

TAX APPEAL BOARD OF THE STATE OF DELAWARE

RAYMOND D. FALCONETTI,)	
)	
Petitioner,)	
)	
v.)	Docket No. 868
)	
DIRECTOR OF REVENUE,)	
)	
Respondent.)	

Before: Joseph S. Yucht, Esquire, Chairman; John H. Cordrey, Esquire, Vice Chairman; Harry B. Roberts, Jr., Regina C. Dudzic, and David C. Epps, C.P.A., Members

Raymond D. Falconetti, pro se

Amanda S. Krasinski, Esquire, Deputy Attorney General for Respondent

P. William Orth, C.P.A., pro se

DECISION ON MOTION TO QUASH SUBPOENA

Joseph S. Yucht, Esquire, Chairman: Petitioner has appealed the Director of Revenue's determination that the tax return he filed on October 14, 1985, for tax year 1984, is not a joint return. After the Petition and Answer were filed by the parties, the Tax Appeal Board (hereinafter "Board") held a pre-trial conference pursuant to Board Rule 15. At the pre-trial conference on September 12, 1986, Petitioner stated he wanted to undertake Discovery pursuant to Board Rule 14 and the Board agreed to permit him to pursue Discovery for 60 days and then to give us a status report. Petitioner then served Interrogatories and Request for Production on Respondent. Respondent on October 1 filed his Answers to the Interrogatories and the Request for Production. Petitioner then filed a Motion to Compel Respondent

to answer Petitioner's Interrogatories and to produce the documents previously requested. Respondent replied by filing an amended response to Petitioner's Request for Production, enclosing the tax return of Mary A. Falconetti for the tax year 1984 and also filed an amended response to the Interrogatories.

Subsequently Petitioner wrote the Board requesting the Board issue a subpoena duces tecum to P. William Orth, C.P.A., 1983 South State Street, Dover, DE 19901 requesting him to produce all his files, workpapers, documents, etc. pertaining to Mary A. Falconetti. The Board pursuant to Rules 13 and 14, issued a Subpoena Duces Tecum, dated March 3, 1987, commanding P. William Orth, C.P.A.

"To appear in the office of Raymond D. Falconetti, 835 South Governors Avenue, Dover, Delaware, on March 16, 1987, at 10 o'clock in the forenoon, and bring with you all of your files, workpapers, documents, etc., pertaining to Mary A. Falconetti and make them available for inspection and copying for use in a hearing wherein Raymond D. Falconetti is the Petitioner and the Director of Revenue is the Respondent."

This subpoena was sent to P. William Orth, C.P.A. by certified mail. Mr. P. William Orth received the Subpoena and by letter dated March 10, 1987, wrote the Board and objected to the Board's request for his appearance in the office of Mr. Falconetti and his production of the documents. Copies of Mr. Orth's letter were sent to Petitioner and Respondent's attorney. On March 11, 1987, Respondent filed a formal Motion to Quash the Subpoena. The Board held a hearing on the Motion on April 10, 1987 wherein

Petitioner, Respondent and Mr. Orth all participated.

Respondent contended that the Board has no authority to issue a subpoena of the type it issued. The only authority the Board has in reference to subpoenas is pursuant to 30 Del.C. §330 for commanding a person to be present for a hearing only. Respondent also argues that if the Board does have authority to issue a subpoena for discovery purposes, the subpoena issued was "overbroad" and beyond the scope of Discovery. In addition, Respondent contends that the Subpoena was not served on Respondent in accordance with the provisions of Superior Court Rule 45 pertaining to the issuance and service of subpoenas. The last contention of Respondent was that Petitioner was on a fishing expedition or was using Discovery to harass and overburden Respondent and Respondent's potential witnesses.

Petitioner argued that he was not of a fishing expedition but was looking for joint tax extension forms both he and Mary A. Falconetti signed. He also said he was looking for any relevant correspondence that could relate to the filing of a joint return.

Mr. P. William Orth stated he had produced the 1984 Delaware tax return of Mary A. Falconetti and that was all the information he had relating to her 1984 Delaware tax return. He objected to producing any documents relating to any other return since only the 1984 Delaware tax return was in issue.

The Board after considering all the evidence holds as follows:

1. The Board pursuant to the provisions of 29 Delaware

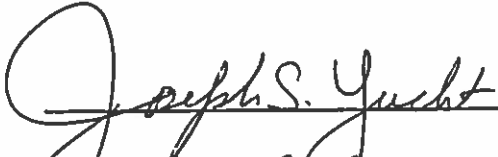
Code §10125(b)(1) and Tax Appeal Board Rule No. 14 has the authority to issue a subpoena for "witnesses and other sources of evidence" and that the request was within the purview of the authority.


2. The subpoena previously issued by the Board at the request of Petitioner was unreasonable and went beyond the relevancy or materiality relating to the matter in issue. The Board, pursuant to Rule 45 of the Superior Court Civil Rules, will modify the subpoena to require the production of documents in the possession of P. William Orth, C.P.A., only pertaining to the 1984 income tax return of Mary A. Falconetti. These documents are to be produced in the office of Raymond D. Falconetti within twenty (20) days of the date of this decision.

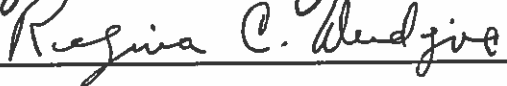
3. The fact that Mr. Orth, the person to whom the subpoena is directed, is an accountant does not make him immune from service since there is no privilege offered to this occupation.


4. The new subpoena will be served in accordance with Superior Court Rule 45.

IT IS SO ORDERED.









Dated: August 14, 1987