Doc. No. 344675

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

NOTICE OF JUDGMENT

Gibbon Packing LLC v. Nebraska Department of Revenue

Case ID: CI 10 702

Judgment has been entered. Affirming tax commisioner

Judgment Date: 05/06/2011

If a money judgment other than child support is owed to the court, payment may be made directly to the court or on-line at: ne.gov/go/paycourts. For information regarding child support payments contact 1-877-631-9973.

Date: MAY 9, 2011 BY THE COURT: Sue M. Kirkland
Clerk

DEPARTMENT OF JUSTICE

MAY 10 2011

STATE OF NEBRASKA

Attorney General Jon Bruning
State Capitol, Room 2115
Post office Box 98920
Lincoln, NE 68509-8920

Jay B
COPY

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

GIBBON PACKING, LLC,	)	**Case No. CI 10-702**
	)	
Petitioner,	)	
	)	
vs.	)	**O R D E R**
	)	
NEBRASKA DEPARTMENT OF REVENUE, an Agency of the State of Nebraska, and DOUGLAS A. EWALD, Tax Commissioner,	)	
	)	
Respondents.	)	

This matter came before the court on February 24, 2011, for hearing on this taxpayer's appeal from a final decision of the Tax Commissioner denying a claim for refund of sales taxes paid by petitioner, Gibbon Packing, LLC (Gibbon). Gibbon was represented by Michael L. Schleich. Assistant Attorney General L. Jay Bartel appeared on behalf of the Nebraska Department of Revenue (Department) and Douglas A. Ewald, Tax Commissioner (Tax Commissioner). Exhibit 1 was received and the matter was submitted on briefs. The court, now being fully informed, finds as follows:

STANDARD OF REVIEW

Pursuant to the Administrative Procedure Act (APA), Neb. Rev. Stat. Section 84-917(5)(a), this court's review in this matter is de novo on the record.

DEPARTMENT OF JUSTICE
MAY 09 2011
STATE OF NEBRASKA

FACTS

This case is an appeal from a final decision of the Tax Commissioner denying Gibbon's request for a refund of sales taxes paid on cleaning services performed at Gibbon's meat processing facilities in Nebraska. The refund request was filed on April 24, 2009 and was accompanied by a request that the Department and Tax Commissioner suspend the 180 day-time period to act on the refund request provided in Neb. Rev. Stat. § 77-2708(2)(d) (2009), until a decision was issued by the Nebraska Supreme Court involving a taxpayer refund request challenging taxation of similar cleaning services. This requested stay was granted by written agreement. That agreement provided that the Tax Commissioner would act on Gibbon's refund request within 180 days of a decision by the Nebraska Supreme Court.

On October 23, 2009, the Nebraska Supreme Court issued its opinion in the earlier refund cases. *Swift and Co. v. Nebraska Dept. of Revenue*, 278 Neb. 763, 773 N.W.2d 381 (2009). In *Swift*, the Court held that, in adopting Reg. 1-098.03A, "the Department did not exceed the scope of its rulemaking authority." *Id.* at 679, 773 N.W.2d at 386. The Court found "the taxpayers could not sufficiently refute[] that cleaning personal property and cleaning the building in which the personal property is located are nearly indistinguishable in this case." *Id.* The Court went on to say that "Reg. 1-098.03A shows it clearly contemplates that taxable cleaning and maintenance of tangible personal property be incidental and related to the cleaning and maintenance of the building and fixtures, which it was in this case." *Id.* at 769-70, 773 N.W.2d at 387. The Supreme Court further found "that the Department did not go beyond its authority when it passed Reg. 1-098.03A and that it did not err when it denied the requests for a refund...," and that "the

district court erred when it invalidated Reg. 1-098.03A...." *Id.* The Court reversed and remanded the decision of the district court.

After the *Swift* decision, Gibbon did not contact or communicate with the Department regarding the pending refund request. On January 25, 2010, 95 days after *Swift* was decided, the Tax Commissioner notified Gibbon by letter that he had acted on the refund request by denying the same, based on the opinion in *Swift*. The denial letter contained notice of Gibbon's right to appeal.

