

IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA

PAUL KOZAK,

CI 01-1822

Plaintiff,

DEPT OF JUSTICE

-vs-

OPINION AND ORDER

MAR 21 2002

STATE OF NEBRASKA
DEPARTMENT OF REVENUE,
MARY JANE EGR, Tax Commissioner,
RICHARD J. KERPER, Revenue
Supervisor, and MARCUS B. FORD,
Revenue Agent,

STATE OF NEBRASKA

Respondents/Defendants.

Under advisement in this case and now coming on for decision, is a motion for summary judgment filed by Defendants through counsel on December 17th, 2001, and heard, by agreement of the parties, on December 27th, 2001.

PLEADINGS, CLAIMS and FACTUAL BACKGROUND

Plaintiff, acting on a pro se basis, filed his petition on December 7th, 2001. Summonses were properly issued and served on Defendants. In conjunction with his petition, Plaintiff submitted a motion for a temporary restraining order on an ex parte basis as well as an application and motion for temporary injunction. The motion for injunction and temporary restraining order was supported by an attached affidavit. The ex parte motion was submitted and denied without prejudice and an order was entered on the minute sheet setting the application for temporary injunction for an evidentiary hearing on December 13th, 2001. On December 11th, Plaintiff submitted a motion for a continuance of the hearing. On December 13th, Plaintiff appeared and Defendants appeared through counsel, Deputy Attorney General Jay Bartels. Plaintiff's motion for continuance was argued, submitted and granted, and the hearing on the application for temporary injunction was continued to December 27th, 2001. On December 27th, with the same appearances as previously noted, Plaintiff withdrew the motion and application for temporary injunction and, as previously noted, Defendants'

motion for summary judgment was heard. A number of other filings have been made, including a filing by Petitioner/Plaintiff on January 28th purporting to be a brief in opposition to the motion for summary judgment. Although the Court has reviewed all filings, including the aforementioned brief, Plaintiff should be aware that filings have no evidentiary value unless they contain admissions, stipulations, or in some manner have been received as evidence to be contained within a bill of exceptions.

The factual allegations made by Plaintiff are, in terms of relevance to the ultimate issue, undisputed. Plaintiff is a resident of Sarpy County, Nebraska, and Defendants are the agency and its employees that are responsible for enforcing revenue laws of the State of Nebraska. Plaintiff is employed in some capacity with the United States Postal Service. From the petition and attachments a proper inference or conclusion is that Plaintiff filed a state income tax return for the calendar year of 1997 claiming he owed no tax and that all withheld monies should be refunded. A second proper inference or conclusion is Plaintiff filed no state income tax return for 1998. In June of 1999, Defendants sent a notice to Plaintiff of a determination of the balance due including interest of his tax liability for the tax year 1997. Plaintiff responded on June 25th as shown in Exhibit "B" attached to his petition. On June 5th, 2001, Defendants sent a notice to Plaintiff reciting a balance due on his tax liability for the year 1998 which included interest computed through June 15th. On June 19th, 2001, Defendants served a notice on Plaintiff of a balance due for both tax years 1997 and 1998, which included interest through June 29th. With that notice was a notice of a state tax lien which showed the date of assessment for each tax period, the amount of tax, the penalty, and the interest. On September 28th, 2001, Defendants served on Plaintiff a notice that one or more actions might be taken to enforce the lien. On October 3rd, 2001, Defendants served on the United States Postal Service a notice of levy instructing that Plaintiff's wages be submitted to Defendant to satisfy this tax liability. On October 24th, Plaintiff sent a letter to Defendants in response to this notice of levy which is attached to his petition as Exhibit "G". Plaintiff's claim, in a nutshell, is that Defendants have not established or proven to him that he is required to file a federal income tax return and, absent such showing or proof, he is not obligated to file a Nebraska tax return. Plaintiff further claims Defendants levy of October 3rd is not authorized by an order of a court and therefore deprives him of property without due process.

