IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

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| E. I. DU PONT DE NEMOURS AND COMPANY & SUBSIDIARIES,<br><br>Plaintiff,<br><br>v.<br><br>THE STATE OF NEBRASKA; THE NEBRASKA DEPARTMENT OF REVENUE; and TONY FULTON, in his official capacity as Nebraska Tax Commissioner,<br><br>Defendants. | ) | Case No. CI 19-4110<br><br>**ORDER** |

This case is before the Court on the Defendants' Motion to Dismiss. On August 27, 2020, the Court heard argument on the motion. Matthew Ottemann, Patrick Brookhouser Jr., Hollis Hyans, and Matthew Cammarata appeared for the Plaintiff E. I. du Pont de Nemours and Company and Subsidiaries ("EID"). L. Jay Bartel appeared for the Defendants State of Nebraska ("State"), Nebraska Department of Revenue ("Department"), and Tony Fulton in his official capacity as the Nebraska Tax Commissioner ("Tax Commissioner"). Being fully advised on the premises, the Court sustains the Defendants' Motion to Dismiss but grants EID leave to file an Amended Complaint within 14 days of the filing of this Order.

## I. BACKGROUND

In this case, EID asks the Court to review the Tax Commissioner's assessment of an income tax deficiency for the period of "December 31, 2012 through December 31, 2014" (hereinafter "2013 to 2014"). Compl. ¶ 10. In December 2018, the Department issued a notice of deficiency alleging that EID had miscalculated a fraction used to determine how much of its income was apportionable to Nebraska. *Id.* at ¶¶ 10, 15–17. The Department claimed that EID

owed more than $9 million of additional taxes, plus interest and penalties of nearly $2 million. *Id.* at ¶ 13. EID has not paid the deficiency. *Id.* at ¶ 14.

EID alleges that, from 2013 to 2014, it had income from forward exchange contracts and marketable securities. *Id.* at ¶ 38. Forward exchange contracts are similar to futures contracts for foreign currency. *Id.* at ¶ 39. They allowed EID to hedge its risk from fluctuations in exchange rates. *Id.* EID included the income from these transactions in the denominator of a fraction (the "sales factor") which is used to determine how much of a unitary business's total income is apportionable to Nebraska. *Id.* at ¶ 40. The Department's proposed deficiency determination removed such income from the denominator, which had the effect of increasing the amount of EID's income which was apportionable to Nebraska. *Id.* at ¶ 41.

In Count I, EID alleges that the Department over-assessed its taxes by removing the income from forward exchange contracts and marketable securities from the sales factor's denominator. *Id.* at ¶¶ 30–47. EID alleges that the additional taxes assessed by the Department are disproportionate to the business EID actually conducted in Nebraska. *Id.* at ¶ 45. Further, EID alleges that, by removing income from these transactions from the denominator of the sales factor, the Department used an apportionment formula that does not reasonably reflect how income is generated. *Id.* at ¶ 46. EID contends that the resulting overassessment violated the Commerce Clause and the Due Process Clause of the 14th Amendment to the U.S. Constitution. *Id.* at ¶¶ 42–46.

In Count II, EID alleges that the "administrative procedure that was originally available to the Plaintiff to protest the Notice through the Department did not provide the Plaintiff with a constitutionally sufficient opportunity to dispute the Notice." *Id.* at ¶ 51. The factual or legal basis for this due process claim is not otherwise explained in the Complaint. But in EID's brief in

opposition to the Defendants' Motion to Dismiss, it complains that the statutes allow the Tax Commissioner to collect a proposed deficiency despite the taxpayer's petition for judicial review.

Counts I and II are against the State and the Department. Counts III and IV generally mirror the allegations in the first two counts but are instead pleaded against the Tax Commissioner.

EID prays for declaratory judgment while "reserv[ing] the right" to request injunctive relief. The purported bases for declaratory and injunctive relief are the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164, and the statutes in Chapter 25 relating to injunctions, Neb. Rev. Stat. §§ 25-1062 to 25-1080. Compl. ¶ 8.

On January 27, 2020, the Defendants moved to dismiss the Complaint under Neb. Ct. R. Pldg. §§ 6-1112(b)(1) and (6).

