appellant paid the State license fee of \$50 per year required by 30 Del.C. §2905(a), but did not pay the additional fee based on gross sales receipts required by

30 Del.C. §2905(b). As a result of an audit conducted in 1980 the Division of Revenue gave appellant a notice of assessment in the amount of \$35,822.90 as license tax, \$9,879.85 as interest, and \$29,742.64 as penalty, total of \$75,445.39. Appellant declined to pay any of the above on the ground that based on opinion of his counsel the Division was not legally empowered to collect said sums. Appellant's petition to the Tax Appeal Board resulted in a decision supporting the Division's assessment. This is an appeal from the Board's decision.

2. Appellant's initial contention is that the license tax statute, 30 Del.C. Ch. 29, is unconstitutional because there is no statute which provides for the collection of this license tax. The constitutional provision upon which appellant relies is section 1, Article VIII of the Delaware Constitution, which reads:

Section 1. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws passed by the General Assembly.

The general power to provide taxation for public purposes is an inherent legislative power of the General Assembly.

Consolidated Fisheries Co. v. Marshall, Del. Super., 32 A.2d 426 (1943); State v. Pinder, Del. Gen. Sess., 108 A. 43 (1919). Article VIII, Delaware Constitution is a restriction on that

general power. Ibid. Appellant's contention is that while the levying of the license tax is provided for by statute, there is no statute providing for the collection of that tax.

3. 30 Del.C. §2905(b) establishes liability for payment of the tax, stating that "every retailer shall pay an annual license fee . . ." 30 Del.C. §2105 confirms that liability by providing that "failure to pay the fee or tax required under this part [Chapters 21-43 of Title 30] at the time when the same shall be due shall subject the taxable to a liability "for interest and penalties" up to a maximum total penalty of 100% of the principal amount due and payable".

4. The duty to collect this tax is established by the following statutes: 30 Del.C. §301 provides that the "Department of Finance shall administer and enforce all state tax laws and shall collect the taxes thereby imposed". 29 Del.C. §8305 vests in the Division of Revenue of the Department of Finance the power and responsibility previously vested in the State Tax Department and the State Tax Commissioner pursuant to various chapters including Chapters 21 and 29 of Title 30, Del.C., and vested in the Collector of State Revenue, the State Tax Commissioner pursuant to Chapter 5 of Title 30, Del.C. Under the prior law, 504 Del.C. (1953) the Collector of State

Revenue had the function of "ascertaining and collecting from every person . . . , any revenue due the State . . . ."

5. Appellant contends that the use of the words "levied and collected" in Section 1, Article VIII requires a statutory provision specifying not only the manner of the levy but also the manner of collection of the tax. This rests on the premise that the objective of the quoted language of Section 1, Article VIII was to control the mechanics of taxation. An examination of the Debates of the Constitutional Convention (Vol. 2, pp. 1383-1411) which considered this provision shows that the objective of the language was to assure uniformity of taxation by requiring that taxation must have its origin in a general law and not a special law and that the taxation must rest upon a law enacted by the General Assembly. Nothing in the Debates indicates a dissatisfaction with the methods employed in the levying and collecting of taxes. The purpose of the provision was to provide for uniformity within the class of taxables and to assure that taxation would be under the control of the General Assembly and it would receive the public attention afforded by enactment as a general law. The words "levied and collected" have been used in this State to refer generally to the process of taxation. Rhodes v. Gwin,

Del. Super., 5 Hous. 183 (1876). From the context in which these words appear in Article VIII and from the reported discussion of the sections in which they are used (Constitutional Debates, Vol. 2, pp. 1383-1465), these words were used to refer to the taxation process from its inception to the receipt of taxes into the hands of a public official as revenue to a government body. It does not appear that the words were used in a technical sense which would give a differentiating meaning to each. The Delaware Supreme Court has recognized that the draftsmen of Section 1, Article VIII, of the Delaware Constitution used words in a broad and not a precise context in that section. In re Estate of Zoller, Del. Supr., 171 A.2d 378 (1961).

