

Dartel

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

GENOA THEATRE ASSOCIATION, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 M. BERRI BALKA, NEBRASKA STATE)
 TAX COMMISSIONER, and the STATE)
 OF NEBRASKA,)
)
 Defendants.)

Docket 512, Page 208.

ORDER

CLERK OF COURT

SEP 26 1996

The Motions for Summary Judgment filed by both Plaintiff and Defendants came on for hearing on the 24th day of June, 1996. Glenn A. Rodehorst was present for the Plaintiff and L. Jay Bartel was present for the Defendants. The Motions were argued and submitted. The Court being fully advised, finds and orders as follows:

STATEMENT OF CASE

This is a tax appeal brought under § 77-2798 (Neb. Rev. Stat. 1990). The plaintiff, Genoa Theater Association, is appealing the tax commissioner's determination that Genoa was not entitled to a refund of taxes paid to the state in the form of a depreciation surcharge. This surcharge was collected under the authority of § 77-2716.02, which requires that taxpayers remit to the state a 2% surcharge for depreciation claimed on federal income tax returns. In 1993, Genoa paid a depreciation surcharge tax of \$109.28 for the 1992 tax year. Subsequently, Genoa filed an amended return, requesting a refund of the depreciation surcharge. Plaintiff

sought this refund on the grounds that the surcharge was unconstitutional. The plaintiff asserts that the depreciation tax is a form of property tax, which the state is prohibited from levying per the Nebraska constitution.

The tax commissioner denied the refund on the grounds that the depreciation surcharge is an excise tax, not a property tax, and the state is authorized to levy excise taxes. Plaintiff filed this appeal in District Court. Both parties then moved for summary judgment.

STANDARD OF REVIEW

In a Motion for Summary Judgment, the court considers the standard of review set forth in *Boyd v. Chakraborty*, 250 Neb. 575, 579-80, ___N.W.2d___ (1996), which provides:

"Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law."

MATERIAL FACTS IN THE CASE

The material facts in this case can be succinctly set out. The relevant statute, § 77-2716.02, authorizing the depreciation surcharge tax was adopted by the Nebraska legislature. The plaintiff filed an income tax return and paid the 2% depreciation tax for 1992 of \$109.28. The plaintiff subsequently filed a request for a refund of the depreciation tax, which was denied by

the tax commissioner. The plaintiff appealed the tax commissioner's decision to the District Court. Both parties agree upon all of these material facts. The only issue in dispute is whether the depreciation surcharge is an unconstitutional property tax. This is a question of law and not a question of fact. Under these circumstances, summary judgment is an appropriate procedure.

QUESTION PRESENTED

Under the Nebraska Constitution, Art. VIII, § 1A, is a 2% depreciation surcharge a property tax or an excise tax, when the tax is based on the amount of depreciation claimed on the taxpayer's federal income tax return, the taxpayer must file a tax return, and depreciation reflects a portion of the value of the property thus depreciated?

ANALYSIS

A tax on federally deducted depreciation is not a property tax, using the definition of property and excise taxes enunciated in *State v. Gaylen*, 221 Neb. 497, 378 N.W.2d 182, 185, (1985). A property tax is a tax based on the assessed value of certain real and personal property, while an excise tax is a tax based upon the doing of an act, often referred to as a privilege or license tax. Property taxes cannot be collected by the state. Neb. Const. Art. VIII, §1A. However, excise taxes can be levied by the state. The statute in question is specifically denominated as an excise tax, but that does not stop the Court from looking at the actual operation of the tax to determine whether the tax is truly an excise tax or a property tax. However, when the tax is analyzed in

terms of its operation, it is clear that the depreciation surcharge is an excise tax.

OPERATION OF DEPRECIATION SURCHARGE

The 2% depreciation surcharge operates in the following manner. When a Nebraska taxpayer fills out his federal income tax return, one of the tax credits he may take is a credit for depreciation of certain qualifying property. This credit is a tax portion of the value of the item when purchased, in acknowledgment that the property item experiences wear and tear, and eventually needs to be replaced. The total depreciation amount of a piece of property can be divided up by the taxpayer among successive years. For example, if the property has a depreciation of \$2,000, the taxpayer can claim 1,000 for two years, or 500 for four years. A taxpayer may opt not to deduct depreciation. However, upon the sale of the item the unclaimed depreciation will be figured in by the IRS as income for the person selling the property. IRS Code § 1016(a)(2)(b) and § 167(b)(1).

When the taxpayer then files a Nebraska income tax return, he is required to also fill out in conjunction with the return "Form DPR 1992", which computes the depreciation surcharge. The taxpayer is then required to remit the surcharge due along with the rest of his return. No tax credits can be applied to this surcharge, per § 77-2716.02.

