

**ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS**

Michael Rothman and Jennifer Rothman,)	
Petitioners,)	
)	
v.)	18-TT-30
)	
ILLINOIS DEPARTMENT OF REVENUE,)	
Respondent.)	
)	

NOTICE OF FILING

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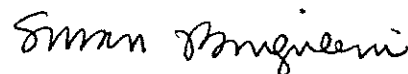
The undersigned representative for the Illinois Department of Revenue (the "Department") certifies that, on May 15, 2018, she filed the Department's Motion to Dismiss with the Illinois Independent Tax Tribunal.



Susan Budzileni
Special Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned representative for the Illinois Department of Revenue certifies that, on May 15, 2018, she served the Department's Motion to Dismiss on the individuals identified above, at the email address shown above.



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**Department of Revenue’s Motion to Dismiss Counts I and II and
Motion to Strike Count III**

NOW COMES the Department of Revenue of the State of Illinois (“Department”), through its attorney Lisa Madigan, Attorney General of and for the State of Illinois, respectfully moves this Tribunal pursuant to §2-607 and § 2-619(a)(1) of the Illinois Code of Civil Procedure, 735 5/2-607 and 619(a)(1) and § 5000.315(g) of the Illinois Independent Tax Tribunal Administrative Rules for an order dismissing Counts I and II of Petitioners’ Petition for lack of subject matter jurisdiction and dismissing and/or, in the alternative, striking County III of Petitioners’ Petition for failure to allege facts and in support thereof states as follows:

Background

On February 27, 2017, the Department issued a Notice of Audit Initiation to Michael and Jennifer Rothman (“Petitioners”) that notified them that an audit had been initiated on their Illinois Individual Income Tax Returns for tax years 2014 and 2015 (“Tax Years at Issue”).

On October 5, 2017, the Department issued a Notice of Proposed Deficiency that informed Petitioners that there was an additional liability due for the Tax Years at Issue and it identified additional tax in the amount of \$48,018 and penalties in the amount of \$8,661 and interest in the amount of \$4,246. Computations documenting the additional liability are detailed on the October 2, 2017, IL-1040 Auditor’s Report that was mailed to Petitioners together with the October 5, 2017 Notice of Proposed Deficiency, all of which are contained in the Department’s exhibit marked “DOR Motion to Dismiss Exhibit 1”.

On November 27, 2017, the Department issued a Notice of Audit Results, updated IL-1040 Auditor's Reports (dated November 27, 2017) and Form IL-870 Waiver of Restrictions, informing Petitioners of the amount of tax and penalty due and accrued interest due for the Tax Periods at Issue. The revised IL-1040 Auditor's Reports added negligence penalties in each of the tax years all of which are contained in the Department's exhibit marked "DOR Motion to Dismiss Exhibit 2".

On November 30, 2017, the Department received payment in the amount of \$52,242¹ from Petitioners together with the Department's Form IL-870 Waiver of Restrictions edited by Petitioners with the note "Taxpayers agree with the increase of tax but disagree with the penalties and therefore decline to sign the IL-870," which was remitted with a letter sent to the Department's auditor from Petitioners' former attorney stating Petitioners "reserve their right to appeal the Department of Revenue's penalty assessment," all of which are attached hereto as "DOR Motion to Dismiss Exhibit 3."

On December 6, 2017, the Department issued a second notice of Explanation of Audit Adjustments, one for each tax year, that advised Petitioners that the Department imposed a negligence penalty, copies are attached hereto as "DOR Motion to Dismiss Exhibit 4."

Thereafter, on or about January 22, 2018, Petitioners remitted payment in the amount of \$1,226.89 for the remaining assessed interest for tax year 2014 as documented on the Department's January 13, 2018, Final Notice of Tax Due, both of which are attached hereto as "DOR Motion to Dismiss Exhibit 5."

On January 18, 2018, the Department issued two Notices of Deficiency, one for tax year 2014 and the other for tax year 2015, that advised Petitioners that a negligence penalty was assessed. These notices gave Petitioners protestable rights to contest the assessed negligence penalty assessed for tax years 2014 and 2015. Copies of the Notices of Deficiency are attached hereto as "DOR Motion to Dismiss Exhibit 6."

Petitioners timely filed a protest to both Notices of Deficiency by filing a Petition with this Tribunal.

