

IN THE DISTRICT COURT OF LINCOLN COUNTY NEBRASKA

2015 JUN 16 PM 3 17

RONALD J. SAMUELSON AND
CLINTA LEON SAMUELSON,

Petitioners,

v.

THE NEBRASKA DEPARTMENT OF
REVENUE,

Respondent.

)
) CLERK OF THE
) DISTRICT COURT CASE CI 15-381

ORDER

(Dismissing appeal of agency decision)

I. BACKGROUND

This matter came on for consideration on April 28, 2015. The parties were represented by their respective counsel. The record for the appeal was established, briefs were submitted and the court took the case under advisement.

Ronald and Clinta Samuelson (Petitioners) have appealed the final decision of the Tax Commissioner denying a Petition for Redetermination of notices of deficiency issued by the Nebraska Department of Revenue (Respondent) for the 1995, 1996 and 1997 tax years. For the reasons set forth below, the court finds that the Tax Commissioner's order denying the Petitioners' request for redetermination should be affirmed and the Petition on Appeal to this court should be dismissed.

II. FACTS

The parties do not have much dispute as to the underlying facts including the dates tax filings were made and hearings conducted. In October, 1998, Petitioners filed joint Nebraska individual income tax returns for 1996, 1997 and 1998. In late 1998, the Petitioners were issued refunds for each of those tax years.



On April 11, 2001, the US Treasury issued Form 4549 reflecting income tax examination changes made by the IRS to the Petitioners' federal returns. Form 4549 disallowed the Petitioner's exclusion of certain amounts from income shown on the subject tax returns and assessed tax liabilities for the years in question. Form 4549 specifically advises recipients that IRS changes may create certain state tax filing obligations. The Petitioners did not file an amended individual income tax for the three years at issue with the State of Nebraska.

On May 11, 2001, Respondent issued notices of deficiency for the three tax years in question. On August 6, 2001, the Petitioners timely filed a Petition for Redetermination and request for hearing with the Respondent. Approximately one month later the Respondent acknowledged receipt of the Petitioners' request.

On July 8, 2005, the Respondent sent the Petitioners a settlement offer and proposed Motion to Dismiss the Petition for Redetermination. Petitioners responded by requesting the IRS tax information used by the Respondent in calculating the assessment.

By letter dated June 7, 2013, the Respondent again sought resolution and provided the Petitioners with the form required for disclosure of the IRS information. That letter was sent to the address for Petitioners in Wichita, Kansas, but was returned as undeliverable. On November 27, 2013, using an updated address, the Respondent again made inquiry of the Petitioners about resolution of the tax issues. The letter set a deadline of December 17, 2013, for the Respondent to assume the Petitioners' wish to proceed with a formal hearing. The Petitioners did not respond to the December 17, 2013, letter.

On February 21, 2014, the Respondent filed a Motion for Preliminary Conference. A final hearing was held on September 22, 2014. Following the September 22, 2014, hearing the

Tax Commissioner entered an order denying the Petition for Redetermination, and imposed an additional penalty finding the Petitioners' arguments were frivolous.

III. *STANDARD OF REVIEW*

Final actions of the Tax Commissioner may be appealed in accordance with the Administrative Procedure Act. Neb. Rev. Stat. §77-27, 127. This review is the exclusive remedy available to a taxpayer with respect to an assessment of a proposed tax deficiency. Neb. Rev. Stat. §77-27, 128.

"[W]hen challenging the decision of an administrative agency, the presumption under Nebraska law is that the agency's decision was correct, with the burden of proof upon the party challenging the agency's actions." *Gridiron Mgmt. Group, LLC v. Travelers Indem. Co.*, 286 Neb. 901, 839 N.W.2d 324 (2013).

This Court has the power to reverse, vacate, or modify the decision of Respondent for errors appearing on the record. See Neb. Rev. Stat. §84-918(3). The review by this Court is without a jury, de novo on the record of the agency. See *Langvardt v. Horton*, 254 Neb. 878, 581 N.W.2d 60 (1998). The record should consist of the transcripts and bill of exceptions of the proceedings before the agency and facts capable of being judicially noticed pursuant to Neb. R. Evid. *Id.*

In a true de novo review, the district court's decision is to be made independently of the agency's prior disposition, and the district court is not required to give deference to the findings of fact and the decision of the agency hearing officer. *Id.* However, for the purposes of construction, a rule or regulation of an administrative agency is treated like a statute. In the absence of anything to the contrary, language is to be given its plain and ordinary meaning and deference should be accorded to an agency's interpretation of its own regulations unless plainly

erroneous or inconsistent. *Melanie M. v. Winterer*, 290 Neb. 764, 862 N.W.2d 76 (2015); *Marion's Quality Servs. v. Neb. HHS*, 289 Neb. 982, 858 N.W.2d 178 (2015).

