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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY



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Re: Markham Enterprises (Mount Holly Exxon) v.
Director, Division of Taxation
Docket No. 015626-2009

Markham Enterprises (Stratford Exxon) v.
Director, Division of Taxation
Docket No. 015634-2009

Markham Enterprises (Ark Road Exxon) v.
Director, Division of Taxation
Docket No. 015637-2009

Markham Enterprises (Millville Exxon) v.
Director, Division of Taxation
Docket No. 015648-2009

Markham Enterprises (Turnersville Exxon) v.
Director, Division of Taxation
Docket No. 015653-2009

Markham Enterprises (Williamstown Exxon) v.
Director, Division of Taxation
Docket No. 015660-2009

Dear Counsel:

This is the court's opinion with respect to the Director, Division of Taxation's cross-motion to dismiss the Complaints in the above-referenced matters for want of jurisdiction due to untimely filing. For the reasons explained below, the Director's cross-motion is denied.

I. Findings of Fact and Procedural History

This letter opinion sets forth the court's findings of fact and conclusions of law on defendant's cross-motion. The following findings of fact are based on the certifications and exhibits submitted by the parties on the motion.

On June 16, 2009, the Director, Division of Taxation issued Final Determinations in each of the above-referenced matters assessing sales and tax, penalties and interest against each of the six plaintiff limited liability companies. The Final Determination with respect to plaintiff Markham Enterprises, LLC (Millville Exxon) also assessed other taxes, including litter tax, and tobacco-related taxes.

The same accountant represented each of the plaintiffs during the audit that result in the Final Determinations. The record contains undisputed evidence that the Final Determinations were mailed to the plaintiffs and to their accountant by certified mail. The accountant and the plaintiffs all received each Final Determination on June 17, 2009.

As a result, the 90-day period for establishing jurisdiction in this court to review the Final Determinations commenced on June 17, 2009. This results in a September 15, 2009 filing deadline.

On September 15, 2009, the Tax Court Clerk received a letter from plaintiffs' accountant, who is not licensed to practice law in New Jersey, in each of the above-referenced matters. The letters state that "[w]e refer to your notice dated June 16, 2009, letter of Final Determination by the Division of Taxation in the amount of (relevant amount). In this regard, we want to file a complaint against the assessment as being unreasonable and exorbitant and grossly overestimated." Each letter was not accompanied by a Complaint, Case Information Statement, see R. 8:3-2(a), the required filing fee, see R. 8:12, or proof of service on the Director or Attorney General, see R. 8:5-3(b)(1). A copy of the relevant June 16, 2009 Final Determination and schedule of liabilities was attached to each letter.

The Clerk accepted each letter and assigned each matter a docket number. More than a month later, the Clerk issued a 10-day Deficiency Notice in each matter (the "Notices"). The Notices are dated either October 26, 2009 or October 27, 2009 and state that the accountant's letter in each case had been assigned a docket number and been given a filing date of September 15, 2009. The Notices explained in relevant part:

We are enclosing a package of complaint forms, which must be completed and retransmitted to the Tax Court Management Office. In order to retain the original "RECEIVED" date shown above, you must retransmit the forms, along with any filing fees due, within 10 days of the date of this letter. Otherwise, the filing date will be the date the Tax Court receives the retransmitted forms with the required fee.

On the portion of the Notices labeled “Attorney for Plaintiff,” the Clerk inserted the name of the taxpayer, as no person licensed to practice law in New Jersey made an appearance on behalf of the taxpayers.

The Notices contain no address. Based on the practices of the Tax Court Clerk’s Office at the relevant time, the court concludes that it is more likely than not that the Notices were sent to the addresses that appeared on the Final Determinations for each taxpayer, and not to the taxpayers’ accountant because he is not admitted to practice law. Plaintiffs concede receipt of the Notices, but do not provide the date of receipt.

