

**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF
THE TAX COURT COMMITTEE ON OPINIONS**

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MELVIN MILLIGAN and	:	TAX COURT OF NEW JERSEY
KIM LAWTON-MILLIGAN,	:	
	:	DOCKET NO. 007048-2011
	:	DOCKET NO. 001337-2012
Plaintiffs,	:	DOCKET NO. 000524-2013
	:	DOCKET NO. 000046-2014
v.	:	DOCKET NO. 000202-2015
	:	
DIRECTOR, DIVISION OF	:	MEMORANDUM OPINION
TAXATION, and DIRECTOR,	:	
DIVISION OF STATE LOTTERY,	:	
	:	
Defendants.	:	
-----x		

Decided: December 16, 2016

Steven R. Klein, Esq., for plaintiffs (Cole Schotz, P.C., attorneys, Lauren M. Manduke, Esq., and Elizabeth Carbone, Esq., on the briefs, Jeffrey H. Schechter, Esq., and Geoffrey Weinstein, Esq., of counsel)

Ramanjit K. Chawla, Deputy Attorney General, for defendant Director, Division of Taxation (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Thu N. Lam, Deputy Attorney General, for defendant Director, Division of State Lottery (Christopher S. Porrino, Attorney General of New Jersey, attorney)

DeALMEIDA, P.J.T.C.

This is the court’s opinion with respect to two motions. Plaintiffs move to enforce litigant’s rights pursuant to R. 1:10-3. They seek a Judgment: (1) specifying the amount of New Jersey gross income tax and interest they are entitled to receive as refunds for tax years 2009 through 2015 from defendant Director, Division of Taxation (the “Director”); (2) compelling the issuance of the refunds within 30 days; (3) granting declaratory relief precluding the Director from assessing

the tax against installments of New Jersey lottery winnings plaintiffs received in annual installments in 2014, 2015, 2016 and will receive in future years; and (4) awarding attorneys' fees. The Director opposes plaintiffs' motion and, in the event that plaintiffs are successful, cross-moves for a stay of any refunds until all claims alleged by plaintiffs in these matters are resolved. For the reasons explained more fully below, plaintiffs' motion is granted in all respects, except for the award of attorneys' fees, and the Director's cross-motion is denied.

I. Finding of Fact and Procedural History

A complete recitation of the facts and procedural history of these matters is set forth in the court's opinion granting partial summary judgment to plaintiffs. Milligan v. Director, Div. of Taxation, 29 N.J. Tax 381 (Tax 2016). That opinion need not be repeated here. It will suffice for purposes of this motion to provide the following summary.

Plaintiffs Melvin Milligan and Kim Lawton-Milligan are a married couple who reside in New Jersey. In June 2000, Mr. Milligan purchased a Big Game Lottery ticket from an authorized Division of State Lottery merchant. Mr. Milligan held the winning ticket for the June 9, 2000 drawing entitling him to a prize of \$46 million. Mr. Milligan did not know he held the winning ticket until almost a year later when, on June 7, 2001, he and his wife validated the ticket after watching the local news and learning that the winning ticket for the June 9, 2000 drawing had still not been claimed.

The Division of State Lottery offered plaintiffs two options for collecting their prize money. They could elect the cash option and receive an immediate lump sum payout of \$23,748,052, or elect the annuity option and receive fixed annual installments of approximately \$1.7 million, net federal income tax withholdings, per year for 26 years.

Shortly after claiming their prize, plaintiffs elected the annuity option. On June 18, 2001, plaintiffs were informed by an official with the State Division of Investment that their “25 annual installments” after an initial payment would be for “\$1,769,000, per year, beginning in May, 2002, and ending in May, 2026.”

When plaintiffs won their lottery prize and claimed their winnings, N.J.S.A. 54A:6-11 excluded New Jersey lottery winnings from income subject to New Jersey gross income tax. At the time that plaintiffs purchased their winning ticket, this fact was advertised in the brochures and on the website of the Division of State Lottery. Officials with that agency admitted that these representations were intended to generate lottery ticket sales and to exploit a perceived business advantage over neighboring States that operated lotteries, the winnings from which would be subject to gross income tax for New Jersey residents.