Neb. Rev. Stat. §84-906.05 provides: "(1) Every court of this state may take judicial notice of any rule or regulation that is signed by the Governor and filed with the Secretary of State pursuant to section 84-906."

IV. ISSUES

The court will deal with three issues. First, the court examines the implications of the rather inexcusable time delay in getting these issues resolved prior to this appeal. Next, the court will address the Petitioners' two arguments that, first, the Respondent's assessments were issued nearly two and one-half years after the refund which is six months beyond the two-year statute of liabilities, and next, that Form 4549, relied upon by the Respondent, does not satisfy the Respondent's burden prior to assessing a tax deficiency.

It should also be noted that the Petitioners have not induced any evidence that would suggest the Federal or State determinations are inaccurate. It appears to the court that their arguments are technical in nature and the court is not engaged to determine whether or not the Federal determination or the Respondent's assessment was calculated accurately or inaccurately.

V. ANALYSIS

a. Preliminary matters.

There is no dispute that the Petitioners' Request for Redetermination and oral hearing was filed in August 2001. That hearing took place on September 22, 2014, more than 13 years after the request. The Petitioners assert that the Respondent's actions should be barred by laches because of the extraordinary delay in this case. (Petition on Appeal, Pg. 4, VI, C.) Further, before the court can pass on the substantive legal issues raised by any party the court is required

to determine whether it had jurisdiction to do so. *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010). Thus, the court will consider whether the delay has an effect on the jurisdiction of the court or might otherwise constitute an equitable bar to recovery.

As a preliminary matter the court considers the Petitioners' claim of laches. Recently the Nebraska Supreme Court articulated the laches standards. In *Schellhorn v. Schmieding*, 288 Neb. 647, 654, 851 N.W.2d 67, 73 (2014) the Court stated:

The defense of laches is not favored in *Nebraska. Farmington Woods Homeowners Ass'n. v. Wolf*, 284 Neb. 280, 817 N.W.2d 758 (2012). Laches occurs only if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice. *Id.* Laches does not result from the mere passage of time, but from the fact that during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another. *Id.*

The record shows the required level of neglect. There is no evidence that shows, however, that the Petitioners have asserted any particular prejudice concerning the delay between the filing of the Petitioners' Petition for Redetermination on August 6, 2001, and the hearing, 13 years later, on September 22, 2014. While the court assumes some prejudice may, in fact, exist the court would have to engage in some speculation to determine whether during the lapse of time that circumstances changed such that to enforce the claim would work inequitably to the disadvantage and prejudice of the Petitioners. The court is unwilling to engage in such speculation.

Similarly, the court could not find any authority for the proposition that the extreme delay may have had an effect on the jurisdiction of the court. Accordingly, the court specifically finds it has jurisdiction to hear the matter and rule accordingly.

b. Statute of limitation.

Neb. Rev. Stat. §77-2787, provides:

An erroneous refund shall be considered an underpayment of tax on the date made, and an assessment of a deficiency arising out of an erroneous refund may be made at any time within two years from the making of the refund, except that the assessment may be made within five years from the making of the refund if it appears that any part of the refund was induced by fraud or the misrepresentation of a material fact.

Form 4549, reflects the adjustment taken by the IRS and which prompted Nebraska's action on April 11, 2001. These assessments were issued nearly two and half years after the refunds were made. Petitioners assert that the deficiency assessments are invalid because they were issued beyond a two-year timeline set for the Respondent to recover erroneous refunds in Neb. Rev. Stat. §77-2787. (Neither party argues the refunds were induced by fraud or misrepresentation of a material fact which changes the statute of limitations for a deficiency determination (Neb. Rev. Stat. §27-2786 (3)).

The Respondent submits that the Petitioners' reliance on Neb. Rev. Stat. §77-2787 is misplaced because the deficiency notices did not arise out of an erroneous refund under Neb. Rev. Stat. §77-2787 but, rather were pursuant to the Respondent's right to determine the deficiency pursuant to Neb. Rev. Stat. §77-2776, which provides, in part:

(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 or she shall notify the taxpayer of the amount of the deficiency proposed to be assessed. If the Tax Commissioner finds that the tax paid is more than the correct amount, he or she shall credit the overpayment against any taxes due by the taxpayer and refund the difference. The Tax Commissioner shall, upon request, make prompt assessment of taxes due as provided by the laws of the United States for federal income tax purposes.

The statute of limitations for a determination under §77-2776 is found at §2786 which provides that deficiency determinations must be mailed to the taxpayer "within three years after the return was filed."

The Petitioners' tax returns for the subject years were all filed on or about October 26, 2008. The Respondent's notices of deficiency determinations were mailed on May 11, 2001.

