NOT FOR PUBLICATION WITHOUT APPROVAL OF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

TAX COURT OF NEW JERSEY

Kathi F. Fiamingo
Judge

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Re: Procacci Brothers Sales Corporation v.
Director, Division of Taxation
Docket No. 015626-2014

Dear Counsel:

This letter constitutes the court's opinion with respect to plaintiff's motion for partial summary judgment. For the reasons explained more fully below, plaintiff's motion is denied.

I. Finding of Facts and Procedural History

The court makes the following findings of fact based on the submissions of the parties.

Plaintiff, Procacci Brothers Sale Corporation ("Procacci") is a wholesale produce distributor operating warehouses in South Philadelphia. During the time period at issue, Procacci

*

sold a variety of fruits, vegetables, plants, and similar items, which were delivered to customers in multiple states, including New Jersey. Procacci did not file Corporation Business Tax ("CBT") returns in New Jersey for the years in question, 2002 through 2008.

On January 11, 2006, defendant, Division of Taxation (the "Division") commenced an investigation of Procacci's activities in New Jersey after questioning a driver who was making a delivery in New Jersey. As a result, the Division found Procacci subject to CBT for tax years 2001 through 2005, and on January 11, 2006 issued a Warrant of Execution Jeopardy Assessment (the "2006 Assessment") demanding Corporation Business Tax of $9,000 for those years. Procacci paid the 2006 Assessment on the date the Warrant was issued, January 11, 2006, in order to obtain the release of its truck. The Warrant of Execution Jeopardy Assessment contained the appeal rights available to the Taxpayer, including the right to file a protest with the Division of Taxation within 90 days from the date of the notice.

A letter of protest dated March 20, 2006, was sent to the Director by Procacci. Under date of April 17, 2006, the Director issued a letter to Procacci indicating that Procacci's protest had been received by the Division. Within the body of the letter the Director had typed that the Protest had been received April 17, 2006, however, the document produced by plaintiff in its motion papers had been manually altered by someone unknown to change the date of receipt of the protest to April 12, 2006.[1] The envelope in which plaintiff's protest letter was mailed was postmarked April 7, 2006.[2]

[1]The letter stated that the "Appeal was received on April 12, 2006." Plaintiff correctly notes that the date of April 12, 2006 is a hand-written correction of a typed date appearing to be April 17, 2006. Plaintiff notes that neither plaintiff nor defendant has verified the author of the "corrected" date, nor has the Director certified that its official records contain the correspondence, as modified.

[2] Although plaintiff initially contended that the postmark was illegible, subsequent submission by the Director demonstrated that the postmark was indeed April 7, 2006 and plaintiff conceded this fact.

In June, 2009, while the protest was pending, Procacci sought relief under New Jersey's 2009 amnesty program and filed CBT returns for years 2002 through 2008. Upon accepting Procacci's amnesty request, the Division noted its position and understanding that Procacci waived its right to any further conference and appeal action relative to its March 20, 2006 protest. The Division reviewed the CBT returns and issued a Notice of Assessment Related to Final Audit Determination, which Procacci protested. The Division adjusted the CBT and issued its Final Determination, dated August 20, 2014, assessing CBT, interests, and penalties totaling $1,444,374.48 for the period of 2002 through 2008 (the "2014 Assessment").

On November 18, 2014, plaintiff filed a Complaint with the Tax Court, challenging the 2014 Assessment. On February 17, 2017, plaintiff filed the instant motion for partial summary judgment. Plaintiff argues that the 2014 Assessment is invalid as to tax years 2002 through 2005 because the 2006 Assessment constituted a final assessment which plaintiff failed to timely protest and therefore the years in question were "closed" prior to the issuance of the 2014 Assessment. In a reply brief plaintiff advanced the position that if plaintiff's protest was timely, it was invalid because plaintiff paid the tax demanded in the assessment prior to making protest. According to plaintiff, it was not an aggrieved taxpayer entitled to file a protest once the tax was paid. Defendant opposed this motion.

II. Legal Issues and Analysis

A. Summary Judgment

Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact challenged and the moving party is entitled to a judgment or order as

a matter of law." R. 4:46-2(c). In Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995), our Supreme Court established the standard for summary judgment as follows:

> [W]hen deciding a motion for summary judgment under Rule 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

"The express import of the Brill decision was to 'encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.'" Township of Howell v. Monmouth Cnty. Bd. of Taxation, 18 N.J. Tax 149, 153 (Tax 1999) (quoting Brill, supra, 142 N.J. at 541).

"[T]he determination [of] whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Ibid. at 523.

The court concludes that there is no genuine issue of material fact, and that the matter is ripe for partial summary judgment.

