

TAX APPEAL BOARD OF THE STATE OF DELAWARE

ZENECA, INC.,)
)
 Petitioner,)
)
 v.) Docket No. 1726
)
 DIRECTOR OF REVENUE,)
)
 Respondent.)

BEFORE: Steven R. Director, Esquire, Vice Chairman, Joan M. Winters, CPA,
Robert W. Slavin, and M. Lynn Fuller

COUNSEL: Mark H. Ely, Esquire, and R. David Miller, CPA, for Petitioner

Elizabeth R. McFarlan, Esquire, Deputy Attorney General,
State of Delaware, for Respondent

DECISION AND ORDER

I. Issue.

Issue before the Board is whether the Board has jurisdiction over this appeal claiming refund of an overpayment of interest. Petitioner claims that the Board has jurisdiction since the Petitioner timely filed its claim for refund of interest within the two-year statutory period. The Respondent argues that the Board lacks jurisdiction because a) Petitioner failed to timely file its protest of the Notices of Proposed As-

assessment within the sixty-day statutory period and b) the Petitioner's claim for refund does not apply to interest. For the reasons set forth below, the Board finds for the Respondent that the Board lacks jurisdiction over this appeal.

II. Background.

In June 2015, the Petitioner filed amended Delaware income tax returns for the years ending December 31, 2004, 2005, and 2006 and paid additional taxes due. These amendments were filed pursuant to a change in federal income by the Internal Revenue Service.

In June 2015, the Petitioner received three separate Corporate Income Tax Advisory Notices (TAN) for tax years ending December 31, 2004, 2005, and 2006 citing tax and interest due. All three notices contained two pages. Page 2 included the following statement:

THIS NOTICE SHALL CONSTITUTE A PROPOSED ASSESSMENT OF THE AMOUNT SPECIFIED, TOGETHER WITH INTEREST, ADDITIONS TO TAX AND PENALTIES. THIS AMOUNT IS DUE. A WRITTEN PROTEST REGARDING THIS PROPOSED ASSESSMENT SETTING FORTH THE GROUNDS IN WHICH YOUR PROTEST IS BASED MAY BE FILED WITH THE DIRECTOR OF REVENUE BY DEPOSITING YOUR PROTEST IN THE U.S. MAIL OR BY PHYSICAL DELIVERY TO THE DIVISION OF REVENUE BY OTHER MEANS WITHIN 60 DAYS OF THE DATE OF THIS NOTICE.

In June 2015, the Petitioner paid interest for the tax years ending December 31, 2004, 2005, and 2006 based on the interest provided in the TANs (payment of 2004's interest was net of a tax overpayment as reflected on the 2004 TAN). The Petitioner did not protest the TANs.

On June 25, 2015, the Director mailed the Petitioner three TANs for years ending December 31, 2004, 2005, and 2006. Page two of all three notices included the same statement included in the earlier TANs. Even though both tax and interest due for tax years 2004 and 2006 differed from the previous TANs, Petitioner did not protest the TANs.

On June 1, 2017, the Petitioner filed a claim for refund of interest paid for years ending December 31, 2004, 2005, and 2006.

On June 29, 2018, the Director mailed the Petitioner a Notice of Determination denying its protest on the merits.

On or before August 27, 2018, the Petitioner timely filed its petition with the Tax Appeal Board.

On February 1, 2019, the Director filed a Motion to Dismiss on the grounds that the Petitioner did not timely protest the June 25, 2015 notices of proposed assessment and therefore the Tax Appeal Board lacks jurisdiction. The Director cites 30 *Del. C.* § 523 stating that the Petitioner has 60 days to file a written protest with the Director. It is the Director's position that since the proposed assessments are dated June 25, 2015, the Petitioner had until August 24, 2015 to file a written protest of the proposed assessment.