The record contains no evidence of the date on which the Notices were actually mailed to plaintiffs. Nor do the records of the Clerk’s Office include evidence of the date of actual mailing. In light of administrative procedures in place at the Clerk’s Office in 2009, it is possible that the Notices were mailed after the dates appearing on the Notices. In fact, the record demonstrates that in a related case involving one of the plaintiffs, the Clerk mailed a deficiency notice dated November 20, 2009, but the postage meter cancelation on the envelope containing that notice is November 24, 2009.

If the court were to assume that the Notices were mailed on October 26, 2009 and October 27, 2009, the deadline for retaining the original filing date through the submission of conforming papers and the filing fee would have been November 9, 2009 in each case, calculated as follows: (1) pursuant to R. 8:4-2(b), when notice of an action is sent by mail, the time to reply to that action is extended in accordance with R. 1:3-3, which adds three days to the time to reply. The time in which to file a Complaint, Case Information Statement, and filing fee was, therefore, extended to 13 days; (2) thirteen days from October 26, 2009 was November 8, 2009, a Sunday. The filing period is extended to November 9, 2009, the next following day that is neither a Saturday, Sunday

or legal holiday. R. 1:3-1; (3) thirteen days from October 27, 2009 was November 9, 2009. If the Notices had actually been mailed later, the filing deadlines, of course, would have been later as well.

It was not until November 19, 2009, that the court received a response from plaintiffs. On that date, Mark Sahaya, a principal of each plaintiff, filed a Case Information Statement, written statement, and filing fee in each matter. The Case Information Statements, each of which was signed by Mr. Sahaya, were complete, except for an identification of the type of tax at issue. The attached written statements, in effect, repeated the allegations contained in the accountant's original filings. The June 16, 2009 Final Determinations and schedules of liabilities were attached to the November 19, 2009 filings, as was a completed proof of service on the Director and Attorney General.

On December 3, 2009, the Clerk issued a second Deficiency Notice (the "Second Notices") in each of the above-referenced matters. The Second Notices informed plaintiffs that it was necessary to file a Complaint and to identify on the Case Information Statement the type of tax in dispute. In addition, the Second Notices alerted plaintiffs to R. 1:21-1(c), which provides that "an entity, however formed and for whatever purpose, other than a sole proprietorship shall neither appear nor file any paper in any action in any court of this State except through an attorney authorized to practice in this State" The Second Notices, pursuant to R. 1:5-6(c)(1), notified plaintiffs that these deficiencies must be cured within 10 days of the date of the Second Notices in order to retain the September 15, 2009 filing date of the accountant's original submission. The filing fee submitted by each plaintiff was returned along with the Second Notices.

As was the case with the Notices, the record does not contain evidence with respect to the addresses to which each of the Second Notices were mailed. Nor does the record contain evidence of the date of actual mailing of the Second Notices.

If the court were to assume that the Second Notices were actually mailed on December 3, 2009, the deadline for curing the deficiencies noted in the Second Notices would have been December 16, 2009, calculated as follows: (1) pursuant to R. 8:4-2(b), when notice of an action is sent by mail, the time to reply to that action is extended in accordance with R. 1:3-3, which adds three days to the time to reply. The time in which to file a Complaint, complete the Case Information Statement, and obtain representation by counsel was, therefore, extended to 13 days; (2) thirteen days from December 3, 2009 was December 16, 2009.

On January 6, 2010, an attorney admitted to practice law in New Jersey filed a conforming Complaint, Case Information Statement and the correct filing fee on behalf of each plaintiff.

A principal of the limited liability companies (against whom taxes were individually assessed), thereafter filed a motion to intervene as a plaintiff in these matters. He also moved to consolidate these matters for the purpose of discovery. The court will address those motions separately.

The Director cross-moved to dismiss each of the Complaints in the above-referenced matters for want of jurisdiction due to late filing.

Plaintiffs opposed the Director's motion and moved for an extension of time in which to cure the deficiencies listed in the Notices and Second Notices or for a relaxation of the rule establishing the 10-day cure period.

The Director opposed plaintiffs' motion.