On February 12, 2010, Gibbon sent the Department and the Tax Commissioner a motion to reconsider and request for hearing. The motion sought reconsideration by the Tax Commissioner of the January 25, 2010 denial and further requested that the Department "reopen the administrative record and hold a hearing" on Gibbon's refund request. The motion made clear that Gibbon now wished to present after-acquired evidence to support the refund request.

By letter dated February 22, 2010, the Tax Commissioner notified Gibbon that the Department would not take action on the motion to reconsider or the request for hearing. This appeal followed.

DISCUSSION

In this appeal, Gibbon claims that the Tax Commissioner and Department abused their discretion in failing to grant the motion to reconsider and the request for hearing and asks this court to reverse those decisions and remand this matter back to the Department and Tax Commissioner for hearing on Gibbon's refund request.

It is clear from Nebraska case law that an administrative agency has inherent authority to reconsider its own decisions until either a timely appeal is filed or within 30 days of the decision

being issued. See, *Bockbrader v. Dept. of Public Institutions*, 220 Neb. 17, 367 N.W.2d 721 (1985); *Andrew Van Lines, Inc. v. Smith*, 187 Neb. 533, 192 N.W.2d 406 (1971); *Morris v. Wright,* 221 Neb. 837, 381 N.W.2d 139 (1986); *B.T. Energy Corp. v. Marcus*, 222 Neb. 207, 382 N.W.2d 616 (1986); *City of Omaha v. Wade*, 1 Neb. App. 1168, 510 N.W.2d 564 (1993).

However, the Department argues that Neb. Rev. Stat. § 77-27,127 (2009) is a legislative restriction on the Department's power to reopen, modify, or rehear a decision once it has been issued. The court does not read this statute as narrowly as the Department and in fact finds nothing within the language of Neb. Rev. Stat. § 77-27,127 that restricts the inherent authority of the Department to reconsider, reopen the record, or have a hearing. This statute simply provides that an aggrieved party's exclusive remedy, beyond the Department, is to file an appeal in accordance with the Administrative Procedure Act. That being said, the question in this case is whether the Department abused its discretion in not granting Gibbon a hearing and reconsidering the refund request.

In determining whether the Department abused its discretion by failing to grant Gibbon a hearing on the request for refund, it is important to look at who has the responsibility either to request or set a hearing in the first place. The procedural regulation in effect at the time of the filing of the refund claim answers this question. That regulation, 33-033.01A provided in pertinent part:

> A claim for 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 the filing of the claim for refund.... For example, the following language will be considered a request for oral hearing on a claim for refund: "Before any denial of this claim for refund, an oral hearing is requested."

It is clear from this regulation that the burden is upon the taxpayer to request a hearing and the time to do so is at the time the request for refund is filed. In the instant case, there was no request for hearing contained in Gibbon's request for refund.

At the time Gibbon filed the request for refund, it also requested a stay of the Department's obligation to decide the request for refund within 180 days. That request was granted by the Department and subsequently, the parties entered into a written agreement on April 30, 2009. That agreement provided that, "Should the Nebraska Supreme Court issue a decision for the pending cases either affirming or reversing the Lancaster County District Court, the Department will act upon the new claims within 180 days of such decision." No mention was made in the written agreement that Gibbon was requesting a hearing on the request for refund prior to any decision by the Department. The stay agreement was entered into in order to allow the validity of similar refund requests to reach finality in litigation. To preserve Gibbon's opportunity to fully present their request for refund, it could have included in this agreement that it was requesting a hearing on the claim. It did not.

On October 23, 2009, the Nebraska Supreme Court decided *Swift and Co. v. Nebraska Dept. of Revenue*, 278 Neb. 763, 773 N.W.2d 381(2009). The Department decided Gibbon's claims on January 25, 2010, 95 days after the Nebraska Supreme Court issued the decision in *Swift*. After the *Swift* decision and prior to making the decision on Gibbon's claims, the Department heard nothing from Gibbon. The Department did not make inquiry of Gibbon as to whether it wanted to have a hearing nor did the Department schedule a hearing. The Department had no responsibility to do so. It was Gibbon's responsibility under the rules and regulations to request a hearing, if it wished to have one.