It is the Petitioner's position that it has two years from the date of the interest payments to file a claim for refund. Petitioner cites 30 *Del. C.* § 539(d), where a

“taxpayer is required by § 514 of this title to report a change or correction in federal income...liability reported on the federal tax return...or to file an amended tax return under this title with the Director, a claim for credit or refund of any resulting overpayment of tax under this title shall be filed by the taxpayer within 2 years from the time such report or amended return was required to be filed with the Director.”

In response to the Director’s assertion that 30 *Del. C.* § 539(d) refers to overpayment of tax and not interest, the Petitioner cites 30 *Del. C.* § 533(c) “[i]nterest prescribed under this section on any tax...shall be assessed, collected and paid in the same manner as taxes...” The Petitioner further cites Section 6601(e)(1) of the Internal Revenue Code of 1986, as amended, and Treasury Regulation § 301.6611-1(b), both of which treat the assessment, collection, and payment of interest in the same manner as taxes.

III. Law.

As set forth above, there are strict procedural time frames under Delaware law regarding a notice of a proposed assessment, protest by a taxpayer, notice of determination after protest, and a review of a determination by filing a petition with this Board. (See generally 30 *Del. C.* §§ 530, 531, 522, 523, 524, 525, and 544.)

30 *Del. C.* § 522 entitled, Assessment final if no protest, states that “Sixty days after the date of which it was mailed..., a notice of proposed assessment under § 521(c) of this title shall constitute a final assessment of the amount of tax, interest,

penalties ... excepting only those amounts to which the taxpayer has filed a timely protest with the Director under § 523 of this title.

30 *Del. C.* § 521(c) states that a notice of proposed assessment shall:

1. Be in writing
2. State that tax, interest, penalty ... is due, and
3. Set forth the amount and the reason for the proposed assessment.

30 *Del. C.* § 523 states that “within 60 days...after the mailing of a notice of proposed assessment ... the taxpayer may file with the Director a written protest against the proposed assessment”

30 *Del. C.* § 331(a) states that the “taxable” has a right to appeal the decisions of the Tax Appeal Board to the Superior Court.

IV. Analysis.

The statute is very clear that if a taxpayer does not protest a proposed assessment of “tax, interest, penalties, additional amounts and additions to the tax specified with such notice” within 60 days of the mailing of the notice, then the proposed assessment becomes final. (30 *Del. C.* § 522.) The Petitioner acknowledges that it did not protest any of the notices of proposed assessment for the years ending December 31, 2004, 2005, and 2006 within the 60-day period.

The statute is also very clear that the two-year period to file a claim for overpayment is for “the overpayment of any tax.” (30 *Del. C.* § 539(a)). The Petitioner

argues that the overpayment of tax is intended to include interest. To support this claim, the Petitioner cites 30 *Del. C.* § 533(c), IRS Code §6601(e)(1), and IRS Treasury Regulation Section 301.6611-1(b).

The Director argues that the language of the statute is unambiguous and that 30 *Del. C.* § 539(a) is limited specifically to a claim for refund of an overpayment of tax. Hence, the Director argues that the Board has no authority to engage in statutory interpretation beyond the plain language of the statute. We agree with the Director, and find that if the intent were to include a claim for refund for interest, the statute would have included such language similar to 30 *Del. C.* § 522, which clearly specifies “tax, interest, penalties, additional amounts, and additions to the tax.”

In addition, the Board looks to its previous decisions, all of which conclude that the Board lacks jurisdiction if the protest to a proposed assessment was not timely filed. (McGowan, Dkt. 1600; Simpson, Dkt. 1444; Ayaoade, Dkt. 1681; Kure, Dkt. 1679; and Smallwood, Dkt. 1655).

Furthermore, the Board considered its decision in the combined Dkts. 677 and 678 (Robino and Poppiti). In these cases, the Petitioners filed “change reports” resulting from an IRS audit, which created an overpayment of Delaware tax. Upon acceptance of the “change reports,” the Director computed the related interest. The Petitioner disagreed with the interest computation and timely filed a protest. In its decision the Board states, “In order for a taxpayer to be entitled to an overpayment

he must either claim it in his original return or file an amended return. Once the claim is made, then interest is calculated thereon..." It is the Board's belief that interest is a computational function after the claim for overpayment of tax is made. If the taxpayer disagrees with the computation, it is afforded the right to protest pursuant to 30 Del. C. § 523.

