IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

RICHARD J. NUERNBERGER, Lancaster County Treasurer; and THE COUNTY OF LANCASTER, NEBRASKA, Plaintiff	)	Docket 389 Page 171
vs.	)	ORDER
DONNA KARNES, State Tax Commissioner, Defendant.	)	

This is an appeal from an order of the Tax Commissioner denying plaintiff's claim for a refund of collection fees in connection with Nebraska Use Tax collected by plaintiff from August 1, 1983 through August 25, 1983. Hearing was held on this matter on October 7, 1985.

In 1983, the Nebraska Legislature passed LB 571. The bill, not having an effective date or an emergency clause became effective August 26, 1983 - three months after the close of the legislative session. One purpose of LB 571 was to amend Neb. Rev. Stat. §77-2703 (2)(d) and 77-2708 (1)(d)(Reissue 1981) to provide a reduced collection fee to retailers collecting over $5,000 of sales and use tax during a month. Under the amendment, retailers can retain 3% of the first $5,000 remitted each month to the State and 1% of any amount above $5,000. Under the previous version of the statute, the retailer was allowed a 3% fee on all sales tax collected.

The issue in this case is whether the LB 571 changes as applied by the defendant acted in a retroactive manner. The plaintiffs argue that this application does result in a retroactive working of the amendment. It is the plaintiffs' view that during the first 25 days of August, 1983, the County had a right to 3% of all the sales and use taxes collected. Therefore, by denying them the full 3% collection fee for taxes collected over $5,000, the defendant's application results in a retroactive impairment of a right held by the County Treasurer.

If the Tax Commissioner is indeed applying the LB 571 changes retroactively, she is doing so without authority. In Retired City Civilian Employees Club v. City of Omaha Employees Retirement System, 199 Neb. 507, 260 N.W. 2d 472 (1977) the Nebraska Supreme Court stated that the law is well settled that "(A) legislative act will operate prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed." Id at 510 (Emphasis added). In that case, the court applied this doctrine to an amendment to an act. In this case, there has been no showing of any legislative intent for retrospective application. As will be seen, the statutory structure is quite ambiguous. It is safe to conclude that no clear legislative intent exists for retroactive application.

County Treasurers are allowed to deduct and withhold the same collection fee allowed retailers collecting sales tax. County Treasurers are required to remit the sales taxes collected along with a Form 9 tax return on or before the 15th day immediately following the calendar month in which the taxes were collected. Neb. Rev. Stat. §77-2703(1) (1984 Cum. Supp.)

The problem in this case centers on the method of calculation used by the plaintiff in determining the amount of sales tax to be withheld as a collection fee for the month of August, 1983. The plaintiffs calculated the collection fee as 3% of the total sales and use tax collected from August 1 through August 25, 1983 (the period before LB 571 became effective) plus 1% of the total tax collected for the period from August 26 through August 31, 1983. The instructions contained on the Form 9 tax return sent to the plaintiff provided that the collection was to be calculated as 3% of the first $5,000 collected in the month plus 1% of any excess amount of collection.

The defendant on May 18, 1984, requested plaintiffs to pay the difference between the amount of the collection fee they retained and the amount based on the Department's calculation. The plaintiff subsequently paid the requested amount plus interest. In this action, the plaintiffs seek a refund of what they paid plus the interest thereon. The State Tax Commissioners denied their refund request following a formal hearing.

The defendant argues that her application of the LB 571 changes does not act retroactively, but is purely prospective. The crux of the argument is that the county treasurer is not allowed nor has any right to a collection fee until the time of remittance. Therefore, since the time of remittance under the facts of the case was not until September 15th, the changes made by LB 571 were in effect and acted prospectively.

Defendant draws on several statutes for this view. First, under §77-2703 (1)(a)(1984 Cum. Supp.) retailers are required to collect sales tax on personal property sold. This collected tax constitutes a debt to the state owed by the retailer. Second, under §77-2712(2)(e) (ii) (1984 Cum Supp.) state sales and use taxes are to be collected by the retailer. Such taxes are deemed to constitute a "trust fund" in the hands of the retailer and are owned by the state as of the time they are owed to the retailer. Finally, under §77-2708 (1) (d) (1984 Cum. Supp.), the taxpayer is required to:

> ". . .deduct and withhold, from the taxes otherwise due from him or her on his or her tax return, three percent of the first five thousand dollars remitted each month and one percent of all amounts in excess of five thousand dollars remitted each month to reimburse himself or herself for the cost of collecting the tax." (emphasis added.)

Based on these statutes, the defendant argues that at no point prior to the time of remittance did plaintiff have a right to a collection fee. The entire amount of the tax

collected belonged to the state. Only at the time of remittance did the collection fee become available to the plaintiff.