On June 29, 2009, the Legislature enacted a statute imposing for the first time in the State’s history New Jersey gross income tax on New Jersey lottery “winnings from a prize in an amount exceeding \$10,000” L. 2009, c. 69. The statute took effect immediately and applies “to taxable years beginning on or after January 1, 2009.” L. 2009, c. 69, §5.

In 2009, plaintiffs received an annual annuity payment of \$1,273,680.00, after the withholding of federal income tax. On April 5, 2010, plaintiffs filed a joint New Jersey gross income tax return for tax year 2009. In order to avoid fees, penalties and interest, they reported the annual installment of New Jersey lottery winnings received in 2009 as taxable gross income and paid the tax due.

On August 9, 2010, plaintiffs filed an amended joint New Jersey gross income tax return for tax year 2009. This return excluded from taxable gross income the installment of lottery winnings they received in 2009. In the amended return plaintiffs disputed application of the

amendment to N.J.S.A. 54A:6-11 to the 2009 installment of lottery winnings and sought a refund of the \$160,406 in gross income tax they paid on the installment.

By letter dated October 22, 2010, the Division of Taxation disallowed plaintiffs' amended income tax return and refund claim for tax year 2009.

On or about December 8, 2010, plaintiffs submitted a Notice of Protest and Request for Hearing with the Division of Taxation. An administrative hearing was held at the Division of Taxation on or about January 7, 2011.

By letter dated February 2, 2011, the Director, Division of Taxation rejected plaintiffs' administrative appeal and issued a Final Determination upholding the denial of plaintiffs' refund request for tax year 2009.

On April 29, 2011, plaintiffs filed a Complaint in this court challenging the Director's February 2, 2011 Final Determination. Plaintiffs allege that application of the gross income tax to the lottery winnings installment plaintiffs received in 2009 constitutes a breach of contract, violates the square corners doctrine, constitutes a manifest injustice, and violates the State and federal Constitutions. Plaintiffs seeks a reversal of the Director's denial of their refund claim, a declaratory judgment that application of the amendment to N.J.S.A. 54A:6-11 to their lottery winnings is unconstitutional and illegal, and the award of compensatory damages, attorney's fees, and costs of suit.

Plaintiffs followed a similar course of action with respect to tax years 2010 through 2013, first filing gross income tax returns including the lottery winnings installments they received in those years in taxable gross income and subsequently filing amended returns excluding the installment payments from taxable income and requesting a refund. Each year the Director denied plaintiffs' refund request.

On January 25, 2013, plaintiffs filed a Complaint challenging the Director's denial of their refund claim for tax years 2010 and 2011.

On February 19, 2014, plaintiffs filed a Complaint challenging the Director's denial of their refund claim for tax year 2012.

On February 11, 2015, plaintiffs filed a Complaint challenging the Director's denial of their refund claim for tax year 2013.

Plaintiffs also challenged the application of the gross income tax to their lottery winnings installments in another forum. On June 6, 2011, plaintiffs filed a Complaint in the Superior Court, Law Division, Bergen County, alleging breach of contract and other claims similar to those raised in their Tax Court Complaints.

On November 4, 2011, the Hon. Brian R. Martinotti, J.S.C., transferred plaintiffs' Superior Court Complaint to this court. See N.J.S.A. 2B:13-2(b).

On March 2, 2015, this court entered an Order consolidating plaintiffs' four Tax Court actions and the matter they initiated in the Superior Court.

On June 3, 2016, plaintiffs moved for summary judgment on all claims in all matters.

On June 14, 2016, plaintiffs amended their motion to exclude a request for summary judgment on their manifest injustice claims, reserving the right to proceed with those claims in the event they do not prevail their other claims.

On June 24, 2016, the Director, Division of Taxation and the Director, Division of State Lottery, in separate filings, opposed plaintiffs' motion and cross-moved for summary judgment on all claims, except plaintiffs' allegations of manifest injustice.

On July 8, 2016, plaintiffs filed opposition to defendants' cross-motion.