§ 2-619 Standard

A motion filed under § 2-619 provides a means of disposing of legal or easily proved factual matters at the outset of a case. *Cramsey v. Knoblock*, 191 Ill.App.3d 756, 764, 547 N.E.2d

¹ Payment includes tax of \$48,018 plus interest of \$4,264 as shown on the Department's October 5, 2017, Notice of Proposed Deficiency. See DOR Motion to Dismiss Exhibit 1.

1358 (4th Dist. 1989). The motion admits all facts well pleaded, but not conclusions of law or conclusions of act unsupported by allegations of specific fact upon which such conclusions rest. *Moreno v. Joe Perillo Pontiac, Inc.*, 112 Ill.App.3d 670,676, 445 N.E.2d 1184 (1st Dist. 1983). A § 2-619(a)(1) motion to dismiss is the proper avenue to raise lack of subject matter jurisdiction. *Zimmerman Equipment Co. v. F.R. Orr Grain Co.*, 29 Ill.App.3d 921, 922, 330 N.E.2d 881 (3rd Dist. 1975); *Ferris, Thompson and Zweig, Ltd., v. Esposito*, 2014 IL App(2d) 130129, ¶ 10.

Tribunal's Jurisdiction

The Illinois Independent Tax Tribunal Act of 2012 contains the following jurisdictional qualifications:

Jurisdiction of the Tax Tribunal is limited to Notices of Tax Liability, Notices of Deficiency, Notices of Claim Denial and Notices of Penalty Liability where the amount at issue in a notice, or in the aggregate amount at issue in multiple notices issued for the same tax year or audit period, exceeds \$15,000, exclusive of penalties and interest.

35 ILCS 1010/1-45(a). While the aggregate amount in dispute is greater than \$15,000, the January 18, 2018, Notices of Deficiency do not include the residency issue and only includes the negligence penalty issue. See DOR Motion to Dismiss Exhibit 6, January 18, 2018, Notices of Deficiency, ¶ 1.

“The Tax Tribunal shall not have jurisdiction to review . . . a notice of proposed tax liability, notice of proposed deficiency, or any other notice of proposed assessment or notice of intent to take some action.” 35 ILCS 1010/1-45(e)(3). There is no provision in the Illinois Independent Tribunal Act (the “Act”) authorizing or permitting the administrative law judge (“ALJ”) to grant or order a refund in this situation, i.e., where petitioner pays the tax before filing his petition. Assuming arguendo that the Tax Tribunal has jurisdiction to revisit the audited residency issue that resulted in the tax liability as set forth in the Notice of Proposed Deficiency² and agrees with Petitioners’ claim that the Notices of Deficiency were issued in error and/or Petitioners were not residents of Illinois, the most the ALJ could do is cancel the Notices of Deficiencies as issued. The ALJ cannot order the Department to refund the amount Petitioners paid prior to filing their Petition. While there is a provision of the Act allowing a taxpayer to pay the tax in dispute “with or after the filing of a timely petition,” that provision does not apply here

² See DOR Motion to Dismiss Exhibit 1

because Petitioners made their November 2017 payment, not only before filing their Petition, but before the January 18, 2018, Notices of Deficiency were even issued. Petitioners made their payments on or about November 30, 2017, in response to the Department's October 5, 2017, Notice of Proposed Deficiency.

It is a long-settled principle of law that tax payments voluntarily made to the State of Illinois cannot be recovered, absent a specific statutory authority procedures. *Wexler, et al., v. Wirtz Corporation*, 211 Ill.2d 18, 25, 809 N.E.2d 1240 (2004) (“Where, as here a taxpayer has paid a tax voluntarily, he normally may not recover that payment even if the taxing body assessed or imposed the taxes illegally. Voluntary tax payments can only be recovered if such recovery is authorized by statute.”); *Getto v. City of Chicago*, 86 Ill.2d 39, 48, 426 N.E.2d 844 (1981) (“Thus, a party may not recover taxes or charges voluntarily paid unless recovery is authorized by statute.”).