## II. STANDARD

Nebraska is a notice pleading jurisdiction. *Vasquez v. Chiproperties, LLC*, 302 Neb. 742 (2019). Plaintiffs only need to set forth a short and plain statement of the claim showing that they are entitled to relief. *Id.* They are not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted. *Id.*

To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts that, accepted as true, state a claim to relief that is plausible on its face. *Vasquez, supra.* A court should sustain a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6) only in the unusual case in which the face of the complaint shows some insuperable bar to relief. *Id.* Similarly, on a facial challenge under § 6-1112(b)(1), a court accepts all the facts alleged in the complaint as true and draws all reasonable inferences in favor of the plaintiff. *Washington v. Conley*, 273 Neb. 908 (2007).

## III. ANALYSIS

### A. Sovereign immunity bars the claims against the Department and State.

The Defendants argue that the State and the Department are immune from suit. The Nebraska Constitution provides: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." Neb. Const. art. V, § 22. But this provision is not self-executing. *State ex rel. Rhiley v. Neb. State Patrol*, 301 Neb. 241 (2018). Thus, a person cannot sue the State unless the Legislature, by law, has so provided. *Id.* A suit against a state agency is the same as a suit against the state for sovereign immunity purposes. *Cappel v. Neb. Dep't of Natural Res.*, 298 Neb. 445 (2017).

Nebraska's Uniform Declaratory Judgments Act does not waive the State's immunity. *Burke v. Bd. of Trs. of the Neb. State Colls.*, 302 Neb. 494 (2019). Nor do the injunction statutes. See Neb. Rev. Stat. §§ 25-1062 to 25-1080. EID has not identified any other statute that waives the State's immunity for the relief sought in the Complaint. The State and Department are therefore immune from suit. But the Defendants concede that sovereign immunity does not bar EID's claims for declaratory and injunctive relief against the Tax Commissioner. See *Concerned Citizens of Kimball County, Inc. v. Dep't of Environ. Control*, 244 Neb. 152 (1993) ("a declaratory or other equitable action against a state officer or agent to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by the general principles governing the immunity of the state from suit.").

### B. Statutory overview.

(1) The protest and appeal process.

Nebraska's statutes allow taxpayers to challenge a proposed deficiency by filing a protest with the Tax Commissioner and then, if necessary, appealing an adverse decision to a district

court under the Administrative Procedure Act (APA). The process begins when the Tax Commissioner examines an income tax return to determine the correct amount of tax. Neb. Rev. Stat. § 77-2776(1) (Supp. 2019). If the Tax Commissioner determines that the amount of tax shown on the return is less than the correct amount, then he or she mails the taxpayer a notice of proposed deficiency. *Id.*

Taxpayers within the United States have 60 days from the mailing of a deficiency notice to file a written protest with the Tax Commissioner. Neb. Rev. Stat. § 77-2778 (Reissue 2018). If the taxpayer files a protest, then the Tax Commissioner must reconsider the assessment and, if requested by the taxpayer, grant an oral hearing. *Id.* If the taxpayer is dissatisfied with the Tax Commissioner's decision after the hearing, then he or she may appeal the decision to a district court under the APA. Neb. Rev. Stat. § 77-27,127 (Reissue 2018).

If the taxpayer does not file a timely protest, then the proposed deficiency "shall constitute a final assessment." Neb. Rev. Stat. § 77-2777 (Reissue 2018). Otherwise, a proposed deficiency becomes final upon the expiration of the time to seek judicial review, upon the final judgment of the reviewing court, or upon the rendering of a decision by the Tax Commissioner according to the mandate of the reviewing court. Neb. Rev. Stat. § 77-27,130 (Reissue 2018); see also Neb. Rev. Stat. § 77-2780 (Reissue 2018) (similar).

Under statute, the Tax Commissioner may collect a deficiency despite a pending application for review unless the taxpayer pays the deficiency or files a security. Neb. Rev. Stat. § 77-27,129 (Reissue 2018). But the parties agree that the Department's regulations prevent the Tax Commissioner from collecting a proposed deficiency until it is final. These regulations describe two ways to start a collection action: The first is a balance due notice, which the Tax Commissioner sends if the taxpayer files a return but does not pay the correct amount of tax. 316

NAC 36-003.01. The second method is a notice of proposed deficiency determination, which the Tax Commissioner sends if the taxpayer did not file a return or if the taxpayer owes more taxes than the return indicates. 316 NAC 36-003.02. Unlike a balance due notice, the Department issues a notice of proposed deficiency determination after examining relevant books and records. See 316 NAC 36-002.02; 316 NAC 36-002.014. Here, the Department sent EID a notice of deficiency determination after an audit. Compl. ¶ 10 & Ex. 1.