On September 26, 2016, the court granted partial summary judgment in favor of plaintiffs and partial summary judgment against defendants with respect to plaintiffs' claims that application of the amendment to N.J.S.A. 54A:6-11 to plaintiffs' New Jersey lottery winnings violates the square corners doctrine. The court reserved decision on the remaining aspects of the parties' cross-motions.

On September 26, 2016, the court entered an Order granting summary judgment, in part, and denying summary judgment, in part, on the square corners claims. According to the September 26, 2016 Order, the court:

1. ORDERED that Plaintiffs' motion for partial summary judgment be and hereby is GRANTED, in part, to the extent that the court concludes that the Director, Division of Taxation's assessment of New Jersey gross income tax on the installments of New Jersey lottery winnings received by plaintiffs on or after January 1, 2009 with respect to the New Jersey lottery prize awarded on June 9, 2000 violates the square corners doctrine. The grant of partial summary judgment in favor of plaintiffs on their square corners doctrine claims is a sufficient basis for reversal of the final determinations of the Director, Division of Taxation denying plaintiffs' requests for a refund of New Jersey gross income tax for tax years 2009, 2010, 2011, 2012, and 2013; and

2. IT IS FURTHER ORDERED that defendants' cross-motions for summary judgment be and hereby are DENIED, in part, to the extent that those motions concern the square corners doctrine.

Notably, the September 26, 2016 Order did not specifically reverse the Director's final determinations denying plaintiffs' refund claims. Nor did the Order expressly compel the Director to refund any amount to plaintiffs.

The Director did not seek interlocutory appellate review of the court's September 26, 2016 Order. Nor did the Director appeal a final Judgment entered on September 26, 2016 in Leger v. Director, Div. of Taxation, 29 N.J. Tax 354 (Tax 2016), in which the court held that application of the amendment to N.J.S.A. 54A:6-11 to taxpayers similarly situated to plaintiffs violated the

square corners doctrine. In Leger, the court also determined that application of the statute to the taxpayers in that case violated the manifest injustice doctrine. Plaintiffs' manifest injustice claims in the present matter have not yet been resolved.

On November 16, 2016, plaintiffs moved to enforce litigant's rights pursuant to R. 1:10-3, seeking a Judgment setting forth the amounts of refunds of gross income tax, plus interest, due to plaintiffs, and ordering the Director to refund those amounts within 30 days. According to plaintiffs, they are due the following amounts, which include the amount of gross income tax paid, and interest calculated through December 2, 2016, the return date of plaintiffs' motion:

- (a) Tax year 2009: \$195,567.34; and
- (b) Tax years 2010 and 2011: a total of \$317,300.33; and
- (c) Tax year 2012: \$150,422.38; and
- (d) Tax year 2013: \$147,352.37; and
- (e) Tax year 2014: \$146,079.12; and
- (f) Tax year 2015: \$141,435.64; plus
- (g) Per diem interest of \$103.61 from December 3, 2016, through December 31, 2016; plus
- (h) Per diem interest of \$105.59 from January 1, 2017 through December 31, 2017; plus interest thereafter until paid in accordance with N.J.S.A. 54A:9-7(f), N.J.S.A. 54:48-2, and N.J.A.C. 18:35-9.2.¹

Plaintiffs argue that even though the September 26, 2016 Order is interlocutory, it effectively reversed the Director's final determinations denying plaintiffs' refund claims, and

¹ Plaintiffs seek relief for tax years not addressed in the September 26, 2016 Order. On September 27, 2016, plaintiffs filed a Complaint challenging the Director's denial of a gross income tax refund for tax year 2014. There is no pending action in this court concerning a denial of a gross income tax refund for tax year 2015. The court addresses the award of declaratory relief for years not before the court in greater detail below.

rendered the refunds due immediately. According to plaintiffs, the unresolved claims might provide additional grounds for the reversal of the Director's final determinations, but would not, even if decided in the Director's favor, vitiate the court's September 26, 2016 Order with respect to the square corners doctrine. In addition, plaintiffs' unresolved breach of contract claim might provide for the award of damages beyond the gross income tax and interest refunded to plaintiffs under the September 26, 2016 Order, but could not provide a basis to reverse that Order.