B. Standard of Review

The review of this matter begins with the presumption that determinations made by the Director are valid. See Campo Jersey, Inc. v. Director, Div. of Taxation, 390 N.J. Super. 366, 383 (App. Div.), certif. denied, 190 N.J. 395 (2007); L&L Oil Service, Inc. v. Director, Div. of Taxation, 340 N.J. Super. 173, 183 (App. Div. 2001); Atlantic City Transp. Co. v. Director, Div. of Taxation, 12 N.J. 130, 146 (1953). "New Jersey Courts generally defer to the interpretation that

an agency gives to a statute [when] that agency is charged with enforc[ement.]" Koch v. Director, Div. of Taxation, 157 N.J. 1, 8 (1999) (citing Smith v. Director, Div. of Taxation 108 N.J. 19, 25 (1987)). Determinations by the Director are afforded a presumption of correctness because "[c]ourts have recognized the Director's expertise in the highly specialized and technical area of taxation." Aetna Burglar & Fire Alarm Co. v. Director, Div. of Taxation, 16 N.J. Tax 584, 589 (Tax 1997) (citing Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 327 (1984)). The Supreme Court has directed courts to accord "great respect" to the Director's application of tax statutes, "so long as it is not plainly unreasonable." Metromedia, supra, 97 N.J. at 327. However, where the interpretation of an administrative agency is plainly at odds with a statute, that interpretation will not be upheld. See Oberhand v. Director, Div. of Taxation, 193 N.J. 558, 568 (2008) (citing GE Solid State v. Director, Div. of Taxation, 132 N.J. 298, 306 (1993)).

C. Discussion

The 2006 Assessment was issued to plaintiff under the authority of N.J.S.A. 54:49-5, which provides:

> If any taxpayer shall fail to make any report as required by any state tax law, the commissioner may make an estimate of the taxable liability of such taxpayer, from any information he may obtain, and according to such estimate so made by him, assess the taxes, fees, penalties and interest due the state from such taxpayer, give notice of such assessment to the taxpayer, and make demand upon him for payment.

Additionally, "[i]f the commissioner finds that a taxpayer designs quickly to depart from this state . . . the commissioner may immediately make an arbitrary assessment as herein provided in section 54:49-5 of this title whether or not any report is then due by law." N.J.S.A. 54:49-7.

Plaintiff initially argued that the 2006 Assessment became a final assessment because Procacci did not timely exercise its appeal rights. Plaintiff likened its situation to that in Peoples

Express Co., Inc. v. Director, Div. of Taxation, 10 N.J. Tax 417 (Tax 1989). There, the court held that if "a taxpayer does not file a protest and request a hearing within the requisite 30-day period, the original preliminary or proposed assessment assumes the role of a final assessment without the necessity of any additional action by the Director." Id at 423.

The 30-day period referred to by the court was subsequently amended to the current 90-day period. N.J.S.A. 54:49-18 now provides that "if any taxpayer shall be aggrieved by any finding or assessment of the director, he may, within 90 days after the giving of the notice of assessment or finding, file a protest in writing . . . and may request a hearing."

In order to have timely appealed the 2006 Assessment, the protest must have been filed no later than April 11, 2006. Even assuming that the manual alteration to the correspondence from the Director dated April 17, 2006 accurately reflects the date of receipt of the protest as April 12, 2006, the protest would have been one day late and therefore would be untimely. Estate of Pelligra v. Director, Div. of Taxation, 23 N.J. Tax 658, 663 (Tax 2008). (Ninety-day period begins to run from the date of the delivery of the assessment notice.)

The burden of timely filing falls squarely and solely upon the taxpayer. Slater v. Director, Div. of Taxation, 26 N.J. Tax 322, 334 (Tax 2012) (citing Dougan v. Director, Div. of Taxation, 17 N.J. Tax 110 (App. Div. 1997)). The Tax Court has repeatedly dismissed taxpayer's appeals where the 90-day filing limitation has not been observed. See, e.g., Slater, supra, 26 N.J. Tax 333-335; Off v. Director, Div. of Taxation, 16 N.J. Tax 157, 164-166 (Tax 1996); Peoples Express, Co., Inc., Supra 10 N.J. Tax 417, 424 (Tax 1989).

In determining the timeliness of service of a protest, N.J.S.A. 54:49-3.1(a) provides in part that

> [A] tax return, report, notice, petition, protest, claim or other document to be filed or remittance containing payment of tax, required to be filed within a prescribed

> period, or on or before a prescribed date, under the provisions of any State tax that, after the period or the date, is delivered by United States mail to the director, bureau, office, officer or person with which or with whom the document is required to be filed shall be deemed to be delivered on the date of the United States postmark stamped on the envelope. This shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of the document, determined with regard to any extension granted for filing, and the document was deposited in the mail, postage prepaid, properly addressed to the director, bureau, office, officer or person with which or with whom the document is required to be filed.

The parties concede that the postmark on the envelope within which the plaintiff filed its appeal is dated April 7, 2006. As a result, by virtue of the application of N.J.S.A. 54:49-3.1(a), the protest is deemed filed as of April 7, 2006, well within the prescribed 90-day period.

