

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

THE WESTERN SUGAR COOPERATIVE,)
CORPORATION,)
)
Petitioner,)
)
v.)
)
NEBRASKA DEPARTMENT OF REVENUE,)
KIMBERLY CONROY, NEBRASKA TAX)
COMMISSIONER, and the STATE OF)
NEBRASKA,)
)
Respondents.)

CASE NO. CI 13-4376

ORDER

INTRODUCTION

Western Sugar Cooperative, Corporation (Western Sugar) seeks judicial review of a final decision of the Nebraska Department of Revenue (the Department) and Kimberly Conroy, the Nebraska Tax Commissioner (the Tax Commissioner), denying, in part, a claim for a refund of sales and use taxes.¹ Western Sugar alleges, in part, that, pursuant to the Department's regulations, it submitted a written request for a hearing on its tax refund claim to the Department prior to the Tax Commissioner's final action on the refund claim and that no hearing was held.

Western Sugar has filed a motion for remand seeking an order remanding the action to the Department and the Tax Commissioner for a hearing on Western Sugar's refund claim. The parties have agreed the court should address the motion for remand prior to their briefing the other issues raised by Western Sugar, including the merits of the basis for the Tax Commissioner's partial denial of the refund claim.

¹ NEB. REV. STAT. Neb. Rev. Stat. § 77-2708(2)(f) (Cum. Supp. 2012), NEB. REV. STAT. § 77-27,127 (2009), and NEB. REV. STAT. § 84-917 (Cum. Supp. 2012)

DEPARTMENT OF JUSTICE

JUL 16 2014

STATE OF NEBRASKA

Hearing on the motion for remand was held on April 1, 2014. Matthew Ottemann appeared on behalf of Western Sugar; Assistant Attorney General L. Jay Bartel appeared on behalf of the Department and the Tax Commissioner. The court received the agency record, which consists of a ten volume Transcript.² It also took judicial notice of various regulations of the Nebraska Department of Revenue, which were marked and received into evidence.³ Upon consideration of the record and the briefs and arguments of counsel, the court finds as follows:

FACTS

On October 24, 2011, Western Sugar filed a Claim for Overpayment of Sales and Use Tax seeking a refund of Nebraska sales and use taxes in the amount of \$563,517.85 for the period from January 1, 2008, through May 31, 2011 (the Refund Claim). The Refund Claim was accompanied by a letter dated October 20 and signed by Beth Ann Boyer of Crowe Horwath LLP, acting under a power of attorney for Western Sugar. In her letter, Ms. Boyer discussed the categories of items which Western Sugar claimed were exempt and subject to refund. Ms. Boyer concluded her letter by offering to provide answers with respect to any questions which may arise as a result of the Refund Claim and by looking “forward to working with you in resolving the refunds requested in this letter”.

With respect to the filing of a claim for an overpayment of tax, the Department’s Practice and Procedures Regulations provide that

[a] claim shall not be presumed to be a request for a hearing. Unless the claim is approved in full by the Tax Commissioner, the Tax Commissioner shall grant a petitioner an opportunity for a hearing if requested in writing by the claimant.[⁴]

Other than claims relating to income taxes, “the request for a hearing must be made when the claim is filed or prior to the Department taking any action on the claim.”⁵ A request for a hearing was not made when the Refund Claim was filed.

² Exhibits 1 through 10. NEB. REV. STAT. § 84-917(4) (Cum. Supp. 2012).

³ Exhibits 11 and 12.

⁴ 316 NEB. ADMIN. CODE § 33.002.03.

⁵ NEB. ADMIN. CODE § 33.002.03B.

On January 31, 2012, Daniel Megathlin, Director of Crowe Horwath, sent an e-mail to Cliff Thomas, Tax Specialist Sr. with the Department, concerning the Refund Claim.⁶ Mr. Megathlin stated he was “looking forward to working with [Mr. Thomas] to resolve this case.” In response to a request from Mr. Thomas, an updated Power of Attorney designating Mr. Megathlin and Kim Ciamarra as Attorneys-in Fact for Western Sugar was sent to the Department on February 16.

On February 17, 2012, Mr. Thomas sent a letter to Mr. Megathlin concerning the Refund Claim. In his letter, Mr. Thomas requested specific information relating to the issues described in Ms. Boyer’s October 20, 2011, letter. He ended his letter expressing the hope that the information could be provided “within the next two weeks”.