Plaintiffs also seek a Declaratory Judgment that the square corners doctrine precludes the assessment of gross income tax on installments of New Jersey lottery winnings from the June 9, 2000 drawing that plaintiffs received in 2014, 2015 and 2016 and will receive in 2017 and later years. They argue that the holding in Milligan, supra, applies with equal force to all installments of the June 9, 2000 lottery prize issued to plaintiffs in 2014 and later years.

The Director opposes plaintiffs' motion. While the Director does not contest plaintiffs' calculation of the amount of gross income tax, plus interest, to which they are entitled under the September 26, 2016 Order, he argues that the Order is not immediately enforceable. It is the Director's position that plaintiffs are not entitled to the award of refunds until all claims raised in their Complaints are resolved by this court. In addition, the Director cross-moves for a stay, arguing that in the event that the court grants plaintiffs' motion, any Judgment entered by the court awarding refunds to plaintiffs should be stayed until all claims raised in their Complaints are resolved.²

² On September 26, 2016, in Harrington v. Director, Div. of Taxation, 29 N.J. Tax 370 (Tax 2016), the court issued an Order granting partial summary judgment with respect to the application of the amendment to N.J.S.A. 54A:6-11 to taxpayers similarly situated to plaintiffs. The taxpayers in Harrington later moved for an Order enforcing litigant's rights to compel the refund of the gross income tax they paid on their New Jersey lottery winnings, plus interest. The Director opposed the taxpayers' motion in that matter and cross-moved for a stay in the event that the taxpayers are

On December 2, 2016, the court heard oral argument from counsel.

II. Conclusions of Law

A. Plaintiffs' Motion to Enforce Litigant's Rights.

Plaintiffs seek relief pursuant to R. 1:10-3. As noted above, a close examination of the September 26, 2016 Order reveals that the court did not expressly reverse the final determinations at issue here. Nor did the court order the Director to issue a refund to plaintiffs. There has, therefore, been no failure on the part of the Director to comply with the court's Order. Although the rule addresses civil contempt, our Supreme Court has interpreted the rule as one designed to provide relief to litigants, whether or not a party has willfully violated a court Order. In re: N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 17 (2015). “[C]ourts have recognized that ‘demonstration of a mens rea, willful disobedience and lack of concern for the order of the court, is necessary for a finding of contempt, but irrelevant in a proceeding designed simply to enforce a judgment on a litigant’s behalf.’” Ibid. (quoting Lusardi v. Curtis Point Prop. Owners Ass’n, 138 N.J. Super. 44, 49 (App. Div. 1975) (emphasis omitted). The “Appellate Division correctly held that upon a litigant’s application for enforcement of an injunctive order, relief should not be refused merely because the violation was not willful.” Department of Heath v. Roselle, 34 N.J. 331, 347 (1961). “The scope of relief in a motion in aid of litigant’s rights is limited to remediation of the violation of a court order.” Abbott v. Burke, 206 N.J. 332, 371 (2011)(citations omitted).

The validity of the September 26, 2016 Order is not affected by its interlocutory nature. The court concluded that the square corners doctrine is a sufficient basis on which to reverse the Director’s denial of plaintiffs’ refund requests. There may be other grounds on which plaintiffs

granted relief. On December 13, 2016, the court issued a Memorandum Opinion and Judgment granting the taxpayers’ motion and denying the Director’s cross-motion in Harrington.

are entitled to relief. As was the case in Leger, supra, the denial of plaintiffs' refund requests may constitute a manifest injustice, warranting reversal of the Director's final determinations. In addition, plaintiffs may establish a breach of contract by defendants, justifying the award of damages, including, and perhaps beyond, the amount of gross income tax they paid on their lottery winnings. Alternatively, the Director may prevail on all unresolved claims asserted in plaintiffs' Complaints. In either case, the September 26, 2016 Order will remain in effect and plaintiffs will be entitled to refunds of the gross income tax they paid on their lottery winnings, plus interest.

There is no legal basis for refraining from entering a Judgment directing the issuance of refunds to plaintiffs. They have established that they are entitled to relief under the square corners doctrine. The Director has cited no statute or legal precedent precluding the award of a gross income tax refund based on this court's grant of partial summary judgment in favor of taxpayers.