VI. Conclusion.

For the foregoing reasons, the Director's Motion to Dismiss based on lack of jurisdiction is granted.

John M. Winter

Robert W. Slavin

Mr. Lynn Fuller

SO ORDERED this 15TH day of SEPTEMBER, 2020.

V. Dissent. Director, S. R., Vice-Chairman

In addition to the procedural steps set forth in detail in the Delaware Code, Delaware also provides for a claim for credit or refund of an "overpayment of any tax imposed by [Title 30] and states that a claim for credit or refund shall be filed with the Director in writing and shall state the specific grounds upon which it is founded." (See 30 Del. Code §§ 539(a) and 541.)

A claim for credit or refund of an overpayment of any tax imposed by [Title 30] shall be filed by the taxpayer within the later of 3 years from the last date prescribed for filing the return or 2 years from the time the tax was paid. (30 Del. Code § 539(a)).

Delaware provides that interest shall accrue on any underpayment. (30 Del. Code § 533(a).) In addition, Delaware provides that interest on an underpayment “shall be assessed, collected and paid in the same manner as taxes.” (30 Del. Code § 533(c)).

The Director argues that the 2-year period for filing a claim for a refund is limited specifically to a claim for refund of an overpayment of tax, not a claim for a refund of interest on an underpayment of tax. (See Director’s Motion to Dismiss, Paragraph 12.) The Director correctly cites the rule that “the plain meaning of the statutory language controls” and lists several authorities. The Director states that there is no ambiguity in the statutory language.

However, I note that 30 Del. Code § 533(a) provides for the assessment of interest on an underpayment of tax, but more importantly that Section 533(c) states that the interest on an underpayment of tax (and penalties, etc.) “shall be assessed, collected and paid in the same manner as taxes.” While the statutory scheme for the Director’s proposed assessment and the protest/denial/appeal thereof through a petition to this Board is very clear in Title 30, in my view that is not the only avenue

in Title 30 to bring to light a disagreement between the Director and a taxpayer over the proper amount that may be due for any given tax period. It appears that the term “overpayment” a term that is used in Section 537(a) and 539, is not defined. Accordingly, I rely on the guidance provided in 30 Del. Code § 502(a) that discusses the meaning of terms where it states that unless a different meaning is clearly required in Title 30, any term used in [this chapter 5] “shall have the same meaning as when used in a comparable context in the Internal Revenue laws of the United States.” (30 Del. Code § 502(a)).

Treas. Reg.¹ § 301.6611-1(c), Ex. (2) states that “[t]he amount of any interest paid with respect to the deficiency...is also an overpayment.” The Petitioner states in its Answering Brief) that “[t]hus under the Internal Revenue Code, an overpayment of tax includes overpayments of both the tax and interest.” I agree with the Petitioner when it states “[i]f the term “overpayment of tax” did not include interest, then there would be no mechanism for obtaining a refund if the interest charged by the IRS and paid was excessive.”

Returning to 30 Del. Code § 537(a), I find by reference to the Internal Revenue laws of the United States that the term “overpayment” also includes interest. Under 30 Del. Code § 539(a), a taxpayer may file a claim for credit or refund of an “overpayment of any tax imposed by this title” within 3 years from the last date

¹ United States Treasury Regulations

prescribed for filing the return or within 2 years from the time the tax was paid, and that this also applies to an overpayment of interest. Thus, I believe that Delaware provides a procedure for seeking a review and refund of taxes, interest, and additions to tax aside from the general assessment, protest, and Tax Appeal Board petition provisions cited earlier. The claim for refund procedures (and the review of a disallowance for failure to respond) are set forth in Del. Code §§ 541 through 544.

Andrew [Signature] 9/15/2020