On February 21, 2012, Mr. Megathlin acknowledged receipt of Mr. Thomas’ February 17 letter. Mr. Megathlin requested that, “to be respectful” to Western Sugar, he be given “until the end of the production season [believed by him to be the end of February or the first week in March] before jumping into the details” necessary to respond to Mr. Thomas’ request. Mr. Thomas responded that same day, advising Mr. Megathlin that the Department only had 180 days to approve, partially approve or disapprove a refund claim, that the 180 days for the Refund Claim “runs through April 20, 2012” and that decisions would have to “be made on or before that date”. Mr. Megathlin responded that same date, stating he would “explain the drop dead ‘due date’ to the client” and that he, too, wanted the Refund Claim to be “resolved quickly”. Mr. Megathlin’s response also addressed some of the questions posed by Mr. Thomas’ letter of February 17.

On March 8, 2012, Mr. Thomas requested information from Mr. Megathlin relating to one of the Refund Claim issues. On March 9, Mr. Megathlin responded that he was traveling for work, but that he planned to focus on Mr. Thomas’ request the following week. On March 15, Mr. Megathlin provided Mr. Thomas with documents and ended his communication with “Look forward to working with you to resolve this.”

On April 2, 2012, Mr. Thomas again contacted Mr. Megathlin inquiring whether he would be submitting any additional information to address the Department’s questions. On

⁶ Unless otherwise provided, all communications between Mr. Megathlin and Mr. Thomas were via e-mails and/or attachments thereto.

April 3, Mr. Megathlin responded, saying he would be providing additional information. Mr. Megathlin also stated he wanted to make arrangements to schedule a conference call “with one of the plant engineers” to address questions Mr. Thomas might have and invited any further questions Mr. Thomas might have.

With the 180-day deadline looming, on April 13, 2012, Mr. Thomas inquired of Mr. Megathlin whether he wanted to extend the 180-day deadline or was considering withdrawing the claim and resubmitting it at a later date. On April 14, Mr. Megathlin responded, asking what needed to be done to get an extension. On April 17, Mr. Thomas provided Mr. Megathlin with an extension form extending the deadline to May 31, 2012. Mr. Megathlin signed and submitted the extension form on April 18.

On May 7, 2012, Mr. Thomas provided Mr. Megathlin with the Department’s position that, except for the special dark enrobing syrup, it was not persuaded that claimed chemicals became an essential ingredient or component part of a finished product or by-product and were not, therefore, qualified for the ingredient/component part tax exemption. Recognizing that Western Sugar may still wish to pursue its claim that certain chemicals were tax exempt, Mr. Megathlin was informed that, if “Western Sugar would like to continue to pursue this matter”, it needed to provide documentation to support its position. In his response of May 23, Mr. Megathlin stated he wanted to “have a meeting on this subject as we would like to protest your findings.” Mr. Megathlin explained reasons for disagreeing with the Department’s position and requested Mr. Thomas to let him “know the next steps in the process”.

On May 29, 2012, a second extension was agreed to, extending the 180-day deadline to June 29, 2012.

On June 6, 2012, Mr. Megathlin notified Mr. Thomas he was planning to meet with Western Sugar in Nebraska during June and that he wanted “to use the opportunity to schedule a meeting with you to go over all aspects of our refund Claim in detail and try to resolve the outstanding issues.” Mr. Megathlin asked Mr. Thomas to let him “know some dates that work for you later this month.” Mr. Thomas responded immediately, stating he would not be available between June 20 and July 4. On June 7, Mr. Megathlin suggested June 14 as a possibility; however, he preferred to “meet” July 5 or 6 or during the week of July 9. With respect to the planned meeting, which he thought might take half a day, Mr. Megathlin said he would have

with him the person on his staff who put the Refund Claim together and someone from Western Sugar, to help getting the Refund Claim finalized. He also thought one more deadline extension would be necessary.

On June 14, 2012, Mr. Thomas requested Mr. Megathlin to provide a list of chemicals for which Western Sugar was no longer claiming a tax exemption and inquired whether he planned to provide any written information to “support your ingredient and component part argument?” If Mr. Megathlin was not planning on providing any additional information, Mr. Thomas asked whether he still wanted to meet to discuss the Refund Claim and, if he did, whether “all of the issues set forth in the [Refund Claim were] on the table or just the ingredient and compone[nt] part”? In his June 15 response, Mr. Megathlin stated he would be working with Western Sugar to provide additional information to the Department to support the tax exemption claims. He committed to providing additional information relating to remaining tax exemption claims by July 15 and, if once that information was provided there was still disagreement, requested “a meeting/hearing to discuss further”. He concluded by suggesting another extension for multiple months, since “if a hearing is necessary, people are often out for weeks in July on vacations”.