N.J.S.A. 54A:9-10(a) provides that a taxpayer whose request for a refund of gross income tax is denied by the Director may seek review of the Director's decision in this court in accordance with the State Uniform Tax Procedure Law, N.J.S.A. 54:48-1, et seq. Such an appeal is the "exclusive remedy available to any taxpayer for review of a decision of the director with respect to the determination of the liability of the taxpayer" for gross income tax. N.J.S.A. 54A:9-10(c). In addition, N.J.S.A. 54A:9-10(d) provides as follows:

Credit, refund or abatement after review. If the amount of a deficiency determined by the director is disallowed in whole or in part, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefore, or, if payment has not been made, shall be abated.

Nothing in N.J.S.A. 54A:9-10(d) provides that a decision of this court awarding a refund of gross income tax is not effective until final Judgment is entered by this court or until any appeal, should one ultimately be filed, is fully resolved.

In contrast, N.J.S.A. 54:3-27.2, which applies only in the local property tax context, provides that “in the event that a taxpayer is successful in an appeal from an assessment on real property, the respective taxing district shall refund any excess taxes paid, together with interest thereon from the date of payment . . . within 60 days of the date of final judgment.” N.J.S.A. 54:3-27.2. This statute has been interpreted to require the municipality to issue a refund of local property taxes only after the conclusion of any appeal from a Tax Court Judgment reducing an assessment. Universal Folding Box Co. v. City of Hoboken, 362 N.J. Super. 429 (App. Div. 2003). Thus, in the local property tax context, a motion to compel a refund is premature prior to final Judgment of the Tax Court, including the resolution of any appeal (or expiration of the time to appeal if no appeal is filed). Ibid. There is no legal precedent interpreting N.J.S.A. 54A:9-10(d) in a similar fashion.

Moreover, a decision of the Director assessing gross income tax

shall become final upon the expiration of the period specified in subsection (a) for filing a complaint with the tax court, if no such complaint has been filed within such time, or if such complaint has been duly made, upon expiration of the time for all further appeals, or upon the rendering by the director of a decision in accordance with the mandate of the tax court or the courts on appeal.

[N.J.S.A. 54A:9-10(e).]

This statute is consistent with N.J.S.A. 54:49-18(a), a provision of the State Uniform Tax Procedure Act, which provides that the filing of a protest of a gross income tax assessment with the Director stays collection of the assessment, and N.J.S.A. 54:51A-15(d), which provides that the filing of a Complaint in Tax Court “shall stay the collection of the tax at issue therein”

It is plain that the Legislature established protections for a taxpayer challenging an assessment of gross income tax. Whether in the context of an administrative appeal before the Director, or a judicial appeal in this court, collection of an assessment of gross income tax is, in

effect, stayed until a final determination of the taxpayer's tax liability. The Legislature, however, enacted no statutory provision effectively staying the award of a refund of gross income tax when a judicial determination has been made in favor of the taxpayer. This court has to conclude that the Legislature, having enacted detailed statutory provisions staying an assessment of gross income tax when the assessment is challenged by a taxpayer, was aware that a taxpayer might also challenge the denial of a request to refund gross income tax, and enacted no statute staying the award of a refund until final Judgment is entered by this court.

The court, therefore, will enter Judgment reversing the final determinations at issue here and compelling the refund of gross income tax, plus interest, to plaintiffs.

B. Plaintiffs' Request for Attorneys' Fees.

Rule 1:10-3 allows for the award of attorneys' fees. According to the Rule, the "court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule." R. 1:10-3. This provision applies to the Tax Court. Arrow Mfg. Co. v. Town of West New York, 321 N.J. Super. 596 (App. Div. 1999).

The court concludes that the award of attorneys' fees is not warranted here. The September 26, 2016 Order does not expressly reverse the final determinations of the Director denying plaintiffs' refund requests. Nor does the Order direct that refunds be issued by the Director to plaintiffs or that the refunds be issued in a particular period of time. In light of the text of the September 26, 2016 Order, the court concludes that the motion record does not support a finding that the Director acted in a deliberate manner warranting the award of attorneys' fees.