There is a distinction between an erroneous refund (§77-2787) and a deficiency determination under §77-2776. The simple reading of §27-2787 suggest that an erroneous refund is a circumstance where the Respondent erroneously issued a refund. The refunds in this case were issued on the tax returns filed by the Petitioners. The distinction to be drawn is that the determination made by the Respondent in this case under §27-2786 is a recalculation based on Form 4549. The petitioners cite no authority, and the court finds none, that suggests that the deficiency could be defined as a §27-2787 erroneous refund.

Thus, the court finds the Respondent's argument persuasive. The Respondent's notices of deficiency determinations did not arise out of an erroneous refund under §77-2787. Instead, the notices were based on the recalculation of the Petitioners' Nebraska income tax liability based on the IRS Form 4549 which was reported to the Respondent by the IRS.

The Respondent also notes that the assessments were not required even within the three-year period contained in §77-2786. In fact, §77-2775, provides that the taxpayer must report a change in the federal adjusted gross income, taxable income, or taxable liability within 60 days by filing amended tax return. When the taxpayer fails to file an amended return, as required by §77-2775, the Respondent may issue a deficiency determination at any time. Neb. Rev. Stat. §77-2786 (4).

Ultimately, the Respondent falls within the three-year time limit for deficiency notices under §77-2786 (1) or was allowed to issue the assessments pursuant to §77-2775.

c. Sufficiency of information to support the deficiency determination.

The Petitioners also take issue with the Respondent's use and reliance upon Form 4549 in two ways. First, they argue that the Respondent cannot presume that Form 4549 is correct or provides an adequate basis for the tax liability. Next, they argue that a "summary record of assessment" from the IRS *is required* to support the deficiency determinations of the Respondent.

As the first argument, Neb. Rev. Stat. §77-2782 provides that evidence of a federal determination as to tax issues shall be admissible under rules established by the Tax Commissioner. Further, Neb. Rev. Stat. §77-2778, provides for the protest by a taxpayer of an income tax deficiency assessment. The Nebraska Administrative Code provides that "evidence of a federal tax determination including, but not limited to, a Treasury Department determination letter,... or an Internal Revenue Service assessment relating to issues raised in the proceedings, shall be presumed to be accurate unless rebutted." 316 Admin. Code, ch.33, §012.04D.

The Nebraska statutory authority and adopted Administrative Code, persuades the court that the Respondent may properly use the federal tax determination to establish Petitioners' tax deficiency. Ultimately, the burden of proof rests on the taxpayer pursuant to Neb. Rev. Stat. §77-2781, which provides, with some exceptions not relevant in this case, in part, that "In any proceeding before the Tax Commissioner, the burden of proof shall be on the taxpayer...". The federal information is assumed to be accurate and, according to the evidence, the Respondent routinely relies on that information. To adopt the position of the Petitioners the court would have to redefine the burden set forth in statute which would not be proper.

As to the second argument, the Petitioners maintain that they should be provided with a "summary record of assessment" as proof of the assessment. The Petitioners do not dispute that evidence from a federal tax determination, including a determination letter, is presumed to be accurate unless rebutted. The Petitioners, however, suggests that the Respondent should not get the benefit of the presumption unless it is established that the federal assessment actually occurred and was properly made. The Petitioners cite to Section 26 CFR 301.6203-1 to support that proposition.

The Nebraska administrative code deems the instant determination letter accurate unless rebutted. 316 Admin. Code, ch.33, §012.04D. Agency regulations have the effect of statutory law and the court is required to give the Respondent's construction considerable weight. In doing so the court finds no authority for the proposition that the Respondent cannot use Form 4549 for the purpose of establishing the deficiency of the Petitioners.

Finally, the Respondent again notes that the Petitioners failed to file amended tax returns after being advised of the changes to their federal taxable income for the subject periods. Neb. Rev. Stat. §77-2775 (1) and (3). Thus, the Petitioners are deemed to have failed in their obligation to file an income tax return. In that circumstance, the Tax Commissioner, pursuant to Neb. Rev. Stat. §77-2776 (2), may estimate the taxpayer's liability from any available information and notify them of the assessment.

VI. CONCLUSION

It is beyond the providence of the court to speculate why this case has taken so long to come to issue. It appears both parties may be equally culpable. However, the court cannot find any prejudice in the record that provides authority to take any action other than to address the merits of the case on the issues as raised by the parties. The Respondent is

technically correct. The Tax Commissioner's order denying the Petition for Redetermination for each of the subject tax years and imposing additional penalties should be affirmed.

SO ORDERED ON 6th, 2015.

BY THE COURT:



ROBERT R. O'NEIL
DISTRICT JUDGE