

TAX APPEAL BOARD OF THE STATE OF DELAWARE

MAGNESS CONSTRUCTION COMPANY,)
)
) Petitioner,)
)
) v.) Docket No. 789
)
)
) DIRECTOR OF REVENUE,)
)
) Respondent.)

Before: Joseph S. Yucht, Esquire, Chairman; James C. Eberly, Sr., Esquire, Vice-Chairman; Nettie C. Reilly, Cyric W. Cain, Jr., and Harry B. Roberts, Jr., Members

William J. Martin, Esquire of Williams, Gordon & Martin, P.A. for Petitioner..

John P. Fedele, Esquire and Joseph Patrick Hurley, Esquire, Deputy Attorneys General for Respondent.

DECISION AND ORDER

Joseph S. Yucht, Esquire, Chairman. This appeal involves a determination as to whether or not the Notice of Assessment issued by Respondent on September 21, 1982 is a valid assessment under Delaware law. The facts of this case are not in dispute and were stipulated by the parties as follows:

1. Petitioner is a Delaware corporation with its principal place of business in New Castle County, Delaware, and its mailing address is P.O. Box 7109, Wilmington, Delaware 19803.
2. A written Notice of Assessment dated March 3, 1980 was mailed to Petitioner on or about March 3, 1980 proposing the assessment of additional income tax withholding taxes, interest

and penalties for the taxable period July 1, 1976 through December 31, 1978.

3. Petitioner appealed the Respondent's Notice of Assessment dated March 3, 1980 to this Board on April 2, 1980. That appeal is currently pending before us in Docket No. 738.

4. The Respondent's written Notice of Assessment dated March 3, 1980 did not propose any additional income tax withholding taxes, interest or penalties for any periods after December 31, 1978.

5. A written Notice of Assessment dated September 21, 1982 was mailed to Petitioner by Respondent on or about September 21, 1982 proposing the assessment of interest and penalties with respect to income tax withholding taxes allegedly due for the periods January 1, 1979 through November 30, 1979.

6. Petitioner appealed Respondent's Notice of Assessment dated September 21, 1982 to this Board on December 15, 1982 and is the subject matter of this proceeding.

7. The amounts in controversy in this proceeding are penalties and interest proposed by the Respondent for the periods January 1, 1979 through November 30, 1979. Petitioner has already paid to Respondent all income tax withholding taxes due and owing to Respondent for the periods January 1, 1979 through November 30, 1979.

8. Respondent's Notice of Assessment proposed a penalty of \$36,419.26 and proposed interest of \$20,363.16 against Petitioner for the period 1/79 to 11/79, which is the amount in controversy.

9. Petitioner paid the eleven (11) months total of income tax withholding tax that was due to Respondent late. In addition, Petitioner paid Respondent interest in full payment of its liability

for interest due with respect to the late payment of said eleven (11) months total of income tax withholding taxes paid.

10. All income tax withholding taxes and all interest due for the periods January 1, 1979 through November 30, 1979 have been paid in full by the Petitioner.

11. Pursuant to the provision of 30 Del. C. §1191(a), no deficiency relating to income tax withholding taxes, penalties or interest may be assessed or collected against Petitioner unless a valid Notice of Proposed Deficiency Assessment has been mailed to the Petitioner by the Respondent within three (3) years after the date or dates on which the Petitioner filed its income tax withholding returns with Respondent.

In addition to the foregoing stipulated facts, the Board finds that the Notice of Assessment dated September 21, 1982 was mailed to the Petitioner by Respondent within the three (3) year period mentioned in 30 Del. C. §1191(a). The question is whether or not it was a valid Notice of Assessment?

Petitioner argues that the said Notice of Assessment is not valid since it fails to set forth the reasons for the proposed assessment as required by 30 Del. C. §1181(c). Said section provides:

"A Notice of Deficiency shall set forth the reason for the proposed assessment."

In support of this contention, Petitioner states that:

A. The Notice contains gross errors, is ambiguous and is confusing and thus does not comply with Wilmington Trust Company v. State Tax Commissioner, Del Supr. 275 A.2d 568 (1971).

B. The Notice is merely a form letter and fails to set forth

any reasons or explanations for the assessment, and the schedule attached to the notice also contains no statements setting forth the reasons why the assessment was proposed.

