

TAX APPEAL BOARD OF THE STATE OF DELAWARE

JAMES E. SCHORAH,)
)
Petitioner,)
)
v.) Docket No. 796
)
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

James E. Schorah, pro se

Joseph Patrick Hurley, Jr., Esquire, Deputy Attorney General
for Respondent

DECISION AND ORDER

Joseph S. Yucht, Esquire Chairman: The Board has before it Respondent's Motion to Dismiss the Petition filed by Petitioner. Upon consideration of the pleadings filed and the contentions of the parties at oral agreement, it appears to the Board that:

- (1) Petitioner filed his Petition on March 23, 1983 which stated, inter alia, as follows:
- a. The Petitioner is an individual with residence at 202 Binstead Avenue, Wilmington, DE 19804.
 - b. The notice of assessment (a copy of which is attached and marked Exhibit A) was mailed to the Petitioner on March 15, 1983.
 - c. The taxes in controversy are income taxes for the calendar year 1981 for \$3,618.80.

d. The determination of tax set forth in said notice of assessment is based upon the following errors:

"Amended Petition to follow".

e. The facts upon which the Petitioner relies as the basis of this proceeding are as follows:

"Amended Petition to follow".

f. The Petitioner prayed that this Board may hear the proceedings and abate the aforesaid assessment and grant such other relief as may be just and proper.

g. The Petition was not signed but Petitioner did affix a label containing his printed name and address.

h. No notice of assessment was attached to the Petition even though Petitioner alleged that it was attached.

i. Petitioner's name was not listed in the caption.

(2) Respondent filed an Answer on April 8, 1983 which contained an affirmative defense alleging that the Petition was not filed timely and does not comply with Rule 6 of the Rules of the Tax Appeal Board.

(3) The Board held a pre-trial conference on June 10, 1983 at which time the aforesaid pleadings were reviewed. Respondent stated that a Motion to Dismiss the Petition would be filed stating with specificity the manner in which the Petition violated Rule 6 and why it was not timely filed. Petitioner was told he would have time to respond to said Motion as per the Board's rules. He was further informed that if he had any questions about the matter of procedure he should contact the Board's Secretary.

(4) On June 15, 1983 Respondent filed a Motion to Dismiss alleging, inter alia, the following violations of Rule 6:

a. The document (Petition) did not contain a copy of the assessment as it recited.

b. The document (Petition) did not articulate any claimed basis for error in the assessment.

c. The document (Petition) did not articulate any facts upon which the Petitioner relied to substantiate his claim of error.

d. The document (Petition) indicated that the Petitioner would file an Amended Petition stating the grounds of error and facts relied upon to substantiate his claim of error.

(5) The Board held a hearing on August 12, 1983 to consider the Motion to Dismiss. Petitioner stated that he did not receive copies of the Motion to Dismiss. Respondent handed Petitioner two (2) copies of his Motion to Dismiss and the Board agreed to continue the hearing until the September meeting so Petitioner could respond.

(6) On September 6, 1983 Petitioner filed an "Answer to Motion to Dismiss" wherein he "pleaded the protection of Haines v. Kerner" and also attached an "Amended Petition" thereto. The Answer to Motion to Dismiss also contended that Petitioner mailed the Amended Petition to the Respondent on or about April 10, 1983. The Amended Petition, inter alia, set forth the facts upon which the Petitioner relies as the basis for the proceedings and also set forth the alleged errors made by Respondent in determining the amount due in the notice of assessment.

(7) On September 13, 1983 the Board continued the hearing on

Respondent's Motion to Dismiss. Petitioner stated under oath that he sent the Amended Petition prior to September 6, 1983, to the Deputy Attorney General for the Division of Revenue. The Respondent replied that he had not received nor had he been served any document purporting to be an Amended Petition prior to September 6, 1983. No such Amended Petition was received by the Board before September 6, 1983. Petitioner was not able to offer any proof that he filed or served the papers as he thought.

(8) The basic contention of the Petitioner was that he was pleading "Haines v. Kerner" as stated in his Answer to Motion to Dismiss. The Respondent contended that since the Petitioner had not complied with Rule 6 of the Tax Appeal Board, and he did not file his Petition timely, his Petition must be dismissed for want of jurisdiction.

(9) Rule 6 of the Tax Appeal Board provides, inter alia:

"VI. Initiation of a Proceeding - Pleading

6a. An appeal from the Director of Revenue shall be initiated by filing a petition with the secretary of the Board.

6b. Failure of a Petitioner to comply with this rule or with Rule III shall be grounds for dismissal of the proceeding for failure properly to prosecute.

6c. Form of Petition.

1. The Petition shall be substantially in accordance with Form A shown in the appendix.

2. It shall be complete in itself so as fully to state the issues.

3. The Petition shall contain:

A. a caption.

B. Proper allegations showing jurisdiction of the Board.

C. A statement of the amount of the deficiency of liability determined by the Director of Revenue or the amount..., the nature of the tax, the taxable period involved and the amount thereof in controversy.

D. Clear and concise statements of each and every error which the petitioner alleges to have been committed by the Director of Revenue in the notice of the deficiency or denial of refund. Issues in respect of which the burden of proof is or may be by statute placed upon the Director of Revenue will not be determined, and will not be considered raised by the petitioner in the absence of assignments of error in respect thereof. Each assignment of error shall be numbered.

E. Clear and concise statements of the facts upon which the petitioner relies.

F. A prayer setting forth the relief sought by the petitioner.

G. The signature of the petitioner or that of his counsel.

H. A copy of the notice from the Director of Revenue of the deficiency or liability or the determination of the Director of Revenue denying petitioner's application for a refund with accompanying statements, if any, so far as material to the issues set forth in the assignments of error shall be appended to the petition.

....."

(10) The Board previously considered a similar question in the case of Ken Houser v. Director of Revenue, Docket No. 780. In that case, Petitioner filed his petition and alleged that it was "to be amended in 60 days" and the required information would be set forth in the Amended Petition. Respondent's Answer set forth an affirmative

defense alleging that the Petition did not comply with Rule 6 of the Tax Appeal Board. Shortly thereafter, Petitioner filed an Amended Petition which supplied the relevant material that was lacking in the original Petition. Respondent then filed his Motion to Dismiss the Amended Petition. The Board denied Respondent's Motion to Dismiss, but stated that in the future the Board will strictly enforce compliance of the Rules.

(11) The Board finds that Petitioner has not complied with Rule 6 of the Tax Appeal Board in that Petitioner's Petition did not contain:

a. Clear and concise statements of each and every error which the Petitioner alleges to have been committed by the Director of Revenue in the Notice of Assessment.

b. Clear and concise statements of the facts upon which the Petitioner relies.

c. A copy of the Notice of Assessment from the Director of Revenue.

As a result of this deficiency, no proper or valid or sufficient Petition was timely filed. The Board looked only to the contents of the Petition and not to whether or not the Petition was artfully presented. We concluded that the document filed was not a Petition.

(12) The Board further finds that since the document filed by Petitioner on March 23, 1983 was not a Petition and that no additional documents were filed until September 6, 1983, a valid Petition was not filed within the 90 day period from January 3, 1983, the date of Notice of Assessment. Accordingly, a valid Petition was not timely

filed and thus the Board lacks jurisdiction over the matter.

NOW THEREFORE, IT IS ORDERED that Respondent's Motion to Dismiss is granted and the Petition is hereby dismissed.

James J. Fink
Debbie C. Kelly
Howard B. Roberts
Cyril W. Cain

Dated: November 18, 1983