II. Conclusions of Law

As our Supreme Court recently reiterated, the “Tax Court is vested with limited jurisdiction” defined by statute. McMahon v. City of Newark, 195 N.J. 526, 546 (2008). The statutory scheme establishing this court’s jurisdiction is “one with which continuing strict and unerring compliance must be observed” Id. at 543. Adherence to statutory filing deadlines is of particular concern in tax matters, given “the exigencies of taxation and the administration of . . . government.” F.M.C. Stores v. Borough of Morris Plains, 100 N.J. 418, 424 (1985)(citing Princeton Univ. Press v. Borough of Princeton, 35 N.J. 209, 214 (1961)); see also Bonnano v. Director, Div. of Taxation, 12 N.J. Tax 552, 556 (Tax 1992). A failure to file a timely Complaint divests this court of jurisdiction even in the absence of harm to the taxing authority. Lawrenceville Garden Apartments v. Township of Lawrence, 14 N.J. Tax 285 (App. Div. 1994). “Failure to file a timely appeal is a fatal jurisdictional defect.” F.M.C. Stores, supra, 100 N.J. at 425. A Complaint that is even one day late must be dismissed for lack of jurisdiction. Mayfair Holding Corp. v. Township of North Bergen, 4 N.J. Tax 38 (Tax 1982); Prospect Hill Apartments v. Borough of Flemington, 172 N.J. Super. 245 (Tax 1979). These rules allow for the effective administration of the State’s finances by removing doubt as to the validity of fixed and final tax assessments. Once the filing deadline has passed, the Director is entitled to assume that his determination is final and no longer subject to review. Commercial Refrigeration & Fixture Co. v. Director, Div. of Taxation, 2 N.J. Tax 415, 419 (Tax 1981).

This court’s jurisdiction to review assessments by the Director regarding a State tax is clearly defined: “[A]ll complaints shall be filed within 90 days after the date of the action sought to be reviewed.” N.J.S.A. 54:51A-14. The 90-day period is also stated in R. 8:4-1(b), which provides that “Complaints seeking to review actions of the Director of the Division of Taxation . . . with respect to a tax matter . . . shall be filed within 90 days after the date of the action to be

reviewed.” Careful compliance with these rules is necessary to establish jurisdiction in this court. Rule 8:4-2, Calculation of Time for Filing, provides that the “time period shall be calculated from the date of service of the decision or notice of the action taken.” In Liapakis v. State, 363 N.J. Super. 96 (App. Div. 2003), certif. denied, 179 N.J. 369 (2004), the Appellate Division held that Rule 8:4-2 applies to the calculation of the 90-day period for filing a challenge to a Director’s Final Determination and that the period begins to run upon receipt of the notice.

The parties agree that if the court considers the filing date of the Complaints, Case Information Statement, and filing fee to be September 15, 2009, the date on which the accountant filed his original letters, then plaintiffs will have filed a timely action and established jurisdiction in this court to review the Final Determinations. Plaintiffs do not, therefore, request an extension of the 90-day filing period established by statute. See N.J.S.A. 54:51A-14. Plaintiffs, instead, asks the court to extend or relax the time period established by court rule for curing deficient pleadings. This is a crucial distinction. While the statutory provision establishing this court’s jurisdiction is strictly construed, a more flexible approach applies when the court interprets rules adopted for the just and efficient operation of the judicial system once jurisdiction has been established.

Rule 1:5-6(c)(1) is the operative provision here. The rule provides as follows:

Nonconforming Papers. The clerk shall file all papers presented for filing and may notify the person filing if such papers do not conform to these rules, except that:

- (1) the paper shall be returned stamped “Received but not Filed (date)” if it is presented for filing unaccompanied by any of the following:
 - (A) the required filing fee; or
 - (B) a completed Case Information Statement . . . ; or

* * *

(D) the signature of an attorney permitted to practice law in this State pursuant to R. 1:21-1 or the signature of a party appearing pro se . . .

* * *

If a paper is returned under this rule, it shall be accompanied by a notice advising that if the paper is retransmitted together with the required signature, document or fee, as appropriate, within ten days after the date of the clerk's notice, filing will be deemed to have been made on the stamped receipt date.