It was only after the Department denied the refund request, based upon the information included with the original request, that Gibbon asked for a hearing and reconsideration of the decision to deny the refund request. This court cannot find that the Department abused any discretion in denying this request. It was clearly Gibbon's duty to ask for a hearing under the rules and regulation, not the duty of the Department to inquire whether Gibbon wanted one.

As part of Gibbon's motion to reconsider and request for hearing, it alleged that "Since the Department issued its decision, Gibbon completed a Sanitation Time Analysis study conducted by outside industrial engineers." The "study" was also attached to the motion. The "study" itself reveals that the engineers hired by Gibbon began the study with a site visit to the Gibbon facility on December 10, 2009. The study was not completed until February 11, 2010. Gibbon wanted to present this "study" to the Department after the Department denied the claims. The Department declined to act on Gibbon's request to present this evidence after the denial of the claims. Not only is Gibbon asking this court to find that the Department abused its discretion in failing to grant Gibbon a hearing when Gibbon failed to request one as required by the applicable rules and regulations, Gibbon is also asking the court to find that the Department abused its discretion in failing to grant Gibbon's request to present this "study" that neither existed nor had been completed at the time the denial was made. At no time did Gibbon inform the Department that it had begun such a study and was wanting to present it to the Department prior to a ruling on the request for refund.

The facts are clear. Gibbon filed a request for a tax refund, but did not request a hearing on the refund request, as provided under the applicable regulations. Gibbon did not request a hearing when it entered into the agreement with the Department to stay the Department's 180

day-time limit within which to decide the refund request. Gibbon did not request a hearing after the Supreme Court decided *Swift*. And, Gibbon did not request a hearing during the 95 days between the *Swift* decision and the Department's denial of Gibbon's claim. Under the regulations, it was Gibbon's duty to request a hearing. The Department had no responsibility or duty to inquire whether Gibbon wanted one or to give Gibbon a "head's up" that a decision was going to be made, as Gibbon has suggested in its brief. The Department's duty was to decide the Gibbon request for refund within 180 days of the *Swift* decision. It did so. There is no abuse of discretion by the Department in failing to grant a hearing or to reconsider its decision.

To find that the Department abused its discretion under these circumstances would be a dangerous precedent to set. It would result in a finding that a taxpayer could file a refund request, not ask for a hearing as provided in the rules and regulations, sit back and await a decision by the Department, and, upon receipt of an adverse ruling, request a hearing by the Department to reconsider evidence that was not presented to the Department in the first place, and in this instance, evidence that didn't even exist until after the adverse ruling was made. Such a finding would eliminate any need for a taxpayer to follow validly promulgated rules and regulations. It would encourage taxpayers to wait for a ruling, and in the event that ruling was adverse to the taxpayer, then and only then gather or seek evidence in support of their claim and request the hearing to present that evidence. This simply cannot be what the law was intended to allow. As indicated above, it would be a dangerous precedent, not one this court is willing to set.

CONCLUSION

The Department denied Gibbon's refund request on the basis of the information provided by Gibbon in the original request. The Department had no duty to seek further information from

Gibbon, to notify Gibbon that a decision was going to made, or to delay making the decision. The Department did not abuse its discretion in not granting the motion to reconsider and for hearing. The decision to deny the refund request is affirmed.

For the above and foregoing reasons, the court finds that the petitioner's appeal from the Department's decision denying the refund request and taking no action on the request to reconsider and to have a hearing, is overruled. The decision to deny the refund request is affirmed. Costs in this matter are taxed to petitioner.

DATED: May 6, 2011.

BY THE COURT:

Jodi L. Nelson
District Judge

cc *Michael L. Schleich, Attorney for Petitioner*
Assistant Attorney General L. Jay Bartel, Attorney for Respondents