6. In this State the right of a person charged with the duty to collect taxes to bring an action in court to recover the amount of the taxes from the person who is obligated under statute to pay the taxes has long been recognized to exist independent of statute. Freeman v. Hall, Del. Supr., 1 Del. Cas. 648 (1793). This right has been held to exist even though the statute authorized only a non-judicial remedy of distress. *Ibid.* The existence of the practice of permitting civil suit for the collection of taxes was recognized by implication in the Delaware Code of 1829 at page 355, section 43,

which forbade a tax collector from commencing suit for taxes before a justice of the peace except where the taxable had removed from the county or the taxable had died and his executor or administrator failed to pay the taxes after demand. The above statute was applied by this Court in Laws v. Jones, Del. Super., 2 Harr. 345 (1838) to bar suit before a justice of the peace which did not allege that the taxable was within the exception specified in the above statute. That statute is no longer in the Delaware law. Other suits to collect taxes are reported in Banks v. Talley, Del. Super., 194 A. 362 (1937), and Marshall v. Consolidated Fisheries, Del. Super., 28 A.2d 247 (1942). The Delaware Supreme Court has held in Mayor and Council of Wilmington v. Dukes, Del. Supr., 157 A.2d 789 (1960) that where a statute authorizing taxation fails to provide a method (other than the criminal process) for collection of license taxes it will be implied that the legislation intended to authorize the taxing agency to institute civil suit to collect the tax, and that where the tax was imposed on the person (as here) rather than upon an item of property that implication is particularly strong. This holding is consistent with the rule applied in decisions in various states discussed in 3 Cooley on Taxation §1331. 2 Woolley on

collection of the tax under judicial process was historically available.

8. Appellant has cited many Delaware tax statutes and has contended that all of the statutes, except 30 Del.C. Ch. 29 (which is the subject of this litigation), provide for the collection of the tax. The Court's review of the tax statutes in Title 30 of the Delaware Code discloses that Chapters 15, 19, 21, 23, 25, 27, 29, 30, 33, 35, 37, 41, 43, 53, 54, 55 and 61 of Title 30 specify who shall collect the tax and direct that that officer or office shall collect the tax, but they do not indicate in what manner (other than by criminal prosecution) the tax can be collected from the person who is liable under the statute for payment of the tax if the taxable fails to pay voluntarily. While these provisions would not prevent the Court from striking down a clear violation of the Constitution, these legislative actions may be viewed as a legislative interpretation of the pertinent constitutional provision and may be considered along with other matters in interpreting the Constitution.

9. Based upon the considerations discussed in the foregoing paragraphs, I conclude that collection of the tax provided in 30 Del.C. §2905 does not violate Section 1, Article VIII of the Delaware Constitution.

10. Appellant also contends this Court should abate the assessment of interest and penalties in this case. The Tax Appeal Board did not determine whether it had the power to abate interest and penalties but without making any findings held that no abatement would be allowed. 30 Del.C. §2103(6) grants to the Secretary of Finance "the power to suspend all fines and penalties imposed by this part and . . . to suspend the imposition of any tax". The Respondent concedes that the Board has the power to suspend the tax and penalty but contends that neither the Secretary of Finance nor the Board has the power to suspend the interest. This position rests on the proposition that in general penalties imposed by statute for tax delinquencies can only be suspended as provided by statute, citing 85 C.J.S. Taxation §1031(c), p. 599. I conclude that the Secretary is empowered to suspend penalties with or without suspending taxes, but that because no such mention is made as to interest it cannot be suspended without suspending taxes. However, since interest is an adjunct to taxes, the extent that taxes are suspended, the interest on the suspended taxes may also be suspended. Thus, in view of the statutory omission, interest may be suspended only in connection with the suspension of taxes. Appellant did not seek suspension of the taxes except on the constitutional grounds which have been resolved against appellant. Therefore, no ground exists for suspension of interest on the taxes.

11. A question has also been raised as to whether the statutory restriction that suspension be made "only if such suspension is in the best interest of this State" applies to suspension of fines and penalties as well as to suspension of the tax. One contention is that because of the location of the above quoted phrase immediately following the reference to suspension of taxes, the quoted phrase is a limitation on suspension of taxes but not on the suspension of penalties. Because the requirement that the suspension must be in the best interest of the State is so fundamental and because no sound reason has been put forth for applying a less stringent standard for suspension of penalties than for suspension of taxes and because the restrictive language follows both clauses which relate to suspension and no punctuation separates the two clauses, I conclude that any suspension, whether of penalty or tax, must rest upon a finding that the suspension is in the best interest of the State.

12. Since the Board made no findings with respect to the issue of suspension of penalty, the matter must be remanded to the Board for appropriate findings.

Based upon the foregoing,

IT IS ORDERED that this Court finds that 30 Del.C. §2905 does not violate Section 1, Article VIII of the Delaware Constitution and the decision of the Tax Appeal Board dated

11 - Brown v. Director of Revenue  
82A-SE-10

September 10, 1982 insofar as it ordered no abatement of interest on the taxes is affirmed; insofar as it ordered no abatement of penalties the decision is reversed and the matter is remanded to the Board for further proceedings consistent herewith.

  
Donald W. Taylor  
J.

CERTIFIED AS A TRUE COPY:  
ATTEST: MARGO BANE,  
PROTHONOTARY  
BY: 