As noted, the parties agree that the regulations prevent the Tax Commissioner from collecting under a notice of deficiency until the taxpayer has exhausted (or failed to exhaust) the protest and appeal process. Plaintiff's brief at 7; Defendants' reply brief at 8–9. But EID argues that the regulations are only a "policy" which the Department can abandon at will. Plaintiff's brief at 7. The Court disagrees. Agencies cannot abruptly repeal their regulations to meet the exigencies of a particular case. Except for emergencies, an agency cannot repeal its regulations without a public hearing and the Governor's approval. See Neb. Rev. Stat. § 84-907 (Cum. Supp. 2018); Neb. Rev. Stat. § 84-908 (Cum. Supp. 2018). And regulations have the effect of statutory law until they are repealed. *Ash Grove Cement Co. v. Neb. Dep't of Revenue*, 306 Neb. 947 (2020). They bind the agency just as they bind individual citizens. *Melanie M. v. Winterer*, 290 Neb. 764 (2015). Regulations are not binding if they are mere guidelines which do not confer a procedural benefit on individuals, *Cain v. Custer Cnty. Bd. of Equalization*, 298 Neb. 834 (2018), but that exception does not apply here. The regulations bound the Tax Commissioner and prevented him from collecting the proposed deficiency until EID had an opportunity for judicial review.

(2) Statutes limiting a taxpayer's remedies.

Several statutes limit the ability of taxpayers to sue for injunctive or declaratory relief. Some of these statutes apply to the collection of taxes generally and some apply to the assessment of a proposed tax deficiency specifically. One of the general statutes is Neb. Rev. Stat. § 77-3908 (Reissue 2018), which is part of the Uniform State Tax Lien Registration and Enforcement Act, Neb. Rev. Stat. §§ 77-3901 to 77-3909. Section 77-3908(1) provides:

> No injunction or writ of mandamus or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this state to enjoin the collection of any tax, fee, or any amount of tax required to be collected under any tax program administered by the Tax Commissioner or Commissioner of Labor.

Another general statute is Neb. Rev. Stat. § 77-1727 (Reissue 2018). Section 77-1727 is codified in Article 17 of Chapter 77, which generally concerns the collection of taxes by county treasurers. It provides:

> No injunction shall be granted by any court or judge in this state (1) to restrain the collection of any tax, or any part thereof, or (2) to restrain the sale of any property for the nonpayment of any such tax.
>
> No person shall be permitted to recover by replevin, or other process, any property taken or restrained by the county treasurer for the nonpayment of any tax, except such tax or the part thereof enjoined in case of injunction, levied or assessed for illegal or unauthorized purpose.
>
> No injunction shall be granted or recovery by replevin shall be permitted unless the person has first successfully argued before a court of competent jurisdiction that the tax levied or collected was levied or assessed for illegal or unauthorized purpose.

While § 77-1727 allows courts to enjoin taxes assessed for an illegal or unauthorized purpose, the Nebraska Supreme Court has suggested this rule does not apply to the Tax Commissioner because § 77-3908 specifically states that the Tax Commissioner shall not be enjoined from

collecting a tax. *Boettcher v. Balka*, 252 Neb. 547 (1997); see also *Jones v. State*, 248 Neb. 158 (1995) (holding that both §§ 77-1727 and 77-3908 prevented the plaintiffs from suing the Tax Commissioner for an injunction).

But the most the most specific statutes here are Neb. Rev. Stat. §§ 77-27,127 and 77-27,128 (Reissue 2018). Generally, if there is conflict between two or more statutes, the specific controls over the general. See, e.g., *State v. Kennedy*, 299 Neb. 362 (2018). Together, §§ 77-27,127 and 77-27,128 limit a taxpayer's remedies with respect to the assessment of a proposed deficiency to the protest and appeal process discussed above. Section 77-27,127 provides:

> Any final action of the Tax Commissioner may be appealed, and the appeal shall be in accordance with the Administrative Procedure Act. ***The appeal provided by this section shall be the exclusive remedy available to any taxpayer, and no other legal or equitable proceedings shall issue to prevent or enjoin the assessment or collection of any tax imposed under the Nebraska Revenue Act of 1967***. . . . (emphasis added)

The subsequent section, § 77-27,128, reiterates that an appeal under the APA is a taxpayer's exclusive remedy concerning the assessment of a proposed deficiency:

> ***The review provided by section 77-27,127 shall be the exclusive remedy available to any taxpayer for the review of the action in respect to the assessment of a proposed deficiency***. No injunction or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this state or against any office of this state to prevent or enjoin the assessment or collection of any tax imposed under the provisions of the Nebraska Revenue Act of 1967. (emphasis added).