From the affidavit of Defendant Richard Kerper, received in evidence as Exhibit 2 (except for a legal conclusion expressed in paragraph 24 of that exhibit), it is confirmed that Plaintiff filed a Nebraska tax return for 1997 claiming no tax due and requesting a refund of all withheld taxes, and that the return was accompanied by a two-page document of Plaintiff setting forth his theory that the Internal Revenue Code did not require payment of income tax. That return and attachments are attached to Exhibit 2 as Exhibit "A". Defendants generated a balance-due notice which was sent to Plaintiff on September 4th, 1998, concerning the 1997 tax. No further action was taken until the demand notice mailed by the State on June 17th, 1999, concerning the 1997 balance. On July 20th - 21st, 1999, Defendants filed notices of state tax liens; on July 30th, 1999, Defendants mailed a further demand notice to Plaintiff; on August 4th, 1999, Defendants met with Plaintiff and his wife; and, on August 24th, 1999, Defendants served a notice of levy upon Plaintiff's employer. In response to the notice of levy, Defendants received payment from Plaintiff's employer in the fall of 1999 which fully satisfied the balance due as determined in June of 1999. In January of 2001, Defendants issued to Plaintiff two separate notices of a deficiency determination for individual income tax for the years of 1997 and 1998 which were generated with information received from the Internal Revenue Service. The amount proposed for 1997 was in addition to the amounts that had previously been determined and collected. Plaintiff filed no return for 1998 and, in June of 2001, Defendants demanded payment by serving notices as previously mentioned and alleged in Plaintiff's petition. On July 6th, Defendants received a letter from Plaintiff referring to the notices supplemented with a telephone call from Plaintiff's wife, and, on September 10th, Defendants sent a letter to Plaintiff explaining that the deficiency determinations for 1997 and 1998 were based upon information obtained from the Internal Revenue Service. On September 28th, Defendants mailed the demand notice. Defendants acknowledge they did not record a notice of state tax lien and, on October 3rd, served a notice of levy upon Plaintiff's employer. Pursuant to the notice of levy, Plaintiff's employer has remitted the sum of \$1,219.22 through December 7th, 2001.

ISSUES

Reducing the issues raised by Plaintiff in his petition to a question format would result in the following:

1. Does the Nebraska Department of Revenue have to prove that a resident of this state was required to file a federal income tax return before it can take any action to collect state income tax alleged to be deficient?
2. Does the Nebraska Department of Revenue have to obtain a judgment or court order before it levies on property or wages of a resident to satisfy an alleged state income tax deficiency? and
3. Does the Nebraska Department of Revenue have to make assurances to a resident of a requirement to file a federal income tax return before recording any lien or levying upon the resident's property to satisfy an alleged deficiency in state income tax?

Defendants have also raised issues in their motion for summary judgment which can be reduced to the following questions:

4. Does a resident taxpayer, who fails to file a protest to a notice of a proposed deficiency within 90 days lose the right to litigate the validity of the assessment or subsequent collection procedures? and
5. Does the failure of a resident taxpayer to make a claim for credit or refund of an overpayment of income tax within a statutory time frame bar a taxpayer from seeking refund of taxes in other litigation?

STANDARD OF REVIEW

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. Babbitt v. Hronik, 261 Neb. 513, 623 N.W.2d 700 (2001). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. Polinski v. Sky Harbor Air Service, Inc., 263 Neb. 406, __ N.W.2d __ (2002); Daniels v. Allstate Indemnity Co., 261 Neb. 671, 624 N.W.2d 636 (2001). After the movant for summary judgment makes a prima facie case by producing enough

evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. Polinski v. Sky Harbor Air Service, Inc., *supra*; Morrison Enters. v. Aetna Cas. & Surety Co., 260 Neb. 634, 619 N.W.2d 432 (2000).

CONCLUSIONS AND REASONING

It is appropriate to address the issue-questions in a reverse fashion as raised by the litigants because an affirmative answer to those questions raised by Plaintiff would merit no relief if those raised by Defendants were likewise answered in the affirmative, i.e. Plaintiff would be barred from bringing the instant lawsuit. The rationale is frequently expressed by appellate courts as a declination to answer questions or resolve issues unnecessary to determine the case pending. See, J.D. Warehouse v. Lutz & Co., 263 Neb. 189, 639 N.W.2d 88 (2002); Crawford v. Crawford, 263 Neb. 37, 638 N.W.2d 505 (2002); Russell v. Stricker, 262 Neb. 853, 635 N.W.2d 734 (2001).

Based on the recitation of undisputed facts outlined above, the Court turns to the legal issues raised by the parties, starting with those raised by Defendants, to ascertain whether summary judgment is appropriate. Defendants claim Plaintiff is barred from advancing his claim before this Court because it was not brought in accordance with the statutory procedures and time frame provided by the Nebraska Revenue Act, found at Neb. Rev. Stat. §§ 77-2701 to 77-27,135.01 and 77-27,222 (Reissue 1996, Cum. Supp. 2000 & Supp. 2001).

The applicable statutory provisions set up a framework requiring the Tax Commissioner to determine deficiencies or assessments when a taxpayer has filed a return or fails to file a return. Pursuant to Neb. Rev. Stat. § 77-2776 (Reissue 1996),

(1)As soon as practical after an income tax return is filed, the Tax Commissioner shall examine it to determine the correct amount of tax. If the Tax Commissioner finds that the amount of tax shown on the return is less than the correct amount, he shall notify the taxpayer of the amount of the deficiency proposed to be assessed. ...

(2) If the taxpayer fails to file an income tax return, the Tax Commissioner shall

estimate the taxpayer's tax liability from any available information and notify the taxpayer of the amount proposed to be assessed as in the case of a deficiency.

(3) A notice of deficiency shall set forth the reason for the proposed assessment. The notice may be mailed by certified or registered mail to the taxpayer at his last-known address. ...

