

was due for income taxes for year 1983.

(c) Petitioner William B. Allman formerly worker for E.I. duPont deNemours & Company. Said duPont Company offered, inter alia, Allman a voluntary termination incentive (VTI) on August 26, 1982, to encourage him to voluntarily terminate his employment on November 30, 1982. These VTI payments were to be made in 1982 and 1983.

(d) Said duPont Company informed Mr. Allman and others that the VTI payments made in 1982 would be subject to both Delaware and the resident's state income taxes, while the VTI payments made in 1983 would be subject only to the resident's state income tax.

(e) Mr. Allman accepted the VTI and retired on November 30, 1982.

(f) Respondent on December 10, 1982 issued Tax Ruling 82-7 indicating that VTI payments are includible in Delaware taxable income for non-resident employees and informed employers to withhold Delaware Income Tax for these payments.

(g) Petitioners filed their 1983 Delaware Income Tax Returns and did not include payment for the 1983 VTI payments.

(h) By document dated June 7, 1984, the Division of Revenue sent Petitioners a Personal Income Tax Advisory Notice (Exhibit A attached to the Petition). This is a Notice of Deficiency in Remittance and notified Petitioners that they owed the Division of Revenue the sum of \$465.56 in additional

tax, based on the tax calculated due on the VTI payments.

(i) On June 29, 1984 Petitioners paid the sum of \$465.56 to the Division of Revenue under protest.

(j) Petitioners filed their Petition with this Board on October 11, 1984, praying that the Tax Appeal Board should abate the assessment and order that the sum of \$465.56 be refunded with interest.

(k) Respondent filed an Answer which was a general denial that Petitioners were entitled to have the assessment abated. In addition, Respondent filed a Motion to Dismiss the Petition based on the following contention:

1. Petitioners received a Tax Advisory Notice dated June 7, 1984, rather than a formal Notice of Deficiency.
2. More than 90 days have elapsed from the date of the Tax Advisory Notice to the date the Petition was filed.
3. Petitioners paid the amount due under protest.
4. Petitioners did not request a refund nor was a written protest made to the Secretary of Finance as required by 30 Del. C. §1200.
5. There was no deficiency in tax asserted by the Tax Advisory Notice.

This is the Tax Appeal Board's decision on the Respondent's Motion to Dismiss.

The Board finds that it must grant the Respondent's Motion to Dismiss since the Board does not have jurisdiction because

the actions of Petitioners were premature. The Tax Appeal Board, pursuant to 30 Del. C. §1203 has jurisdiction to hear appeals:

a. On a taxpayer's protest against the proposed assessment of a deficiency; or

b. On a taxpayer's claim for refund; after the protest or claim for refund has been first considered and rejected by the Secretary of Finance. In other words, a prerequisite for filing a Petition with the Board pursuant to 30 Del. C. §1203 is to have the Secretary of Finance determine that the taxpayer's protest is denied or the taxpayer's claim for refund is denied. Then the taxpayer may file his Petition with this Board if it is timely filed.

In the case before us, no "deficiency", as that term is defined for purposes of filing a Petition with this Board, has been made by the Respondent. Thus no appeal can be taken at this time. In addition, if the Personal Income Tax Advisory Notice dated June 7, 1984 could be deemed to be a Notice of Deficiency from which an appeal could be taken, then the Petition filed by Petitioners on October 11, 1984 would not be timely, since it was filed more than 90 days after the purported Notice of Deficiency.

By granting Respondent's Motion to Dismiss the Board is not ruling on the question of whether the VTI payments are taxable. The Board looked only to the facts in this case and the issues raised by the pleadings. This does not mean that Petitioners

may not have some other avenue of recourse open to them.

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

Joseph S. Gucht
Gottie G. Kelly
Harold B. Ricketts
Cyril W. Cain

Dated: March 8, 1985