On June 15, 2012, a third extension was agreed to, extending the 180-day deadline to August 31, 2012.

In a letter dated July 11, 2012, to Mr. Thomas, Mr. Megathlin protested the Department’s “initial refund findings”. The letter contained “additional information and analysis” to support the positions of Western Sugar that it was entitled to a refund. At the end of the letter, Mr. Megathlin requested:

1. A detailed listing of items approved and denied (including reason for denial) for the submitted refund; and
2. A meeting to go through the refund and discuss the items denied in order to provide additional documentation to support the refund of such items.^[7]

Mr. Megathlin ended the letter by agreeing to answer any questions Mr. Thomas might have and expressing that he looked forward to working with Mr. Thomas to resolve the refund issues being protested.

⁷ Exhibit 9, page 2223.

On August 15, 2012, Mr. Megathlin contacted Mr. Thomas inquiring about what was going on and “the next steps on this”. He offered a tour of Western Sugar’s facility to help visualize the process described in prior written communications and reduced the chemicals for which Western Sugar was claiming it was entitled to a refund. Mr. Megathlin asked whether any additional information was needed (e.g., affidavits) and inquired “Has a hearing been scheduled yet or is this necessary?”

On August 27, 2012, a fourth extension was agreed to, extending the 180-day deadline to October 31, 2012.

On September 26, 2012, Mr. Thomas responded to Mr. Megathlin’s letter of July 11, setting forth what Western Sugar had to establish to be entitled to the exemptions it claimed. The response also detailed why the Department was of the opinion Western Sugar was not entitled to the exemptions. On September 27, Mr. Thomas sent additional information to Mr. Megathlin on the Department’s position with respect to information previously provided by Western Sugar. The information of September 26 was resubmitted to Mr. Megathlin on October 12. On October 19, Mr. Megathlin responded to the information provided by Mr. Thomas on September 26. In his response, Mr. Megathlin requested a conference call be set up early the following week.

On October 26, 2012, Mr. Thomas informed Mr. Megathlin it did not appear the Refund Claim was going to be resolved by the existing October 31 deadline and another extension would be necessary. Mr. Thomas also addressed some of the issues raised by Mr. Megathlin on October 19. On October 26, a fifth extension was agreed to, extending the 180-day deadline to December 31, 2012.

On November 27, 2012, Mr. Thomas asked Mr. Megathlin some questions with respect to “the pallet” issue and let him know “the ingredient and component issue” was still being reviewed by the Department. Mr. Megathlin provided additional information on November 28.

On December 21, 2012, a sixth extension was agreed to, extending the 180-day deadline to February 28, 2013.

On January 17, 2013, Mr. Megathlin inquired whether he and Mr. Thomas should meet later in January, stating he was available the week of January 28, since he was going to be meeting with Western Sugar that week. On February 11, Mr. Megathlin again reiterated that he

wanted to meet with Mr. Thomas “to discuss the remaining issues of contention”. On February 14, Mr. Thomas reported the Department’s position on Western Sugar’s claims based upon the information available to it and inquired whether Western Sugar would be providing any additional information. Mr. Thomas also asked Mr. Megathlin how he “would like to proceed”. Mr. Thomas reiterated his “how do you want to proceed” comment on February 22. Mr. Megathlin responded on February 25 saying, once he understood what Mr. Thomas was wanting he would get with Western Sugar. He again stated he wanted “to schedule a meeting [the] next time [he was] in town”, which he wanted to have set for early March.

On February 26, 2013, a seventh extension was agreed to, extending the 180-day deadline to April 30, 2013.

On April 5, 2013, Mr. Thomas and Mr. Megathlin had a telephone conference call. On April 25, Mr. Thomas notified Mr. Megathlin there would be “[o]ne last extension through May 31, 2013.” He also let Mr. Megathlin know he would be providing him with responses to questions raised during their telephone conference call. Mr. Megathlin responded on April 26 that he was getting more specific information from Western Sugar. On April 26, an eighth extension was agreed to, extending the 180-day deadline to May 31, 2013.

On May 23, 2013, Mr. Megathlin informed Mr. Thomas that he was working with Western Sugar to provide additional information concerning the chemicals at issue. On May 29, Mr. Thomas provided Mr. Megathlin with the Department’s position with respect to the various aspects of the Refund Claim. He also posed some additional questions/concerns.