The taxpayer then has ninety days from the date such notice of a deficiency is mailed to file a protest with the Tax Commissioner. Upon receiving a protest, the Tax Commissioner shall reconsider the assessment and, if requested by the taxpayer, shall grant an oral hearing. After ninety days, in the absence of a protest, the notice of proposed assessment of a deficiency shall constitute a final assessment. Neb. Rev. Stat. §§ 77-2777 and 77-2778 (Reissue 1996).

The Nebraska Supreme Court has further construed the above-referenced statutory sections in its decision in Sack v. State, 259 Neb. 463, 610 N.W.2d 385 (2000). In that case, our Supreme Court held, "that the exclusive remedy to contest an income tax deficiency assessment is the filing of a written protest with the Tax Commissioner within 90 days of the mailing of the proposed assessment of the deficiency. If a timely protest is not filed by the taxpayer, the proposed assessment becomes final." Id at:469, 610 N.W.2d at 390.

Our statutory scheme further provides the following statute of limitations on advancing a claim for a credit or refund, which reads as follows: "A claim for credit or refund of an overpayment of any income tax imposed by the Nebraska Revenue Act of 1967 shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires later. No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in this subsection for the filing of a claim for credit or refund unless a claim for credit or refund is filed by the taxpayer within such period." Neb. Rev. Stat. § 77-2793(1) (Reissue 1996). "The Tax Commissioner shall mail a notice of action on any refund claim within six months after the claim is filed. The taxpayer may, prior to notice of action on the refund claim, consider the claim disallowed." Neb. Rev. Stat. § 77-2797 (Reissue 1996). A taxpayer may then bring an action on a refund claim "in a district court of Nebraska of appropriate jurisdiction where the taxpayer resides or in the district court of Lancaster County." Neb. Rev. Stat. § 77-2798 (Reissue 1996). Lastly, this section mandates:"No

suit shall be maintained for the recovery of any income tax imposed by the provisions of the Nebraska Revenue Act of 1967 alleged to have been erroneously paid until a claim for refund has been filed with the Tax Commissioner as provided in section 77-2795 and the Tax Commissioner has denied the refund.” Neb. Rev. Stat. § 77-2799 (Reissue 1996).

When a taxpayer receives an adverse ruling, Neb. Rev. Stat. § 77-27, 127 (Reissue 1996), provides the exclusive review procedure:

Any final action of the Tax Commissioner may be appealed, and the appeal shall be in accordance with the Administrative Procedure Act. The appeal provided by this section shall be the exclusive remedy available to any taxpayer, and no other legal or equitable proceedings shall issue to prevent or enjoin the assessment or collection of any tax imposed under the Nebraska Revenue Act of 1967.

In view of the applicable statutory and case law governing this area, it is apparent that Defendants are correct in their assertion that Plaintiff is barred from proceeding with the instant litigation in that he failed to adhere to the time frame and procedures spelled out in the Nebraska Revenue Act for the redress of his complaints. These statutes clearly condition the right of any refund of Nebraska state income tax on the timely filing of a refund claim with the Tax Commissioner. Accordingly, Defendants have demonstrated they are entitled to judgment as a matter of law and that Plaintiff’s Petition should be dismissed.

While such conclusion disposes of the case pending, making it unnecessary to address the issues raised by Plaintiff, this Court notes that even if the merits of Plaintiff’s claims had been reached, none of his assertions are legally supportable. There is no requirement anywhere in the Act that the Nebraska Department of Revenue has a threshold duty to demonstrate that a resident is required to pay federal income tax before it can take action to collect state income tax. To the contrary, in the event a taxpayer files a protest to a proposed deficiency notice by the Tax Commissioner, the burden is on the taxpayer to prove all issues in any proceedings before the Commissioner, except for those enumerated in Neb. Rev. Stat. § 77-2781 (Reissue 1996). Furthermore, there is no requirement under our statutory scheme that the Department of Revenue must obtain a judgment or court order prior to levying on property or wages to satisfy a tax

deficiency. Specifically, Plaintiff urges that the Department's second levy of his wages was improper as not duly recorded. The statutes do not require a court order prior to a levy based on a final assessment, and the only possible purpose to be served by a recording speaks to priority of interests in the property or wages, which is not in issue in this case. The failure to record a lien does not invalidate the resulting levy of Plaintiff's wages. Lastly, Plaintiff claims the Department has to make assurances to a resident of the requirement to file a federal income tax return before recording a lien or levying on property. Again, there is no such requirement found in our statutes. Accordingly, even if Plaintiff's claims were properly brought before this Court, I find no merit to the allegations set out in the petition.

RULING

In sum, I conclude that summary judgment in favor of Defendants is warranted in view of the applicable law as applied to the uncontroverted facts of this case.

IT IS ORDERED AND ADJUDGED Defendants' Motion for Summary Judgment is granted, the action is dismissed, and costs are taxed to the Plaintiff.

Signed and entered this 20th day of March, 2002.

BY THE COURT:



District Court

SIGNED COPY