Sections 77-27,127 and 77-27,128 apply to the assessment of deficiencies for income, use, and sales taxes. See *Boettcher v. Balka*, 252 Neb. 547 (1997).

The Nebraska Supreme Court has applied §§ 77-27,127 and 77-27,128 only once. In *Sack v. State*, the court confirmed that filing a protest and petitioning for review under the APA are a

taxpayer's exclusive remedies. 259 Neb. 463 (2000). There, the Department issued the taxpayers a notice of deficiency after auditing their tax return. The taxpayers filed a protest but later conceded that it was untimely. They then paid the deficiency and filed an amended return which claimed a refund in the same amount as the deficiency. The Department denied the refund claim. The taxpayers filed a lawsuit under Neb. Rev. Stat. § 77-2798 (Reissue 1996), which allowed taxpayers to sue the Tax Commissioner for a refund "[e]xcept in cases involving the proposed assessment of a deficiency." The district court dismissed the case for lack of subject matter jurisdiction.

On appeal, the taxpayers argued that the exception in § 77-2798 for "cases involving the proposed assessment of a deficiency" did not apply because their deficiency had become final. That is, they were no longer contesting a "proposed" deficiency but rather a "final" deficiency. The Nebraska Supreme Court disagreed, reasoning that the taxpayers' action arose from a proposed deficiency assessment.

The taxpayers' theory also flew in the face of §§ 77-27,127 and 77-27,128, which made filing a protest and then petitioning for review under the APA the taxpayers' exclusive remedy. The Nebraska Supreme Court explained:

> Section 77-27,128 clearly provides that the exclusive remedy available to any taxpayer for the review of the action of the Tax Commissioner in respect to an assessment of a proposed deficiency is to be in accordance with § 77-27,127. Section 77-27,127 provides that any final action of the Tax Commissioner may be appealed in accordance with the Administrative Procedure Act and that "no other legal or equitable proceedings shall issue to prevent or enjoin the assessment or collection of any tax imposed under the Nebraska Revenue Act of 1967." As previously explained, the Sacks' failure to timely protest the proposed assessment caused it to mature into a final assessment. The Nebraska Revenue Act of 1967 provides that the final assessment

resulting from a proposed assessment of a deficiency is properly appealable only under §§ 77-27,127 and 77-27,128.

The Sacks' proposed interpretation of § 77-2798 has the effect of nullifying §§ 77-27,127 and 77-27,128. Section 77-2798 simply does not allow a taxpayer who receives a proposed assessment of a deficiency to avoid the exclusivity of §§ 77-27,127 and 77-27,128 by not filing a protest and allowing the proposed assessment to mature into a final assessment, for which the taxpayer may then seek a refund under § 77-2798. Thus, we hold that the exclusive remedy to contest an income tax deficiency assessment is the filing of a written protest with the Tax Commissioner within 90 days [now 60 days] of the date of the mailing of the proposed assessment of a deficiency. If a timely protest is not filed by the taxpayer, the proposed assessment becomes final.

*Sack*, *supra*, 259 Neb. at 468–69 (alteration added).

Because the taxpayers did not file a timely protest, the district court correctly dismissed their lawsuit for lack of jurisdiction.

### C. The exclusive remedy provisions of §§ 77-27,127 and 77-27,128 bar EID's claims under the Uniform Declaratory Judgments Act.

The reasoning in *Sack* applies equally to EID's declaratory judgment claim. EID cannot avoid the exclusivity of §§ 77-27,127 and 77-27,128 by waiting for the time to file a protest to expire and then suing the Tax Commissioner for a declaratory judgment. Doing so would effectively nullify those statutes.

While the Nebraska Supreme Court has generally said that a declaratory judgment action is proper method for challenging the constitutionality of a tax statute, see, e.g., *Trumble v. Sarpy Cnty. Bd.*, 283 Neb. 486 (2012), there are some limits. One of these limits is that the Uniform Declaratory Judgments Act does not provide an additional remedy if there is an exclusive statutory remedy. *Boettcher v. Balka*, 252 Neb. 547 (1997). That is the case here.

Further, even a non-exclusive statutory remedy can be an equally serviceable remedy. The function of declaratory relief is to decide a justiciable controversy that is not conveniently amenable to the usual remedies. *State ex rel. Wagner v. Evnen*, 307 Neb. 142 (2020). Thus, plaintiffs generally cannot sue for a declaratory judgment if they have an equally serviceable remedy. *Id.* Thus rule flows from the discretionary nature of the Uniform Declaratory Judgments Act. See *Mansuetta v. Mansuetta*, 295 Neb. 667 (2017).