In this matter there is no tax liability at issue because none is proposed/assessed in the January 18, 2018, Notices of Deficiency; the only assessment is a negligence penalty. See DOR Motion to Dismiss Exhibit 6, January 18, 2018, Notices of Deficiency, ¶ 1. Nevertheless, Petitioners, in their Petition, seek a hearing on whether they were Illinois residents during tax years 2014 and 2015, which tacitly suggests they are also seeking a refund if the Department's residency determination is overturned. The Illinois Income Tax Act (the “IITA”) (35 ILCS 5/101-1 et seq.) provides a statutory procedure to recover overpaid taxes, commonly referred to as a “refund claim.” See 35 ILCS 5/911(a)(1). As interpreted by the Department administrative rules,

no credit or refund shall be allowed or made with respect to any year unless a claim for refund or credit was filed on or before the later of:

- 1) *3 years after the date the return was filed or, in the case of returns required under Article 7 of the IITA respecting any amounts withheld as tax, the 15th day of the 4th month following the close of the calendar year in which such withholding was made); or*
- 2) *one year after the date the tax was paid. (IITA Section 911(a)).*

86 Ill. Admin. Code § 100.9410(a).

The only statutory authority to recover an overpayment is through the refund claim provisions stated above. As the Illinois Supreme Court has explained, taxpayers contesting “the correctness of an assessment . . . may (1) withhold payment of the tax and receive an administrative hearing following receipt of a notice of [deficiency] from the Department of Revenue; or (2) pay the tax, file a claim for credit or refund, and have an administrative hearing after protesting the

Department's notice of tentative determination of claim . . . ; or (3) pay the tax under protest pursuant to the Protest Monies Act and have the circuit court pass upon the protest.” *Shell Oil Company v. Department of Revenue*, 95 Ill.2d 541, 545-46, 449 N.E. 2d 65 (1983).

Consequently, the only remaining remedy still available to Petitioners is to file a claim for credit or refund, and seek an administrative hearing after protesting the Department’s notice of claim denial, which will grant this Tribunal with jurisdiction to rule on the merits of Petitioners’ non-residency claim.

Wherefore, the Department requests that this Tribunal enter an Order that:

- a. Dismisses Counts I and II for lack of subject matter jurisdiction, and;
- b. For any other relief that the Tribunal deems just and proper under the circumstances.

§ 2-607 Standard

Under § 2-607 when “allegations are so wanting in details that the responding party should be entitled to a bill of particulars, file and serve a notice demanding it. The notice shall point out specifically the defects complained of or the details desired.” 735 ILCS 5/2-607. Similarly, a petition filed with the Tribunal must state “in clear and concise terms a summary of the errors of fact or law that the petitioner alleges have been made by the Department . . . together with a statement of facts or law upon the petitioner relies to establish the errors.” 86 Ill. Admin. Code 5000.310(a)(F).

In Count III of the Petition, Petitioners seek the abatement of penalties based upon reasonable cause but fail to set forth any facts upon which the Department can determine whether reasonable cause exists. Specifically, ¶ 88 through ¶ 95 in the Petition, Petitioners simply state/allege that penalties should not apply or should not be imposed where reasonable cause exists and they cite the statutory and regulatory language of various sections of both the Uniform Penalty and Interest Act (35 ILCS 735) and the Department’s administrative rules without alleging specific facts demonstrating that reasonable cause, in fact, exists.

The Department will consider a request for the abatement of penalties based upon reasonable cause “if the taxpayer shows that his failure to file a return or pay tax at the required time was due to reasonable cause.” 86 Ill. Admin. Code 700.400(a). It is incumbent upon a taxpayer to demonstrate that reasonable cause exists. While reasonable cause is determined “on a case by case basis taking into account all pertinent facts and circumstances” various examples of reasonable cause are set forth in the Department’s administrative rules. 86 Ill. Admin. Code

700.400(b) and (e). Requesting abatement of penalties based upon reasonable cause is not sufficient without providing facts and circumstances upon which the Department can make a determination. The burden is on a taxpayer to demonstrate reasonable cause and citing statutory authority will not suffice.

Wherefore, if Petitioners wish to address the merits of a residency claim, they must file a claim for refund as discussed above. At this time, any request for abatement of penalties based upon reasonable cause is premature, and the Department requests that this Tribunal enter an Order:

- a. Dismissing Count III because it is premature, and;
- b. For any other relief that the Tribunal deems just and proper under the circumstances.

Wherefore, in the alternative, if Petitioners only seek to protest the Department's penalty assessment as identified in the Department's Notices of Deficiency, then the Department request this Tribunal to enter an Order:

- a. Striking Count III as deficient and require Petitioners to amend their Petition and specifically allege facts upon which the Department can determine if reasonable cause exists to abate the penalties assessed, and;
- b. For any other relief that the Tribunal deems just and proper under the circumstances.

State of Illinois

By:

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