On May 31, 2013 a ninth extension was agreed to, extending the 180-day deadline to June 28, 2013.

On June 27, 2013, Mr. Megathlin informed Mr. Thomas that Western Sugar was obtaining information to respond to Mr. Thomas’ questions. Notwithstanding that, Mr. Megathlin agreed that it appeared to him that Western Sugar and the Department were at “an impasse on the larger issues”. He committed to providing Western Sugar’s additional information by July 15, so “we can finalize this by the end of next month”. On that same date, Mr. Thomas responded by again providing Mr. Megathlin with the information previously provided on May 29. In his response, Mr. Thomas opined that it was time to “wrap of this refund claim”, since he did not believe Western Sugar was going to provide any additional

information to support its refund claim on unresolved matters. He ended by stating: "Please let me know how you want to proceed." A tenth extension was agreed to on June 27, extending the 180-day deadline to July 31, 2013.

On July 18, 2013, Mr. Megathlin provided Mr. Thomas with additional information. On July 22, Mr. Thomas acknowledged receipt of the new information, requested some additional information and answers to posed questions and informed Mr. Megathlin that, based upon the information/answers provided, he might have more questions. Mr. Megathlin forwarded more information to Mr. Thomas on July 30. On that same date, Mr. Thomas asked Mr. Megathlin whether he was "ready to wrap this refund claim process up today or tomorrow?" That was followed-up by an eleventh extension agreed to on that date, extending the 180-day deadline to August 30, 2013.

On August 21, 2013, Mr. Megathlin inquired of Mr. Thomas whether he had any additional questions, based upon the information provided, or anything else he wanted to discuss. Mr. Megathlin concluded with "I assume we are striving to complete this by the end of this month." On August 26, Mr. Thomas acknowledged he had received the additional information, but, due to health issues, had not been able to review it. He asked whether there could be another extension. Mr. Megathlin agreed and, on August 27, the twelfth extension was agreed to, extending the 180-day deadline to September 30, 2013.

On September 27, 2013, Mr. Thomas notified Mr. Megathlin of the Department's position with respect to the issues raised by the Refund Claim. The notification included that, if another extension was not submitted to allow time for Western Sugar to present more documents to support its claims, the Refund Claim, which was for \$563,517.85, would be approved for \$15,592.54. On that same date, the thirteenth extension was agreed to, extending the 180-day deadline to October 31, 2013.

On October 31, 2013, the Tax Commissioner approved \$15,592.54 of the Refund Claim. As a result, the remainder of the Refund Claim was disapproved. The Department provided notice to Western Sugar by a letter dated November 1, 2013. Attachments to the letter included documents from Mr. Thomas explaining the Department's position on those parts of the Refund Claim denied and a statement of the refundable amounts of the Refund Claim.

Between October 24, 2011, and October 31, 2013, the Tax Commissioner did not provide Western Sugar with a hearing.

DISCUSSION

By way of its motion to remand, Western Sugar argues, in a nutshell, that, although requested in writing, it was never granted a hearing on the Refund Claim by the Department and/or the Tax Commissioner. As a result, it claims it is entitled to have this matter remanded for a hearing on its Refund Claim by the Department. The Department and the Tax Commissioner disagree.

A. Hearing Required: Communications between Mr. Megathlin and Mr. Thomas trying to resolve issues raised by and relating to the Refund Claim prior to the final action taken on October 31, 2013, took place, generally speaking, between January 31, 2012, and September 27, 2013. During that period of time, there were two specific uses of the word “hearing” in written communications from Mr. Megathlin, the power of attorney for Western Sugar, to Mr. Thomas and, according to Western Sugar, one “substantive [written] request” for a hearing.

On June 15, 2012, Mr. Megathlin sent an e-mail to Mr. Thomas⁸ in response to Mr. Thomas’ e-mail of June 14. In addition to trying to distinguish the Refund Claim from other claims referred by Mr. Thomas, Mr. Megathlin stated that additional information would be provided in support of the Refund Claim. He also let Mr. Thomas know that he and his “team” would be visiting with Western Sugar the following week, would address with Western Sugar issues raised by Mr. Thomas and would forward the responses to Mr. Thomas. At that point Mr. Megathlin wrote: “If there is [sic] still disagreed items upon your review of the final information provided, then I would like to respectfully request a meeting/hearing to discuss further.”⁹ Rather than a written request for a hearing, the reference to a hearing in the June 15 e-mail is more aptly described as a notification or warning that, if the parties are not able to agree, there will then be a request for a hearing. That interpretation is reinforced by Mr. Megathlin’s reference to “if a hearing is necessary” in the last paragraph of the e-mail.¹⁰

⁸ Exhibit 9, page 2216.

