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TAX APPEAL BOARD OF THE STATE OF DELAWARE

M. FIERRO & SONS, INC.,)	
)	
Petitioner,)	
)	
v.)	Docket No. 872
)	
DIRECTOR OF REVENUE,)	
)	
Respondent.)	

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

Anthony A. Figliola, Jr., Esquire for Petitioner

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

DECISION AND ORDER

Joseph S. Yucht, Esquire, Chairman. This appeal involves a determination as to whether or not the provisions of 21 Delaware Code §2108(a) are unconstitutional. The facts of this case are not in dispute and were stipulated by the parties as follows:

1. Petitioner M. Fierro & Sons, Inc. is a Delaware corporation with offices located at 1025 North Union Street, Wilmington, DE 19805 and a Federal Employer Identification Number of 51-0071185.

2. Petitioner M. Fierro & Sons, Inc. for the periods January 1, 1973, through December 31, 1981, paid Delaware gross receipts tax in error on sales made out of state. Said out of state sales are not to be computed in determining the receipts subject to tax. Accordingly, it is agreed that the tax has been

overpaid in the following amounts:

- a. Calendar year 1973 - \$ 810.60
- b. Calendar year 1974 - \$1,029.76
- c. Calendar year 1975 - \$1,608.60
- d. Calendar year 1976 - \$1,881.67
- e. Calendar year 1977 - \$2,247.87
- f. Calendar year 1978 - \$3,030.12
- g. Calendar year 1979 - \$3,372.54
- h. Calendar year 1980 - \$3,945.93
- i. Calendar year 1981 - \$4,245.27

3. Petitioner applied for said refunds on January 21, 1986.

4. Respondent denied refunds for calendar years 1973 through 1981 pursuant to the provisions of 30 Delaware Code §2108(a).

5. Petitioner contends that the Respondent has the authority to grant refunds beyond the three (3) year period.

6. Respondent contends that Petitioner's claim is barred by 30 Delaware Code §§ 2102, 2103(b), and 2108(a).

Petitioner argues that Respondent's reliance on statutes that bar claims for refunds after the passage of three (3) years is unconstitutional since it violates rights of Petitioner and unjustly enriches the State of Delaware. In support of this, Petitioner alleges that it should have the same rights as Respondent and not be time constrained as provided by 30 Delaware Code §2108(a).

Respondent argues that Petitioner is not entitled to

any refund since it did not file its claim within thirty (30) days from the date it paid the taxes or within three (3) years from the expiration of the license to which the payments related as required by 30 Delaware Code §2108(a). Respondent filed a Motion to Dismiss the Petition based on 30 Delaware Code §2108(a). This is the statute that Petitioner contends is unconstitutional.

The Board has repeatedly held that it does not have the authority to declare a statute unconstitutional since only a court of law or equity can do this. We are bound by the presumption that all statutes are constitutional. Therefore, we find that the claims for refund were not timely filed by Petitioner pursuant to 30 Delaware Code §2108(a) and we grant the Motion to Dismiss filed by Respondent.

IT IS SO ORDERED.

Joseph L. Yucht
Regina C. Dulzic
Paul L.
Henry B. Roberts

Dated: December 11, 1987