

The legal issues are whether Petitioners are entitled to interest on the monies paid, but not due, to Respondent and, if so, at what rate should the interest be paid. Respondent has asserted the defense of Sovereign Immunity as a bar to the payment of interest.

Petitioners argue that Moskowitz v. Mayor and Council of Wilmington, Del. Supr., 391 A.2d 209 (1978) requires the payment of interest upon the overpaid tax. Unquestionably the Delaware Supreme Court required payment of interest upon an overpaid tax in Moskowitz even in the absence of a statute providing for such interest. The Supreme Court, after stating that other jurisdictions were evenly divided about paying interest in the absence of a statute, held at page 211:

Upon due consideration of the prevailing views and given the strong policy in Delaware of providing full compensation to a prevailing Plaintiff, we find the rule permitting the recovery of interest to be more reasonable.

This ruling, combined with other cases entitling successful litigants to pre-judgment create a strong argument for the imposition of the interest. In fact, there seems to be an unquestioned strong public policy to make successful litigants whole, which includes the repayment for the time value of money (otherwise known as interest) when wrongfully held by the opposing party.

A similar issue was considered by this Board in the case of Wilmington Trust Company v. Director of Revenue, T.A.B., Docket No. 878 (May 13, 1988). In that case the Board was called upon to interpret 30 Del.C. § 1509 which permitted interest upon a refund if the Director failed to pay the refund within 90 days of the "application." This Board held that interest upon the refund was mandated by the statute and the Petitioner in that case requested the Board to order Respondent to pay interest upon the interest which Respondent had wrongfully refused to timely pay. The Board held that the policy

of awarding interest as a matter of right is applicable only where the litigants do not have the rights afforded under the doctrine of sovereign immunity or where the doctrine of sovereign immunity has been waived. Therefore in Wilmington Trust, the doctrine of sovereign immunity having been waived by the statute only for interest on the refund, the Board held that there was no authority to award interest upon the wrongfully withheld interest. The Delaware Superior Court upheld the Board's decision in Director of Revenue v. Wilmington Trust Co., Del. Super., C.A. No. 88A-MY-6-1-AP (Poppiti, J., March 22, 1988). In his decision, Judge Poppiti held at page 14:

I am satisfied that the statutory provision for interest [present in the Wilmington Trust case] does not constitute a general waiver of sovereign immunity. Furthermore, I am satisfied that petitioner's reliance on the case of Moskowitz v. Mayor and Council of Wilmington, *supra*, is misplaced since the instant statutory scheme regarding interest is not like the general waiver arising from the City's Charter. [Explanation added.]

Petitioners, at oral argument, have tried to distinguish the Wilmington Trust case from the case at bar stating that Wilmington Trust was a case of interest upon interest whereas the present case is a request for interest upon the wrongfully held tax. It is certainly a more compelling argument to pay interest upon wrongfully held taxes rather than interest upon interest, but the doctrine of sovereign immunity is a bar to the payment of any interest unless the doctrine is waived by a sovereign. In Moskowitz the doctrine was waived by the City. In Wilmington Trust the doctrine was waived by the State as to interest upon the refund under specific circumstances, and not waived in general thereby prohibiting payment of interest upon admittedly due interest.

In the present case there is no general waiver of the doctrine of sovereign immunity by the State. Likewise there is no specific or limited waiver of the doctrine of sovereign immunity to payments of interest upon refunds for this tax. While the Board recognizes

that the Petitioners are not made whole absent payment by the Respondent for the use of Petitioners' monies, the Board and Respondent cannot correct the wrong under our present law.

As the Board has ruled that there can be no payment of interest in this case, the issue of what rate of interest to use is moot.

The determination of the Division of Revenue is therefore AFFIRMED this 8th day of March, 1991.

SO ORDERED.

John H. Cordrey

Joseph J. Yurek

Regina C. Dudzica

Marjorie B. Roberts
