

TAX APPEAL BOARD

ANTHONY J. and JO EMMA)
SELVAGGI,)
)
Petitioners,)
)
v.) Docket No. 952
)
DIRECTOR OF REVENUE,)
)
Respondents.)

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

For Petitioner: Charles A. Schiavo, Brian Martin and Theodore
Nannas of Nannas & Schiavo, C.P.A.'s

For Respondent: Joseph P. Hurley, Jr., Esquire, Deputy
Attorney General

DECISION AND ORDER

Petitioners, ANTHONY J. and JO EMMA SELVAGGI, husband and wife, and residents of Delaware, filed a Petition appealing a Notice of Determination by the Director of Revenue, which declared that Petitioners had not filed or paid their Delaware State Income Tax for the tax year 1986 in a timely fashion. Petitioners insist they did file and pay within the required time frame.

We must decide whether the Petitioners' tax return and payment for the tax year 1986 were timely filed. The amount of penalty and interest assessed and here in controversy is \$365.40.

This factual issue was the subject of two evidentiary hearings on January 13, 1989 and April 14, 1989. Petitioners presented a check register, reflecting a check to the Division for tax due in 1986 dated April 30, 1987 as evidence it was written on that date, and corroborative of testimony that it was mailed on that date. Further, Petitioners presented a bank statement for further evidence of the consecutive, regular nature of check transactions.

Petitioner, Dr. Selvaggi, stated he received the completed return for signature from his accountant on a date just prior to April 15th, together with the federal return due that date. He testified he is sure he mailed the return and payment on time because of his methodical, meticulous nature, and is convinced that it was mislaid or stamped in error. He declared the return would have been mailed on the day it was due from his own office, being

put in a mail slot by himself alone, and picked up by the mailman just after mid-day.

He stressed that in the past he had always filed and paid his Delaware state income tax or applied for extension in a timely manner. He further declared he was meticulous concerning his bills and taxes because of his frugality. Lastly, he established he had an enormous amount of liquid funds available to pay at the time the taxes were due.

The Respondent's case was based upon the physical evidence associated with the return. In essence, the Respondent determined that because of the absence of a postmark on the return's envelope, and by virtue of its own internal sorting and batching of questioned return procedures, the return was not filed until July, 1987.

The envelope's postmark or cancellation was in part off of the envelope, leaving off the date. The batch of questioned returns, with which the Petitioners' return was sorted, consisted of returns whose postmarks all were legible as mailed in early July, 1987. This led to the inference that if sorting was proper, receipt of Petitioner's return was at or about the same time as the receipt of the other returns in the batch.

Marion Dolman, manager of the Fraud Investigations and Unfiled Tax Unit of the Division of Revenue, testified on the procedures for processing tax returns received by the Division. First, she said, the mail room "flags" what it believes are late returns by stapling envelopes to the returns which suggest a date problem from their postmark. Second, as a matter of routine, the Division date stamps late-filed returns.

But in this case, Miss Dolman conceded, an error was made in the handling of Petitioners' return. The envelope was saved and attached, but no date stamp was put on the face of the return. None of the other returns in the batch bore a date stamp either, despite the Division policy.

All the other returns in the batch bore envelopes, and all had legible, late postmarks, from July 1, 1987 to July 6, 1987. The Respondent's case, therefore, relies on the regularity of its procedures and the inferences that can be drawn from such procedures, together with the related physical evidence, all to suggest that Petitioners' return was late filed.

The absence of a postmark on Petitioners' return envelope and the envelope being attached to the return by the mailroom personnel is consistent with the return being filed late. But there is no internal proof positive by what should have been present - the date stamp the mailroom should have placed on the face of the return.

Nevertheless, it is the Petitioners' burden to sustain his case when he pleads a timely filing. So the question resolves itself to whether the Petitioner has met that burden. In particular, Petitioner has a burden of addressing the statutory provision on

timely mailing which says mailing on the due date will be considered timely filing if postmarked that date.

Unfortunately for Petitioners, Del. C. § 1211 specifies that the postmark of the due date must be stamped on the envelope for that date to be deemed to be the date of filing, and in this case, no postmark date was stamped on the envelope. That such circumstance is the fault of the U. S. Post Office is not a matter which this Board can address. The Board would observe, however, the injustice of a circumstance where a person timely files in reliance on the regularity of a government-supported service, and is penalized for the failure of the performance of that service. Therefore, we are constrained to say that under the law, the Petitioner has not met his burden to prove that he filed this return in a timely manner, even if it were in fact filed in a timely manner.

However, that does not end the discussion. 30 Del. C. § 1194(a) and (b) both specify that failure to file return or failure to pay on a return filed on the due date shall cause penalty and interest to be due and owing, " ... unless it is shown that such failure is due to reasonable cause" There is an additional proof requirement that failure to file must not be due to "wilful neglect" as well.

In this case, the Board must make a factual finding on whether Petitioners demonstrated their failure to file the return on time was due to reasonable cause and not due to wilful neglect, and that failure to pay on that return was due to a reasonable cause. If the Board so finds, then the Notice of Determination should be set aside.

We find based on the evidence of record that Petitioner did not fail to file due to "wilful neglect", since we find that his conduct did not amount to conscious, intentional failure or reckless indifference.

Further, we understand that "reasonable cause" insulating a taxpayer from penalty from failure to file a tax return or pay tax means there was a reasonable basis for the late filing of a return and paying of tax, i.e., it occurred late in spite of ordinary business care and prudence.

We find that to be the case. We find, based on evidence before us, that Petitioner did in fact mail his return on April 30, 1987. That it was not postmarked, or that it was not received until later is not now controlling. Instead, we find that Petitioner undertook adequate and ordinary steps and acted prudently enough in a business sense to be excused from failure to file and pay tax on time.

For the foregoing reasons, the Board concludes that while the Petitioners failed to file and pay their 1986 Delaware income taxes on a timely basis they should not be subject to a Notice of Determination, because we are satisfied they should be excused from such failure. Accordingly, we reverse the Director's Determination.

IT IS SO ORDERED, this 12th day of July, 1991.

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Joseph Yucht
Register C. Dredging

John H. Cordrey

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