

Subs-tax

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

WILLIAM McMANIGAL, d/b/a)	Docket 370	Page 210
BILL'S BAR,)		
)		
Plaintiff,)		
)		
vs.)	DECREE	
)		
DONNA KARNES, STATE)		
TAX COMMISSIONER,)		
)		
Defendant.)		

Now, this matter came on for trial on the 20th day of May, 1983, upon the pleadings and files. The plaintiff was present by and through his attorney, Steven M. Lathrop, and the defendant by and through her attorney, Ralph Gillan, Assistant Attorney General. Evidence was adduced, the matter argued and briefs now having been submitted, and the Court being duly advised in the premises finds as follows:

1. That this is an appeal of an order of the defendant, State Tax Commissioner, revoking the sales tax permit of the plaintiff herein April 26, 1983.
2. That the Court has jurisdiction over the parties and subject matter hereto.

3. That the Commissioner after an audit of plaintiff's records for the period of November 1, 1979, through April 30, 1982, found that the plaintiff was liable for \$5,514.80 in sales tax, penalty and interest.

4. That the Commissioner thereafter issued a notice of jeopardy determination and assessment on February 25, 1983, which was mailed by certified mail to the plaintiff and which was signed for by plaintiff's wife at plaintiff's place of business in Hooper, Nebraska. In said notice, demand was made for the immediate payment of the tax, penalty and interest due and plaintiff was advised that the determination would become final and could not be reconsidered by the State Tax Commissioner unless a petition for redetermination was filed within ten days from the postmark date of the letter and security in the amount of the unpaid tax was deposited with the State Tax Commissioner at that time. The plaintiff was also advised that a petition for redetermination "must be filed and security deposit within ten days from the postmark date hereof" and should be directed to the Nebraska Department of Revenue, attention Tax Policy Division and an address given. The plaintiff's wife signed a receipt for ^{the} certified mail on March 2, 1983.

5. The evidence developed before the hearing officer of the State Tax Commissioner shows that plaintiff had difficulty with sales tax on previous occasions with the Commission.

6. Plaintiff raises the question as to jurisdiction of the notice of jeopardy determination claiming that what is now Section 77-2710 Reissue 1981, requires the Commissioner to declare the tax period at an end before issuing a notice of jeopardy determination and assessment. Section 77-2710 R.R.S. 1943 in part states: "The Tax Commissioner shall declare the taxable period for such taxpayer immediately terminated.

"If the Tax Commissioner finds that the taxpayer is about to depart from the State of Nebraska, remove his property therefrom, conceal himself or his property therein, or do any other act tending to delay, prejudice or render wholly or partially ineffectual any proceedings to collect the sales or use tax for the preceding or current taxable year unless such proceedings be brought without delay, the Tax Commissioner shall declare the taxable period for such taxpayer immediately terminated..." In this instance, when the notice of jeopardy determination and assessment was issued on February 25, 1983, the tax years of 11-1-79 through 1980 and '81 had

already been completed and were at an end, and therefore, no declaration was necessary for those years. The tax year of 1982 had not been completed and the Tax Commissioner should have declared the tax year 1982 immediately terminated, but such failure was not prejudicial to the taxpayer.

6. The evidence in this case reflected that the audit was based upon the records of the plaintiff relative to his purchases at wholesale of alcoholic beverages and taxable sales then determined by the amount of liquor that the plaintiff claimed he dispensed in each drink at a price the plaintiff claimed he charged for each drink. The retail sales reported by the taxpayer were far less than the national average per bottle of liquor and less than the retail sales determined by the audit.

7. That the Commissioner found that the plaintiff's act of failing to timely file returns and remit tax due and owing might delay prejudice or render wholly or partially ineffectual any proceeding to collect tax. Giving the plaintiff the benefit of the doubt, the most that can be said about his record keeping was that it was highly minimal. He was operating strictly on a cash basis, not depositing any money in the bank, had no assets, but was receiving money daily from the operation of his business and claimed not to have any money to pay any assessment. Taking

into consideration his prior history with the Tax Commissioner and the facts as shown by the record, the Commissioner had just cause to issue the jeopardy determination and assessment.

8. Subsequent to the issuance of the notice of jeopardy determination and assessment, the Commissioner issued a show cause order on March 14, 1983, for the plaintiff to show cause why his Nebraska sales tax permit issued for his business at Hooper, Nebraska, should not be revoked for failure to comply with the provisions of Sections 77-2701 through 77-2713 R.R.S. 1943 as amended in that he failed to pay over to the state a sales tax balance of \$5,514.80 including tax, interest and penalty, based on the notice of jeopardy determination and assessment dated February 25, 1983, for the tax period of 11-1-79 through April 30, 1982. Such show cause order was scheduled for hearing on Tuesday, April 5, 1983, at 1:30 p.m. A copy of such show cause order was mailed on March 15, 1983, by certified mail to plaintiff's place of business. Plaintiff either failed or refused to claim the certified mail and now claims that he did not have notice. Prior to the hearing plaintiff was called by the State Tax Commissioner's personnel and notified of the hearing, and it was continued until April 6, 1983, at which time the plaintiff was present

and adduced evidence. The matter was then taken under advisement and the hearing was continued to April 20, 1983, at which time the plaintiff appeared and adduced additional evidence.

9. Plaintiff contends that since he did not receive notice of the hearing scheduled for April 5, 1983, that the State Tax Commissioner had no jurisdiction on the show cause order. However, Section 77-2709 R.R.S. 1943 provides that notice may be served personally or by mail and "the service is complete at the time of deposit in the United States Post Office". Section 77-2705 (6) (a) (Supp. 1983) provides 20 days' notice in writing of the time and place of hearing. The facts in this case indicate, since the time begins running with the posting of the notice, that the Tax Commissioner complied with the statutes in regard to service.

10. That there is substantial evidence to support the findings and rulings of the State Tax Commissioner.

11. That even though the State Tax Commissioner was in error in failing to terminate the tax year 1982, that the evidence was sufficient and substantial for the Tax Commissioner to revoke the sales tax permit of the plaintiff.

12. Generally for the defendant and against the plaintiff.

13. That the plaintiff's other contentions are without merit.

14. That plaintiff's petition should be dismissed at plaintiff's costs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the State Tax Commissioner's order revoking the sales tax permit of the plaintiff should be and hereby is affirmed, and that the plaintiff's petition should be and hereby is dismissed at plaintiff's costs.

Dated this 20 day of June, 1983.

BY THE COURT:

COPY

~~Distric~~ Judge E. Fahrnbruch