⁹ *Id.*

¹⁰ *Id.*

What Western Sugar refers to as a “substantive request” for a hearing was made at the end of Mr. Megathlin’s letter of July 11, 2012.¹¹ Mr. Megathlin characterized his letter as representing a “protest” to the initial findings of the Department on the Refund Claim. The letter provided a detailed analysis of each of the issues raised by the Refund Claim and why the Refund Claim should be approved. At the end of the letter, “[i]n order to resolve this protest”, Mr. Megathlin made the following “Request”:

1. A detailed listing of items approved and denied (including reason for denial) for the submitted refund; and
2. A meeting to go through the refund and discuss the items denied in order to provide additional documentation to support the refund of such items.^[12]

Western Sugar argues that this “procedure” is exactly what would have occurred, if a formal hearing had been held under the Department’s Practice and Procedures Regulations.¹³

The “Request”, however, was not a written request for a hearing. Rather, it represented a request that the Department and Western Sugar’s representatives meet “to go through the refund and discuss the items denied in order to provide additional documentation to support the refund of such items”. That is exactly what occurred during the 15 months between July 11, 2012, and September 27, 2013. During that time period, there were numerous written communications between Mr. Megathlin and Mr. Thomas relating to the Refund Claim. Those communications outlined items for which there were no concerns and those for which there were concerns; the reasons for concerns to some of the items; and a request for and consideration of additional documents to address the concerns. The “Request” made through the July 11, 2012, letter was complied with by the Department.

Finally, Western Sugar points to Mr. Megathlin’s August 15, 2012, e-mail¹⁴, which is the first communication in the record between Mr. Megathlin and Mr. Thomas subsequent to the July 11 letter. Mr. Megathlin started the e-mail with “what are the next steps on this? I have not heard anything from you in a while. ” He then offered to arrange for a tour of the Western

¹¹ Exhibit 9, page 2220.

¹² *Id.* at page 2223.

¹³ *See, e.g.*, 316 NEB. ADMIN. CODE §§ 33.012 and 33.014.

¹⁴ Exhibit 9, page 2233.

Sugar facility and discussed concerns that have been raised “[r]egarding the chemicals”. The penultimate paragraph of the e-mail raised the question “Has a hearing been scheduled yet or is this necessary?” By questioning whether a hearing is “necessary”, Mr. Megathlin acknowledged that, as of that time, he had not made and was not making a written request for a hearing before the Department on behalf of Western Sugar.

Apparently recognizing the offhanded and/or tentative manner in which Mr. Megathlin used the word “hearing” in his e-mails of June 15 and August 15, 2012, Western Sugar points to modifications of the Department’s Practice and Procedure Regulations subsequent to January 30, 2010, to support its argument that a request can be made by a “substantive request”, as it argues with respect to the “Request” in Mr. Megathlin’s July 11, 2012, letter. Prior to January 30, 2010, the regulation relating to requesting “an oral hearing” provided, in part, as follows:

A claim for a refund . . . shall not be presumed to be a request for an oral hearing. The Tax Commissioner shall grant a taxpayer or his authorized representative an opportunity for an oral hearing if the taxpayer so requests. In this latter case, the request for an oral hearing should be made at the time of filing the claim for refund For example, the following language will be considered a request for an oral hearing on a claim for refund: ‘Before any denial of this claim for refund, an oral hearing is requested.’^{15]}

As pointed out at the outset, subsequent to January 30, 2010, the requirement became that, when a claim for a refund of any overpayment of tax is filed, other than a claim for a refund of income tax, a request “for a hearing must be made when the claim is filed or prior to the Department taking any action on the claim”.¹⁶

The existing regulation contains no recommended language that needs to be made to effectuate a request for a hearing. Western Sugar interprets the lack of such language as representing the Department’s “intent to allow taxpayers to request a refund claim by making a substantive request for such hearing, even if such substantive request did not use specific language”.¹⁷ The court does not agree.

¹⁵ Exhibit 11, 316 NEB. ADMIN. CODE § 33-003.01A.