The Nebraska Supreme Court has applied the equally serviceable remedy rule in declaratory judgment cases involving taxes. See *Northwall v. State*, 263 Neb. 1 (2002) (plaintiffs could not file a declaratory judgment action because filing a claim with the Department and then petitioning for review under the APA was an equally serviceable remedy); *Boettcher v. Balka*, 252 Neb. 547 (1997) (statute allowing taxpayers to claim a refund from the county treasurer was an equally serviceable remedy). A statutory remedy might not be equally serviceable, however, if it requires the taxpayer to pay the tax before challenging its validity. See *Jones v. State*, 248 Neb. 158 (1995); *Mullendore v. Sch. Dist. No. 1 of Lancaster Cnty*, 223 Neb. 28 (1986). Indeed, as applied to indigent taxpayers, conditioning judicial review on the payment of the tax violates due process. See *Boll v. Dep't of Revenue*, 247 Neb. 473 (1995).

But as discussed above, the Department's regulations prevent it from collecting an assessed deficiency until that deficiency is final. If a taxpayer pursues the protest and appeal process, then a proposed deficiency does not become final until judicial review concludes. The Court therefore determines that §§ 77-2778 and 77-27,127, in addition to being the exclusive remedies, are equally serviceable.

**D. The exclusive remedy provisions of §§ 77-27,127 and 77-27,128 bar EID's claims for injunctive relief.**

EID cannot sue the Tax Commissioner for an injunction for the same reason that it cannot sue the Tax Commissioner for declaratory relief: Sections 77-27,127 and 77-27,128 state that the protest and administrative appeal process are a taxpayer's exclusive remedy for challenging a proposed deficiency. Indeed, those statutes specifically say that courts may not issue injunctions.

And even if these statutes were not a taxpayer's exclusive remedy (which, again, they are), they would still be adequate remedies at law. Generally, injunctions are extraordinary remedies and are particularly disfavored in cases involving the collection of taxes. See *Bock v. Dalbey*, 283 Neb. 994 (2012); *Ganser v. County of Lancaster*, 215 Neb. 313 (1983). Courts cannot issue injunctions unless the remedy at law is inadequate, meaning that the legal remedy is not as plain, complete, practical, and efficient to the ends of justice and its prompt administration as the remedy in equity. See *Bock, supra*; *Fyfe v. Tabor Turnpost, L.L.C.*, 22 Neb. App. 711 (2015). Thus, where a statute provides an adequate remedy at law, a plaintiff must exhaust the statutory remedy before suing for an injunction. *Teadtke v. Havranek*, 279 Neb. 284 (2010); *V.C. v. Casady*, 262 Neb. 714 (2001). The Nebraska Supreme Court has applied this rule in tax cases. See *Ganser v. County of Lancaster*, 215 Neb. 313 (1983).

It is true that a taxpayer does not have to exhaust statutory remedies if the tax is "void." See *Ganser, supra*; *Offutt Housing Co. v. Sarpy County*, 160 Neb. 320 (1955); see also *Mid-Continent Airlines v. Neb. State Bd. of Equalization & Assessment*, 105 F. Supp. 188 (D. Neb. 1952 (collecting cases). A tax is void if the taxing authority did not have the jurisdiction or power to impose the tax. *Northwall v. State*, 263 Neb. 1 (2002); *Jones v. State*, 248 Neb. 158 (1995). Examples of void taxes include a municipal tax levied outside the bounds of the municipality and a bridge tax assessed before the authorizing legislation became effective. See

*Hemple v. City of Hastings*, 79 Neb. 723 (1907); *Burlington & M. R. R. Co. v. Cass Co.*, 16 Neb. 136 (1884).

Taxes that are merely "irregular or erroneous," on the other hand, are not void. *Offutt Housing Co. v. Sarpy County*, 160 Neb. 320, 322 (1955). Whether the taxing authority assessed too much tax—as opposed to whether the taxing authority could assess the tax at all—is a question of irregularity. For example, in *Xerox Corp. v. Karnes*, a taxpayer successfully sued for a declaration that a statute allowing real and personal property to be valued only in odd-numbered years violated the state constitution. 217 Neb. 728 (1984). The taxpayer then argued that the taxes assessed in 1982—an even-numbered year in which the property had not been valued—were void to the extent that they exceeded the property's actual value. *Xerox Corp. v. Karnes*, 221 Neb. 691 (1986). The Nebraska Supreme Court disagreed, holding that the plaintiff had alleged a mere irregularity: "An overassessment is an erroneous assessment but not a void one." *Id.* at 694 (citation omitted); see also *Jones v. Valley Cnty. Bd. of Equalization*, 208 Neb. 559 (1981) (excessive increases in the value of real property did not make tax void).

