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IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

OEI, INC., a Nebraska Corporation, Plaintiff, vs. DEPARTMENT OF REVENUE, STATE OF NEBRASKA, a Nebraska Administrative Agency, Defendant. DOUGLAS EWALD in his capacity as the State Tax Commissioner for the State of Nebraska	)	CI 12-4225 **ORDER**

This is an appeal from the decision of the Tax Commissioner denying OEI's request for a refund of the credit allowed under the Nebraska Advantage Research and Development Act, NEB. REV. STAT. §77-5801 *et. seq.*, for the tax year 2008. For the reasons that follow I find the decision of the Commissioner should be reversed.

Statement of the Case

The material facts are not in dispute. OEI's 2008 income tax return was due on March 16, 2009. OEI received a six month extension of time in which to file, making the return due on September 16, 2009. OEI didn't file its 2008 return until December 7, 2009. The return showed a loss and thus no tax was due. Because OEI made no estimated or other income tax payments for 2008, no refund was due either. The return filed on December 7, 2009, did not claim a credit under the Nebraska Advantage Research and Development Act. On September 13, 2012, OEI filed an amended return for 2008 in order to take the credit and receive a refund. The amended

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return, too, showed a loss and thus no tax due. But under the Act, specifically NEB. REV STAT. §77-5804(1), the credit allowed may be used as a refundable credit claimed on a taxpayer's income tax return even if the return reflects that no tax is owed.

The Tax Commissioner denied the claim for the sole and only reason that on September 13, 2012, the statute of limitations for issuing refunds for the 2008 tax year had expired. This appeal followed. The Commissioner argues that the refundable credit allowed under the Act is an overpayment and subject to the limitation period set forth in NEB. REV. STAT §77-2793. OEI argues that the refundable credit is not an overpayment and that §77-2793 does not apply. It appears this is a case of first impression.

Analysis

It has long been the rule that statutory language is to be given its plain and ordinary meaning. A court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct and unambiguous. *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013). The word overpayment is plain and unambiguous. An overpayment occurs when one pays more than is owed. It does not occur when nothing is owed and nothing is paid.

The Commissioner relies on *Sorenson v. Secretary of the Treasury*, 475 U.S. 851 (1986) and its progeny *Israel v. United States*, 356 F.3d 221 (2d. Cir 2004), *Hof v. United States*, 2009 U.S. Dist. LEXUS 14520 (D.S.D. 2009) and *Edmonson v. IRS*, 2006 U.S. Dist. LEXIS 98040 (N.D. Cal. 2006). Those cases involve the Earned Income Tax Credit which is also a refundable credit. The persuasiveness of these cases is undermined by the fact that under the Internal Revenue Code, Congress specifically provided that the when the Earned Income Credit exceeded the taxes due, the difference was to be treated as an overpayment. 26 U.S.C. §6401(b)(1). The Commissioner also cites *Con-Way Inc. & Affiliates v. Dep't of Revenue*, 353 Or. 616, ___P.3d __ (2013) and argues that because tax credits are the equivalent of tax payments, an overpayment occurs whenever the amount of the credit exceeds the amount of tax due. *Con-Way* involved the Business Energy Tax Credit passed by the Oregon Legislature. It is important to note that as, was the case in *Sorensen*, the legislature specifically provided that where the sum of both tax payments and tax credits exceed a taxpayer's liability, the excess shall be treated as an overpayment of tax. ORS 315.068(5). It appears that Congress understood that the EIC was not

a payment and the Oregon legislature understood that the BETC was not a payment. In each case a statute was passed to treat them as overpayments if they exceeded the tax due.

Had the Nebraska Legislature wanted the credit allowed under the Act to be treated as an overpayment when it exceeded the tax due, it knew how to do so. It did exactly that with the credits found in the Economic Growth and Development Act and the Nebraska Advantage Act. See NEB. REV. STAT. §77-4106(d) and NEB. REV. STAT. §77-5626(2)(d). It did the same for the credit for taxes withheld. NEB. REV. STAT. §77-2791(2). I can find no comparable statutory provision that applies to the credit allowed in the Nebraska Advantage Research and Development Act.

The Commissioner further argues that the credit here must be treated as an overpayment because if it is not, he would have no authority to issue a refund. First, §77-2793 is not a grant of authority to the Commissioner to issue refunds. It is limitation on his authority to issue refunds for overpayments. If the refund sought is not for an overpayment, §77-2793 doesn't apply. It does not follow from that that the Commissioner lacks the authority to issue the refund requested here, however. The Commissioner, through the Department of Revenue, has the authority, indeed the duty, to execute the tax laws of the State of Nebraska. One of those laws is to refund to the taxpayer the credit allowed under the Nebraska Advantage Research and Development Act even if the tax payer paid no taxes.

The Commissioner next argues that the failure to apply §77-2793 would lead to an absurd result— that is, there would be no statute of limitations on a refund under the Act and the Department could be charged with the duty to determine the validity of such claims decades after the tax years to which they applied. It seems to me unlikely that a taxpayer would wait decades to claim money that is due. But even if he does, the burden of showing that he is entitled to the refund rests with the taxpayer. If the passage of time leads to the loss or destruction of records, that's a problem for the taxpayer, not the Department of Revenue. But more importantly, whether there should be a statute of limitations and, if so, its length, is for the Legislature to decide, not me. It is a policy question to be determined in the context of the objectives sought by the Act itself. No statute of limitations on the request for a refund under the Act is provided. If that was not the intent, it is the Legislature that must correct it.

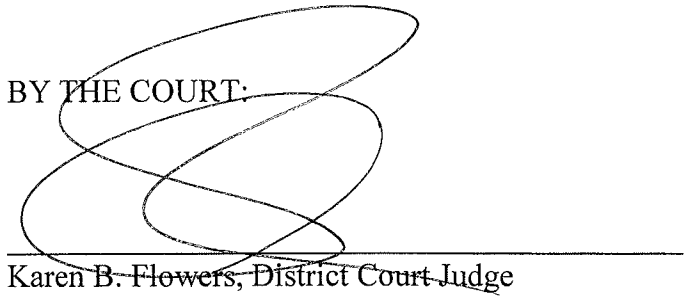
For the foregoing reasons the decision to deny OEI's request for refund is reversed.

Costs are taxed to the Department.

My bailiff shall mail a copy of this Order to counsel of record.

DATED: July 24, 2013.

BY THE COURT:



Karen B. Flowers, District Court Judge

C: Brian S. Koerwitz, Esq.
L. Jay Bartel, Asst. Attorney General