¹⁶ 316 NEB. ADMIN. CODE § 33.002.03A and B. The parties are in agreement that no action as contemplated by this regulation was taken on the Refund Claim prior to, at the earliest, October 31, 2013.

¹⁷ Western Sugar’s brief in support of motion for remand, page 5.

While the existing regulation does not require the inclusion of any magic language before a taxpayer is entitled to a hearing on a refund claim, a taxpayer must make a request for a hearing in unequivocal language, expressing the clear intent that resolution of the refund claim must be done through the formal hearing process. Anything less would allow a taxpayer, after providing a “substantive request”, to try and resolve a refund claim informally and, when the refund claim is not resolved to the taxpayer’s satisfaction, to claim that, months prior to the final determination, a “substantive request” for a hearing had been made. Surely, it was not the Department’s intent that a taxpayer be allowed to lull it into believing that a claim was being resolved informally, when explicit, unequivocal notice of requesting a formal hearing was not made. That is not what the regulation authorizes.

Even presuming, for purposes of argument, that Mr. Megathlin’s e-mails of June 15 and August 15, 2012, somehow should have signaled to the Department that Mr. Megathlin was requesting a formal hearing on the Refund Claim, his continued communications and negotiations with Mr. Thomas between then and the final decision on October 31, 2013, clearly indicated that, for whatever reason, he elected not to pursue that option and effectively withdrew his request. This election is evident not only by the nature of the many communications between the two (e.g., Mr. Megathlin not responding to Mr. Thomas’ “how do you want to proceed” inquiries with “have a hearing”) but also by the eleven 180-day deadline extensions filed on behalf of Western Sugar during that 15-month time period.

B. Due Process: “Procedural due process . . . requires that parties deprived of . . . [property interests] be provided adequate notice and an opportunity to be heard.”¹⁸ Western Sugar argues it was not afforded due process because its request for a formal hearing was, in essence, ignored. As just discussed, the court has found that a request for a formal hearing was not made by Western Sugar.

By providing a procedure by which Western Sugar could have requested and had a formal hearing¹⁹, the Department satisfied the necessary due process requirement. It is of no

¹⁸ *Marshall v. Wimes*, 261 Neb. 846, 851, 626 N.W.2d 229, 234 (2001) (citations omitted).

¹⁹ 316 NEB. ADMIN. CODE § 33.002.03 and § 33.002.03B.

consequence that Western Sugar, for whatever reason, elected to forego use of the process provided by the Department.²⁰

CONCLUSION

For the reasons set forth herein, the court finds that Western Sugar's motion for remand should be, and hereby is, denied. The matter is to proceed on the merits.

Hearing on the merits is set for November 3, 2014 at 8:30 a.m., in Courtroom #36, at 575 South 10th Street, Lincoln, Nebraska.

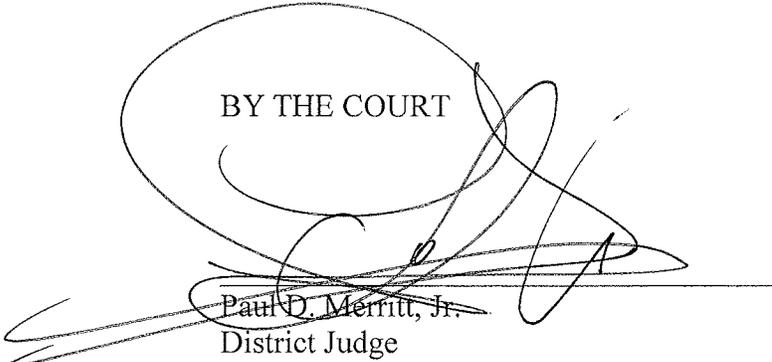
Western Sugar's brief is due to the court's bailiff not later than August 22, 2014; the brief of the Department and the Tax Commissioner is due to the court's bailiff not later than September 22, 2014; and any reply brief is due October 7, 2014. Without written permission of the court, briefs are not to exceed 25 pages in length.

A copy of this order is sent to counsel of record.

Dated July 14, 2014.

SO ORDERED.

BY THE COURT



Paul D. Merritt, Jr.
District Judge

c: Mr. Matthew R. Ottemann, Mr. L. Jay Bartel

²⁰ *Garamendi v. Golden Eagle Ins. Co.*, 116 Cal. App. 4th 694, 706, 10 Cal. Rptr. 3d 724, 736 (2004) (footnote 4) (due process demands only that litigants have the *opportunity* to be heard, not that they avail themselves of that opportunity) (emphasis in original).