[R. 1:5-6(c).]

The Tax Court Clerk acted pursuant to this rule when she issued the Notices and Second Notices to plaintiffs. As provided in the rule, the Clerk set a 10-day period to cure the deficiencies listed in the Notices and Second Notices in order to retain the original filing date.

Plaintiffs rely on another court rule, R. 1:1-2(a), as the basis for the request that the 10-day period set in the October 26, 2009 and October 27, 2009 Notices be extended to November 19, 2009, and that the 10-day period set in the December 3, 2009 Second Notices be extended to January 5, 2010. That rule provides, in relevant part, as follows:

The rules in Part I through Part VIII, inclusive, shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice.

[R. 1:1-2(a).]

Plaintiffs argue that relaxation of the 10-day period established by the rule, and incorporated in the Notices and Second Notices, is warranted for a number of reasons.

First, plaintiffs rely on the fact that the Clerk did not send the October 26, 2009 and October 27, 2009 Notices to plaintiffs' accountant, the person who signed the original submissions to the court. Plaintiffs, unaware that the accountant could not represent a taxpayer in the Tax Court, relied on the accountant to protect plaintiffs' interest in this forum. It is understandable that the Tax Court Clerk did not send the Notices to the accountant, given that he is not licensed to practice law in New Jersey and is not recognized by the court as plaintiffs' representative. It is also understandable, however, that plaintiffs, whose principals had no training in the law, would expect that that the accountant would receive notice of any deficiencies in the original filings.

Second, there is no evidence in the record with respect to the date on which the October 26, 2009 and October 27, 2009 Notices were actually mailed to plaintiffs by the Clerk. While plaintiffs also did not produce proof of the date on which the Notices were received, it is the Clerk's Office which set the 10-day response period and which, in fairness to plaintiffs, should bear the burden of establishing when the Notices were actually mailed.

Third, plaintiffs argues that the delay in filing the Case Information Statements and accompanying documents was occasioned, in part, by the number of Notices issued at the same time, but mailed to separate addresses. The October 2009 Notices were mailed not to plaintiffs' accountant, but to the last known address of each of the taxpayer limited liability companies and principals. Some of those addresses were out of date and some were the locations of retail operations of the taxpayers at which business mail was not regularly received. Plaintiffs' principal, Mr. Sahaya, awaited the collection of all of the Notices before he filed what he thought were fully compliant Case Information Statements and filing fees with the court. While this may not have been the best approach for Mr. Sahaya to have taken, if all of the Notices had been sent to the accountant, this delay would likely have been avoided.

Finally, plaintiffs argue that the short delay in filing the Case Information Statements, and correct filing fees did not result in harm to the Director or unduly delay the adjudication of this matter. Plaintiffs' Case Information Statements, and filing fees were filed on November 19, 2009, ten days after the deadline established by the October 26, 2009 and October 27, 2009 Notices (assuming they were mailed on October 26, 2009 and October 27, 2009). The Director makes no argument that he was harmed by the initial 10-day delay. This is not an instance in which evidence was lost or the memory of witnesses diminished during the delay in filing. Nor is there evidence that the initial 10-day delay interfered with judicial administration. In fact, more than a month passed between the September 15, 2009 deficient filings and the October 26, 2009 and October 27, 2009 Notices from the Tax Court Clerk. There was a longer period of delay occasioned by the lag in sending the Notices than would result from the 10-day extension of the cure period.

The court concludes that strict application of the 10-day period established by R. 1:5-6(c)(1) would result in an injustice here. This conclusion is based on unusual circumstances: (1) the sufficiency of the details of plaintiffs' claims in the original filings, which included a copy of the relevant Final Determinations and schedules of liabilities; (2) the fact that the original deficient pleadings were filed by an accountant not admitted to practice law in New Jersey, to whom the Notices were not sent, but who plaintiffs reasonably expected would receive the Notices; (3) the fact that the Notices were sent to separate addresses, some of which were out of date and some of which were addresses at which business mail was not regularly received; (4) the fact that the record does not contain evidence with respect to the date on which the Notices were actually mailed; and (5) the relatively short period of extension requested by plaintiffs to cure the deficiencies in the original filings, and the demonstrated lack of harm to the Director as a result of the delay.