C. Plaintiffs' Request for Declaratory Relief.

This court has jurisdiction to provide declaratory relief. Labor Ready Northeast, Inc. v. Director, Div. of Taxation, 25 N.J. Tax 607 (Tax 2011); American Trucking Ass'n, Inc. v. Kline,

8 N.J. Tax 181, 190-91 (Tax 1986), aff'd, 9 N.J. Tax 631 (App. Div. 1987). The purpose of declaratory relief “is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.” N.J.S.A. 2A:16-51. As Judge Sundar recently explained,

A declaratory action questioning the propriety of imposing [a] tax on a certain activity is proper provided there is a justiciable controversy, the party claiming the relief has standing, and there are no adequate or appropriate alternative remedies.

[Labor Ready, supra, 25 N.J. Tax at 612 (citing Registrar & Transfer Co. v. Director, Div. of Taxation, 157 N.J. Super. 532, 538-43 (Ch. Div. 1978), rev'd on other grounds, 166 N.J. Super. 75 (App. Div.), certif. denied, 81 N.J. 63 (1979)).]

Here, there can be no dispute that there is a justiciable controversy between plaintiffs and the Director. Every tax year since 2009, plaintiffs received an installment of New Jersey lottery winnings from a 2000 drawing. Every tax year plaintiffs reported the installment they received as taxable income and paid gross income tax. Every year they thereafter filed an amended return seeking a refund of the tax paid on the installment. Every year the Director denied the refund request, resulting in the filing of an action in the Tax Court challenging his decision.

There is no dispute that plaintiffs will receive additional annual installments of lottery winnings until 2026. There is also no dispute that the operative facts upon which the court relied for its decision regarding the square corners doctrine took place in 2000 and 2009 and will apply with equal force to an analysis of whether the square corners doctrine precludes assessment of the tax on installments of lottery winnings plaintiffs received in 2014, 2015 and 2016, and will receive in 2017 and later years. Denying plaintiffs declaratory relief for the tax years not included in the September 26, 2016 Order would serve only to perpetuate ongoing disputes between the parties in future years and the filing of additional Tax Court Complaints, wasting the time and resources of plaintiffs, the Director and this court.

D. The Director's Cross-Motion for a Stay.

The standards for entry of stay are set forth in Crowe v. De Gioia, 90 N.J. 126, 133 (1982). The court must weight several factors, including whether a stay is necessary to prevent irreparable harm, whether the party seeking a stay is likely to succeed on the legal rights asserted, and whether a balancing of the relative hardships to the parties of granting or denying relief favors entry of a stay. Id. at 132-34. Each factor is examined in turn.

(1) Prevention of Irreparable Harm.

As our Supreme Court has explained, “[h]arm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages.” Id. at 132-33. The Director’s moving papers do not contain a statement of the harm that would be visited upon the State in the absence of a stay. Nor are the Director’s moving papers supported by an Affidavit explaining the State’s financial situation, the steps that would be necessary to satisfy a Judgment compelling refunds to plaintiffs, or the impact that compliance with such a Judgment would have on the State. Simply put, there is no suggestion, let alone proof, of a threat of irreparable harm to the State if the Director is compelled to return to plaintiffs the gross income tax they paid on their New Jersey lottery winnings, plus interest.

At oral argument on the motions, the Director argued that it is possible that after receipt of refunds the taxpayers could declare bankruptcy, effectively precluding the Director from recovering the refunded amounts should the Director ultimately file a successful appeal in this matter. (The court notes that the Director has not stated that he intends to file an appeal after the resolution of all claims asserted in this matter, did not seek interlocutory appellate review of the September 26, 2016 Order, and did not file an appeal in Leger, supra). There are two significant flaws in this argument. First, the prospect of plaintiffs filing for bankruptcy after receiving refunds,

or at any point in time, is entirely speculative. There is no suggestion in the record that plaintiffs do not have the financial means to satisfy their gross income tax obligations should the Director's position ultimately be upheld on appeal. To the contrary, plaintiffs recently won a significant amount of money in a New Jersey lottery drawing. While luck at the lottery, even when a large prize is awarded, does not necessarily portend a lifetime of financial stability, the Director produced no evidence suggesting that plaintiffs are at risk of financial ruin. Moreover, plaintiffs will continue to receive annual installments of their lottery prize from 2017 to 2026, providing a ready stream of revenue to satisfy plaintiffs' gross income tax obligations.