ARGUMENT

Plaintiff advances three basic arguments as to why the surcharge is a property tax. 1) the taxpayer has to pay the tax

even if she owes no other state income taxes, 2) claiming depreciation on federal income tax return is not a voluntary act, and 3) the surcharge is based on depreciation, which is based on a portion of the value of the property.

Defendant argues that the surcharge is an excise tax because 1) it is a tax on the act of claiming federal depreciation tax credits, 2) there is no valuation of the property involved, 3) the Nebraska Supreme Court has denominated various taxes similar to the depreciation surcharge as excise taxes.

AVOIDABILITY OF THE SURCHARGE

The fact that a type of tax is unavoidable under Nebraska law is not pertinent to whether or not a tax is an excise or property tax. While property taxes are traditionally unavoidable, there are excise taxes which are also unavoidable, in that if you choose to do a certain act, you will pay the excise tax. Gasoline excise taxes, corporate excise occupation taxes, cattle excise sales taxes are all unavoidable if a person engages in those activities. One could argue that in a practical sense people cannot choose to not purchase gasoline any more than they can choose not to claim depreciation. The fact that the surcharge is unavoidable, in a practical sense, is not relevant to the definition of excise and property taxes laid out in *Gaylen*. The Supreme Court has also given, in a dissenting opinion in *Bahensky v. State of Nebraska*, 241 Neb. 147, 486 N.W.2d 883, 886, (1992), the statement that depreciation surcharges are not property taxes, because the tax is imposed on the taxpayers voluntary act of claiming depreciation.

While the opinion does define the act of the taxpayer as voluntary, that definition does not legally supplant the definition subscribed to by the Court in *Gaylen*.

PROPERTY VALUE AND DEPRECIATION

The fact that the depreciation surcharge is related to the value of property owned by the taxpayer does not mean that the surcharge is a property tax. Plaintiff argues that the depreciation is based on the value of the property, and the surcharge is based on the depreciation. In other words, we can trace the surcharge back to tangible property, as was the case in *Gaylen*, 221 Neb. at 497, 378 N.W.2d at 185. The excise tax was based on each head of cattle sold. However, in *Gaylen* the tax was not related in any way to the value or selling price of a particular cow. This is unlike the surcharge, which does change based on the amount of depreciation claimed. An excise tax in Nebraska that does relate to property value is the corporate occupation tax, which is based on the amount of capital stock the company has. *Licking v. Hayes Lumber Co.*, 146 Neb. 240, 19 N.W.2d 148 (1945). The corporate occupation tax varies, depending on the capital stock (property) that the company has. Plaintiff would distinguish this case because operating a corporation is clearly a privilege, unlike claiming depreciation, which is a necessary part of filing federal income taxes. This distinction overlooks the definition followed by the court in *Gaylen*.

A property tax is a tax based on the assessed value of certain real and personal property, while an excise tax is a tax based upon

the doing of an act, often referred to as a privilege or license tax. *State v. Gaylen*, 221 Neb. at 497, 378 N.W.2d at 185. The surcharge is unambiguously based on doing an act. The act is claiming depreciation. The plaintiff notes that even if a taxpayer does not claim depreciation, the IRS will count it as income when the property is sold. But if the IRS counts the unclaimed depreciation as income, this will not subject the taxpayer to a surcharge on unclaimed depreciation. Instead, the taxpayer will have additional income, subject to other tax obligations at the state level. The Supreme Court made it clear in *Licking* that an excise tax can be related to property owned by the taxpayer, if the excise tax is taxing an act by the taxpayer, and not the property itself. The depreciation surcharge fulfills the definition of excise tax used by the Gaylen Court.

The plaintiff also raises the question as to whether it is constitutionally allowable for a state to tax a federal income tax credit. Plaintiff offers no authority that addresses the issue either way. The U.S. Supreme Court has discussed whether or not a state must give credence to federal taxing guidelines in determining whether certain types of federally tax exempt property can be included by the state in a franchise tax. 350 US 492, 493 (1960). While excise and franchise taxes are not identical, the principle of whether the state can construct their tax laws independently of federal law is answered in the affirmative. "[T]his Court has consistently upheld [state] franchise taxes measured by a yardstick which includes [federally] tax-exempt

income or property."

CONCLUSION

Because the Nebraska depreciation surcharge is a tax upon the act of claiming federal depreciation tax credits, and not a tax upon the property underlying the depreciation, the surcharge is an excise tax allowable under the Constitution of Nebraska.

THEREFORE, the Defendants' Motion for Summary Judgment is sustained and the Plaintiff's Motion for Summary Judgment is denied. Petition is dismissed and costs are taxed to the Plaintiff.

ENTERED this 24 day of September, 1996.

BY THIS COURT:



District Court Judge

cc: Glenn A. Rodehorst, attorney for Plaintiff
L. Jay Bartel, attorney for Defendants