These are cogent reasons constituting good cause to extend the period to cure plaintiffs' initial deficient filings to November 19, 2009.

The court makes the same conclusion with respect to plaintiffs' request to extend the 10-day period established in the Second Notices from December 16, 2009 to January 5, 2010. The substantive deficiencies listed in the Second Notices were relatively minor. The Case Information Statements were complete, except for the line requiring the type of tax at issue to be identified. Yet, each Complaint had attached to it the relevant Final Determination and schedule of liabilities, from which one could easily determine the type of tax at issue. In addition, although plaintiffs did not file a Complaint on November 19, 2009, each did file a statement containing several paragraphs in which the amount of the assessments at issue were identified and the basis of each taxpayer's claims were explained in some detail. Although not captioned as a Complaint, the written statements had all of the essential elements of a Complaint sufficient to put the Director on notice of the taxpayers' claims.

In addition, the fact that the Complaints were signed by a principal of plaintiff and not an attorney admitted to practice law in this State, while a defect that required correction, did not in any manner obscure the substantive allegations contained in the Case Information Statement and written attachments.

Plaintiffs attribute the delay in retaining counsel to the difficulty that Mr. Sahaya experienced in identifying an attorney who was willing to represent plaintiffs. The attorney with whom plaintiffs had an established relationship was not experienced in tax matters and did not consider herself capable of representing plaintiffs' interests sufficiently. A second attorney contacted by Mr. Sahaya had recently been nominated to the Superior Court bench and was, as a result, not taking new cases. It was not until early January that Mr. Sahaya was able to secure a

meeting with the attorney ultimately hired to represent plaintiffs. That attorney, shortly after meeting with Mr. Sahaya, filed fully conforming Complaints, Case Information Statements and the correct filing fees.

The court concludes that plaintiffs have demonstrated good cause for an extension of the 10-day period established in the Second Notices to January 5, 2010. Mr. Sahaya made a good faith and prompt effort to retain counsel for plaintiffs. Once retained, counsel promptly corrected the deficiencies in the pleadings. In addition, as was the case with the October 2009 Notices, the record contains no evidence that the Director was harmed by the delay in filing fully compliant documents. The November 9, 2009 filings, while deficient, were detailed, included the relevant Final Determinations, and explained the basis of plaintiffs' claims.

Of course, the court's decision is predicated entirely on the fact that plaintiff's' initial filings reached the court on September 15, 2009, prior to the expiration of the 90-day period in which to establish jurisdiction in this court to review the Final Determinations. Those initial filings, although deficient, included a copy of the Final Determinations and schedules of liabilities, stated that plaintiffs wanted to challenge the assessments and set forth the grounds on which plaintiffs would rely. The initial submissions were sufficient to establish jurisdiction in this court to review the Final Determinations, given their specificity. See Widder v. Director, Div. of Taxation, 14 N.J. Tax 349, 353 (Tax 1994). There is "clear precedent that defectively executed pleadings operate to toll applicable limitations periods" if filed in a timely manner and the claim can be gleaned from the facts alleged. Patel v. Director, Div. of Taxation, 13 N.J. Tax 509, 519 (Tax 1993)(citing White v. Katz, 261 N.J. Super. 672 (App. Div. 1993)).

Had plaintiffs been even one day late with their initial filings, the court would be powerless to grant relief. Lawrenceville Garden Apartments, supra. The court's jurisdiction having been

established by the timely initial filings, however, the rules adopted by the Supreme Court for the efficient and just operation of the courts apply to plaintiffs' claim. Those rules include both R. 1:5-6(c), which sets the 10-day cure period, and R. 1:1-2(a), which allows for the relaxation of that rule to avoid injustice. In light of the court's conclusions, the Director's cross-motion to dismiss the Complaints for want of jurisdiction is denied.

Very truly yours,

/s/Patrick DeAlmeida, P.J.T.C.