Second, as explained above, the Legislature has enacted statutes effectively staying the collection of gross income tax assessed against a taxpayer while administrative and judicial hearing are pending. Thus, in those instances in which a taxpayer is assessed a tax, as opposed to where a taxpayer pays the tax and seeks a refund, the Director always faces the risk that the collection of the tax will be stymied by a bankruptcy filing after conclusion of the legal challenges to the assessment. Yet, the Legislature has enacted statutes staying collection until all legal challenges are final. Plaintiffs elected to pay significant amounts of gross income tax for tax years 2009 through 2015 that they believed were not legally due and to thereafter seek refunds. Having prevailed on one of their legal claims challenging the tax, plaintiffs should not now be put at a disadvantage as compared taxpayers who do not pay a tax that is due, challenge a subsequent assessment of the unpaid tax, and who do not have to pay the tax until a final Judgment has been issued against them. Those taxpayers have possession of their funds, insulated from collection efforts, for the duration of their legal challenges even though they may ultimately be unable to satisfy the assessment.

The first factor of the Crowe test has not been met.

(2) Likelihood of Success on the Merits.

There is curiously little in the Director's moving papers on this critical point. The Director does not express an intention to seek appellate review of the court's square corners decision. Interlocutory appellate review of the September 26, 2016 Order was not sought. No appeal was filed in Leger, supra, in which this court entered a final Judgment in favor of the taxpayers based, in part, on application of the square corners doctrine in circumstances quite similar to those presented here. Even if the court were to assume that the Director ultimately will seek appellate review of a Judgment concerning plaintiffs' square corners claims, the Director advanced no argument that he is likely to succeed on the merits of any such appeal. The Director's moving papers do not even suggest that the court's decision on the square corners doctrine is incorrect.

The Director's argument is based on the equitable contention that a refund should not be granted until all claims raised by plaintiffs in their Complaints are resolved. The Director relies on the holding in Universal Box, supra, in support of his position. Yet, Universal Box is based on N.J.S.A. 54:3-27.2, which applies only in the local property tax context, and which, in this court's view, undermines the Director's position. N.J.S.A. 54:3-27.2 evidences the fact that the Legislature provided for an effective stay on the refund of taxes disputed in judicial proceedings until after entry of final Judgment and conclusion of all appeals, if filed, only in the context of local property taxes. No parallel provision was enacted by the Legislature in the statutes addressing the gross income tax or in the State Uniform Tax Procedure Law. It appears that the Legislature made a tax policy decision not to stay the issuance of refunds in the gross income tax context. The second Crowe factor, therefore, is not satisfied.

(3) Balancing of the Hardships.

The Director produced no evidence establishing the hardship the State would endure if plaintiffs are awarded refunds of gross income tax, plus interest. The hardship to plaintiffs in the absence of a refund is evident. In 2010 and subsequent tax years, plaintiffs voluntarily reported income they believed was not legally subject to gross income tax. Shortly after filing each return, plaintiffs sought refunds of the tax they paid. More than six years after making their first payment of gross income tax, plaintiffs obtained a judicial determination that the assessment of the tax on their New Jersey lottery winnings violates the square corners doctrine. They have been deprived of their money for more than six years. There is no valid reason they should continue to be denied possession of their money while the remaining claims alleged in their Complaints are resolved.³

Having examined each of the Crowe factors and given appropriate weight to the competing considerations arising from the Director's cross-motion, the court concludes that a stay of the Judgment issued today is not warranted. Although plaintiffs' refunds are due immediately, the court will order the refunds be made within thirty days in order to permit the Director to seek appellate relief should he elect to do so.

³ The court makes no findings with respect to whether plaintiffs suffered monetary damages as a result of not having use of the money they paid to the Director. The existence and measure of any such damages are elements of plaintiffs' pending breach of contract claims.