

TAX APPEAL BOARD OF THE STATE OF DELAWARE

HOLLY PARK HOMES, INC.,)	
Petitioner,)	
)	
v.)	Docket No. 951
)	
DIRECTOR OF REVENUE,)	
Respondent.)	
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Before: Joseph S. Yucht, Esquire, Chairman, John H. Cordrey, Esquire, Vice Chairman; David Eppes, and Regina Dudzic, Members.

Petitioner is represented by Glenn E. Hitchens, Esq. of Morris, James, Hitchens & Williams.
Joseph Patrick Hurley, Jr., Esquire, Deputy Attorney General for Respondent.

DECISION AND ORDER

John H. Cordrey, Esquire, Vice Chairman. This is the Board's decision regarding Respondent's motion to dismiss.

The parties have stipulated to the facts regarding this matter. The essential facts are that Petitioner was issued a Notice of Assessment dated July 23, 1987. No appeal was filed with this Board within the 30 days following the Notice of Assessment. Thereafter the Respondent issued a Notice of Determination and Petitioner filed the present appeal with the Board within 30 days of the date of the Notice of Determination.

Respondent contends that 30 Del.C. §2103 provides that the taxes as set forth in Notice of Assessment "...shall be due and payable unless the person... shall have, within the aforesaid 30 days filed a complaint or appeal in writing over his signature from the assessment of the Secretary of Finance or filed a petition with the Tax Appeal Board." Respondent argues that this statute is jurisdictional and that the Petitioner, having failed to

file within the aforesaid period, is barred from seeking redress from this Board as it has no jurisdiction.

This Board has repeatedly held that failure to file with the Board an appeal within the statutory time frame (30 days in this instance) deprives this Board of jurisdiction to hear the matter. These decisions have been repeatedly affirmed by the appellate Courts.

Petitioner argues that the prior decisions of this Board are based upon different sections and therefore are not applicable to the present case. The various statutes have a common thread which is the finality of a decision asserted by the Respondent unless it is timely appealed.

Petitioner next argues that the Respondent has, in issuing the Notice of Determination, created a new cause of action from which an appeal may be taken. It is well settled that the parties to a law suit may not confer jurisdiction upon a court even by stipulation. The actions of the Respondent may have had the effect of causing the Petitioner to appeal based upon the Notice, but neither its actions nor the Petitioner's action in reliance upon the Notice can confer jurisdiction to this Board in absence of the statutory authority.

Petitioner next asserts that the Respondent has no authority to make an assessment as the Petitioner has failed to file a return. The Board believes that as it is without jurisdiction it cannot rule upon this issue. If the Board does have jurisdiction to consider this argument, the Board finds that the statute does permit the Respondent to have the authority if it "...discovers from the examination of the return, license application, statement or otherwise..." that the tax is unpaid to make an assessment. The statute is sufficiently

broad to allow the assessment however the Respondent made the determination, and the checks upon this right is a timely appeal.

The final argument is that 30 Del.C. §2103 is unconstitutional. This Board has no authority to decide the statute to be unconstitutional. In any event we agree with the Respondent that the question of constitutionality is decided by the case of State v. Moore, Del.Super., Judgement No. 132, March term T-123-245 (Walsh, J. September 23, 1982).

Based upon the foregoing the Director's Notice of Assessment is affirmed.

SO ORDERED, this 17th day of February, 1995.

John H. Cordrey

Regina C. Rudzinski

[Signature]

Joseph J. Yank