The plaintiff contests this view. The plaintiff's position is that at the time of collection the collection fee became available to the treasurer. Two arguments are advanced in support of this view. First, plaintiff contends that if the taxes collected constitute a trust fund for the state and hence belong to the state when collected, they are at that point due from him in the stated percentages. Therefore, when §77-2708(1)(d) speaks of deduction and withholding of taxes "otherwise due from him", it must mean deduction and withholding at the time of collection. "Due" does not refer to the time when the return is due.

Second, the plaintiff argues from §77-2703 (1)(j). This section provides in part:

> The County Treasurer shall report and remit the tax so collected to the Tax Commissioner at such times as the Tax Commissioner may require by rule and regulation. The County Treasurer shall deduct and withhold for the use of the county general fund, the collection fee permitted to be deducted by any retailer collecting the sales tax; Provided, this collection fee shall be forfeited if the County Treasurer violates any rule or regulation pertaining to the collection of the use tax . . . (Emphasis added).

The argument is that if the collection fee can be forfeited by the county treasurer, it must have been vested at that point. In other words, one cannot forfeit a collection fee unless one has a vested right in that fee. Thus, the county treasurer, acting as a retailer, has a vested right in the collection fees at the time of the collection.

If the plaintiff's view of the pertinent statutes is correct, the LB 571 changes in collection fees as applied would clearly be working retrospectively. For the period August 1, to August 25, 1983, a retroactive impairment of the plaintiffs' existing legal rights would have occurred through the state's demand that the lower collection fee be withheld. As stated, without clear legislative intent backing this result, the statutory changes could not be given such an application.

Both parties argue that the statutes here involved are clear, unambiguous, and support their view. In my view, no such clarity exists. Both interpretations have merit. The determinative issue again is whether the defendant's application of the reduced collection fee to the entire month of August 1983, constitutes a retroactive working of the law.

The Nebraska Supreme Court has not precisely defined what a retroactive law is. However, other courts have. The Iowa Supreme Court in Walker State Bank v. Chipokas, 228 N.W.2d 49 (Iowa, 1975) adopted the Blacks Law Dictionary definition:

> "A retroactive law is one which 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.'"

Id at 51. The Michigan Supreme Court subscribes to an almost identical definition. Quoting 50 Am. Jur. 492 it stated:

> "A retrospective law, in the legal sense is one which takes away or impairs vested rights acquired under existing laws. or creates a new disability, in respect of transactions or considerations already past."

Barber v. Barber, 327 Mich. 5, 41 N.W. 2d 463, 465 (1950). The test is whether the LB 571 change as applied by the defendant took away or impaired any vested rights acquired under the then existing laws held by the plaintiff.

The plaintiff did have a vested right to the collection fees as calculated under the former law during the period of August 1 to August 25, 1983. Though the statutes are unclear, I tend to accept plaintiffs' view that the statutory structure in general does recognize an existing right to a collection fee at the time of collection.

This view is also based on policy grounds. Courts generally view statutes with retroactive effect as unjust, oppressive, and dangerous. As a result, we have judicial policies such as that enunciated by the Nebraska Supreme Court that there must be clear legislative intent in order to give a statute retroactive effect. Strong arguments exist stating that the defendant has given LB 571 a retroactive application without the support of clear legislative intent. Similarly strong arguments have been made by the defendant that their application of the statutes is not retroactive. Given the strong policy disfavoring retroactive application of law

and given the fact that defendant's application of LB 571 was arguably retroactive, the burden should be on the defendant to clearly show that its application of the LB 571 changes did not operate retroactively against the state sales and use tax collectors. The defendant has not made such a showing. The defendant has not clearly shown that its application of LB 571 did not impair vested legal rights held under the previously existing laws by the plaintiff.

Another argument in favor of the plaintiffs' position is that prior to the enactment of LB 571, Neb. Rev. Stat. §77-2708 (1)(d) did not include the word "remitted" in reference to the deduction and withholding of the three percent collection fee. This would further indicate that under the former law, the County did have a right to the collection fee at the time of collection. By adding the word "remitted" in the new version of §77-2708(1)(d) the legislature arguably changed the rules. Before LB 571, the County had a right to its fee at the time of collection. After LB 571 the County under defendant's argument, would not have a right to its fee until the time of remittance. If under the old law, the County had a right to its collection fee at the time of collection during the period of August 1 to August 25, 1983, LB 571 clearly impaired that right by saying that the right to the fee was postponed until September 15, 1983 and in addition, that the new fee allowed was to be less than what

tled the County to retain. Such a working of the LB 571 change would be retroactive, but without the legislative intent required.

The Court finds that the order of defendant should be and it is hereby reversed and it is further ordered that plaintiffs be refunded $10,201.79 with interest from June 15, 1984.

Dated this 1st day of November, 1985

William H. Blue
District Judge