Plaintiff argues, however, that plaintiff was not entitled to file a protest. Plaintiff contends that the requirement set forth in N.J.S.A. 54:48-18 that a taxpayer be aggrieved by an assessment in order to file a protest, combined with the statement in N.J.S.A. 54:49-14(a) that a taxpayer may file a refund for a tax paid *after a protest has been filed*, requires that the tax demanded remain unpaid at the time of the protest. Otherwise, according to the plaintiff, a taxpayer has no pecuniary interest in the finding or assessment of the Director and is not an "aggrieved taxpayer."

In the case before this court, the plaintiff paid the 2006 Jeopardy Assessment in order to obtain the release of its property (its truck and contents). Adopting plaintiff's interpretation of the statute would mean that anytime the Director imposes a "jeopardy" assessment pursuant to N.J.S.A. 54:49-7 requiring immediate payment, the taxpayer is foreclosed from protesting the assessment. The court finds no support for plaintiff's position. Neither N.J.S.A.54:49-18(a), nor any of the cases decided thereunder, require that the tax demanded in an assessment be unpaid in order to find the taxpayer "aggrieved."

The court finds no support in the language of N.J.S.A. 54:49-18 for plaintiff's position. The referenced statute is clear:

> If any taxpayer shall be aggrieved by any finding or assessment of the director, he may, within 90 days after the giving of the notice of assessment or finding, file a protest in writing signed by himself or his duly authorized agent, certified to be true, which shall set forth the reason therefor, and may request a hearing. Thereafter the director shall grant a hearing to the taxpayer, if the same shall be requested, and shall make a final determination confirming, modifying or vacating any such finding or assessment. The filing of a protest shall stay the right of the director to collect the tax in any manner if the taxpayer shall furnish security of the kind and in the amount determined pursuant to subsection b. of this section until 90 days after final determination by the director. The time for appeal to the Tax Court pursuant to subsection a. of R.S. 54:51A-14, enacted pursuant to section 1 of P.L.1983, c.45, shall commence from the date of the final determination by the director.
> [N.J.S.A. 54:49-18]

The court finds no reason to refer to N.J.S.A 54:49-14 to aid it in its interpretation of the protest statute. Unlike the situation in Vicoa, Inc. v. Director, Div. of Taxation, 166 N.J.Super. 496 (App. Div. 1979), there is no conflict between the provisions requiring resolution. Nowhere within either statute is there a distinction between the ability to protest an assessment before the tax is paid. Furthermore, the court declines to adopt the restrictive reading of N.J.S.A 54:49-14 advanced by plaintiff that the phrase "but no claim for refund shall be required or permitted with respect to a tax paid, after protest has been filed with the director" means that a protest may only be filed prior to the payment of tax. That argument distorts the plain language of both statutes and is rejected.

"It is well settled that tax laws are to be 'strictly construed against the state and in favor of the taxpayer.' 3A Norman J. Singer, Sutherland Statutory Construction § 66.01 (5th ed.1992)." Stryker Corp. v. Director, Div. of Taxation, 168 N.J. 138, 155 (2001). Based on the straightforward language of the statute, the court finds that a taxpayer who makes payment of the tax demanded in an assessment is not foreclosed from protesting the assessment.

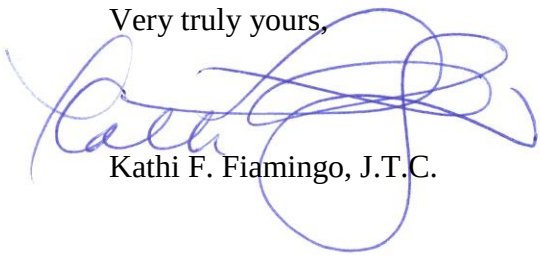
The court also notes that in the property tax context, the concept of an aggrieved taxpayer is based on whether the plaintiff has a "sufficient financial interest" in the property which will be affected by the challenged assessment and not in the tax assessed. NNN Lake Ctr., LLC, v. Twp. of Evesham, 28 N.J. Tax 82, 89 (Tax 2014). See also Mobil Admin. Services Co. v. Mansfield Tp., 15 N.J. Tax 583 (Tax 1996), aff'd, 17 N.J. Tax 509 (App. Div. 1997) (concluding that a subsequent purchaser of property was not an aggrieved taxpayer as of the April 1st deadline for filing a tax appeal "within the meaning of N.J.S.A. 54:3-21 because, as of such date, it had no interest in the subject property and no obligation to pay property taxes assessed to the property."). Furthermore, for the most part, a taxpayer in the property tax context is required to have paid the tax in full in order to institute a property tax appeal. N.J.S.A. 54:51A-1(b).

In a non-property tax appeal contest, a taxpayer may determine to make payment of the tax prior to filing a protest for any number of reasons, for example to minimize the accrual of penalties or interest, or as in this case, to obtain property being held by the Director as security for the payment of tax. The court finds plaintiff's argument that a taxpayer is not aggrieved once the tax demanded is paid unpersuasive. The court finds that such an argument is counter-intuitive and that a taxpayer is clearly aggrieved to the extent a tax is demanded and regardless of when it is paid.

III. Conclusion

For the reasons set forth above, plaintiff's motion for partial summary judgment is denied.

Very truly yours,



Kathi F. Fiamingo, J.T.C.