C. The errors Petitioner contends are that all taxes and interest were paid in full years before (see stipulated facts) so therefore no taxes nor interest were due and therefore there was no basis for any assessment to be made.

Respondent argues that Petitioner filed all eleven (11) of its withholding tax returns late, and, in addition, Petitioner paid its withholding tax liability for each of the eleven (11) months after the due date for payment. Since Respondent mailed its Notice of Proposed Assessment within the three (3) year limitation period required by 30 Del. C. §1191(a) said Notice is a valid one. In support of this contention, Respondent states that:

D. The said Notice provides a reason for the assessment because it had a schedule attached which shows that the proposed assessment of penalties was based upon "Petitioner's violation of 30 Del. C. §1194(a) and §1195(d), i.e. Petitioner's failure to timely file and pay its withholding taxes". By providing the statutory basis for the penalty, the Respondent contends that he set forth the reason for the assessment.

E. The case of Wilmington Trust Company v. State Tax Commissioner, supra, does not apply because it can be distinguished on its facts and thus is not on "all fours" with the case at bar.

F. There are no gross errors in the Notice of Assessment since"petitioner's attorneys were informally advised that the

proposed assessment of interest would be abated to the extent that it was erroneous" and the parties stipulated that "no interest is due".

G. Even if there is an error in the Notice of Assessment it does not render the entire Notice invalid.

The Board considered the various arguments of the parties and concludes that the Notice of Assessment dated September 21, 1982 is not valid in that it does not meet the requirements of Wilmington Trust Company v. State Tax Commissioner, supra. In that case, the Supreme Court had to determine whether or not the then State Tax Commissioner (now known as the Director of Revenue) had made a valid assessment pursuant to 30 Del. C. §1181. The Supreme Court examined the letter or letters and the audit report attached thereto sent by the State Tax Commissioner to the taxpayer. Each party had a different interpretation as to the meaning of the documents. The Court found that they did not meet the requirements of 30 Del. C. §1181. The Court said:

"We think that compliance with the provisions of §1181 requires an unambiguous notice to a taxable that the tax has been assessed. The taxable should not be compelled to guess about so important a matter."
275 A.2d 571

The Court went on to hold that the information contained in the Notice must be clear and unambiguous to the taxpayer when it said:

"...We are not here interested primarily in what the Commissioner intended to say, but rather in what the Trustee justifiably understood from the letters themselves. The fault lies with the Commissioner, not the Trustee."
275 A.2d 571.

In applying these principles to the case under consideration, we find that the mere recitation of the statutory cites for a basis for the assessment is not enough. This does not meet the requirements of 30 Del. C. §1181 of stating the reason for the assessment. This is especially true where statutes such as 30 Del. C. §§ 1194 and 1195 have been amended several times. The taxpayer is not required to guess which provision is applicable, since the Respondent is required to spell it out in a clear and unambiguous Notice. The Notice of Assessment dated September 21, 1982 is not a valid Notice.

The Notice of Assessment of the Respondent dated September 21, 1982 is hereby reversed.

IT IS SO ORDERED.

Joseph J. Gault, Esq.
Debbie C. Gilly
Thomas R. Kahan
Arthur W. Cain

Dated: September 14, 1984

SYNOPSIS

DOCKET NO. 789

TAX SEGMENT: WITHHOLDING INCOME TAXES
 Penalty & Interest - Late Payment

ISSUE: Whether or not the Notice of Deficiency assessment mailed by Respondent on September 21, 1982 constitutes a valid assessment pursuant to 30 Del. C., §1181 (c).

TAX DECISION: The Tax Appeal Board concluded that the Notice of Assessment dated September 21, 1982, is not valid in that it does not comply with Wilmington Trust Company v. State Tax Commissioner, Del. Supr. 275 A.2d 568 (1971) in which case Superior Court found the documents did not meet the requirements of 30 Del. C., §1181. The Court said:

"We think the compliance with the provisions of §1181 requires an unambiguous notice to a taxable that the tax has been assessed. The taxable should not be compelled to guess about so important a matter."

Applying these principles to the case at bar, the Notice of Assessment of the Respondent dated September 21, 1982 was reversed.

DECISION: For Petitioner

DECISION DATE: September 14, 1984