

2019 WL 2487944 (La.Bd.Tax.App.)

Board of Tax Appeals

State of Louisiana

KIM I. MILLER, PETITIONER

v.

KIMBERLY ROBINSON, SECRETARY, DEPARTMENT
OF REVENUE, STATE OF LOUISIANA, RESPONDENT

Docket No. 10157B

April 11, 2019

JUDGMENT

*1 This case came before the Board for hearing on April 11, 2019, on the merits of the Petition filed by Kim I. Miller and Jaime Miller (the “Petitioners”) with Judge Tony Graphia (Ret.), Chairman, presiding and Board Members Cade R. Cole and Jay Lobrano present. Participating in the hearing were Jaime Miller, for the Petitioners and Donald Bowman for Kimberly Robinson, Secretary, Department of Revenue, State of Louisiana (the “Secretary”). After the hearing, the matter was taken under advisement. The Board now renders Judgment in accordance with the written reasons attached herewith.

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the Petitioner and against the Secretary. The Department is ordered to issue a refund to the Petitioner in the amount of \$7,327.67 along with interest as provided for by law.

Judgment Rendered and Signed at Baton Rouge, Louisiana this 11 day of April, 2019

WRITTEN REASONS FOR JUDGMENT

This case came before the Board for hearing on April 11, 2019, on the merits of the Petition filed by Kim I. Miller (the “Petitioners”) with Judge Tony Graphia (Ret.), Chairman, presiding and Board Members Cade R. Cole and Jay Lobrano present. Participating in the hearing were Jaime Miller, for the Petitioners and Donald Bowman for Kimberly Robinson, Secretary, Department of Revenue, State of Louisiana (the “Secretary”). After the hearing, the matter was taken under advisement. The Board now renders the attached Judgment for the following written reasons.

Petitioners' appeal concerns a levy placed on their bank account in the amount of \$7,327.67. The Secretary contends that the levy was a result of an Assessment of withholding tax dated January 1, 2016 (the “Assessment”). Petitioners claim that they never received the Assessment. The Secretary disputes this claim but produced no evidence at the hearing to establish that the Assessment was mailed to the Petitioners.

The procedure for the Assessment of taxes under [La. R.S. 47:1565\(A\)](#) provides that the Secretary, “shall send a notice by certified mail to the taxpayer against whom the assessment is imposed at the address given in the last report filed by said taxpayer.” In this case, the evidence does not establish that the Assessment was mailed in accordance with the statute. A statutorily deficient notice of assessment does not become a final assessment. *Catahoula Par. Sch. Bd. v. Louisiana Mach. Rentals, LLC*, 2012-2504, p. 17 (La. 10/15/13); 124 So.3d 1065, 1076. Consequently, the Assessment could not become final. Under [La. R.S. 47:1569](#), The Secretary could not properly levy the Petitioners' bank account without a final Assessment.

Nevertheless, the Secretary pointed out at the hearing that the Petitioners did not file a refund request before filing their Petition. Under [La. R.S. 47:1625](#), an appeal to the Board from the disallowance of a refund is predicated upon the Secretary's denial

of said refund, either directly or through inaction. However, our Supreme Court has held that the Secretary's remedy when a taxpayer files an appeal to the Board without first requesting a refund is through a dilatory exception of prematurity. *Trans con. Gas Pipe Line Corp. v. Bridges*, 2009-0421 (La.App. 1 Cir. 10/23/09); 28 So.3d 1082, writ denied, 2009-2764 (La. 2/26/10); 28 So.3d 277. The law is clear that a "dilatory exception is waived if not pleaded prior to an answer." *Bridges v. Anderson*, 2016-0432, p. 7-8 (La.App. 4 Cir. 12/7/16); 204 So.3d 1079, 1083, writ denied, 2017-0194 (La. 3/24/17); 216 So.3d 817. The Secretary did not attempt to file an Answer until April 11, 2019, the day of the hearing. The Secretary did not raise the prematurity issue in that document. Accordingly, the exception is waived. In the absence of such a properly filed exception, and considering that the levy was not done pursuant to a final assessment, the Board must order the Secretary to refund the amounts taken, from the Petitioners' bank account.

*2 Baton Rouge, Louisiana this 11 day of April, 2019.

Judge Tony Graphia (Ret.)
Chairman

2019 WL 2487944 (La.Bd.Tax.App.)

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.