This Court likewise concludes that EID has alleged an irregular tax rather than a void tax. Generally, the Department calculates the income tax owed by a unitary business with activity both inside and outside Nebraska by multiplying its federal taxable income, as adjusted, by a fraction, which is the average of the property factor plus the payroll factor plus the sales factor. Neb. Rev. Stat. § 77-2734.05 (Reissue 2018). The sales factor, in turn, is itself a fraction, the numerator of which is the taxpayer's total sales in the state and the denominator of which is the taxpayer's total sales everywhere. Neb. Rev. Stat. § 77-2734.14(1) (Reissue 2018). EID alleges that the Defendants improperly removed receipts from forward exchange contracts and marketable securities from the denominator of the sales factor, which had the effect of increasing

the amount of taxes assessed to EID. This is a question of overassessment, which would not make the tax void.

## IV. LEAVE TO AMEND

Finally, EID asks for leave to file an amended complaint. The Defendants respond that any amendment would be futile. While EID has not provided the Court with a proposed amendment, it specifically asks for leave to add a claim under Neb. Rev. Stat. § 84-911 (Reissue 2014). Section 84-911 provides:

> (1) The validity of any rule or regulation may be determined upon a petition for a declaratory judgment thereon addressed to the district court of Lancaster County if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule or regulation in question.
>
> (2) The court shall declare the rule or regulation invalid if it finds that it violates constitutional provisions, exceeds the statutory authority of the agency, or was adopted without compliance with the statutory procedures. . . .

Section 84-911 waives the state's sovereign immunity for questions about the validity of a rule or regulation. *Engler v. State Accountability & Disclosure Comm'n*, 283 Neb. 985 (2012); *Logan v. Dep't of Corr. Servs.*, 254 Neb. 646 (1998). But § 84-911 does not allow courts to decide factual issues. *Riley v. State*, 244 Neb. 250 (1993). It is limited to a declaration regarding the validity of a rule or regulation. *Riley*, *supra*; *Dozler v. Conrad*, 3 Neb. App. 735 (1995).

The Court observes that EID cannot use § 84-911 as a backdoor to review the Tax Commissioner's deficiency assessment for 2013 to 2014. The text of § 84-911(1) and caselaw indicate that, generally, persons suing under the statute do not have to exhaust their

administrative remedies. See *Engler v. State Accountability & Disclosure Comm'n*, 283 Neb. 985 (2012); see also *Smith v. Sorensen*, 748 F.2d 427 (8th Cir. 1984). But, here, the more specific statutes, and therefore the controlling statutes, are §§ 77-27,127 and 77-27,128. The latter statute expressly states that the protest and appeal process "shall be the exclusive remedy available to any taxpayer for the review of the action in respect to the assessment of a proposed deficiency." Having apparently failed to pursue its exclusive remedy for reviewing the proposed deficiency, EID cannot use § 84-911 to argue that one of the Department's regulations is invalid and, therefore, EID should not have to pay the now final deficiency.

The Court agrees with the Defendants that amending EID's claims under the injunction statutes and the Uniform Declaratory Judgments Act would be futile. Further, as explained above, EID cannot use § 84-911 to challenge the Department's deficiency assessment for 2013 to 2014. Yet EID might still be able to state a claim that does not ask the Court to review the Tax Commissioner's action in respect to the assessment of the proposed deficiency. And EID has not expressly admitted that it failed to protest the deficiency, so it is still possible that this case is really a mispled petition for review under the APA. The Court will therefore grant EID leave to file an amended complaint.

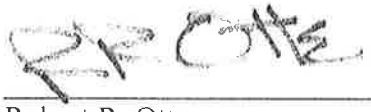
## V. CONCLUSION

The Court sustains Defendants' Motion to Dismiss but grants the Plaintiff 14 days to file an amended complaint. If the Plaintiff does not file an amended complaint, then the Court will enter a judgment dismissing the Complaint for Declaratory Relief.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Defendants' Motion to Dismiss is **SUSTAINED**. The Plaintiff is granted leave to file an amended complaint within 14 days of the filing of this Order.

DATED this 13th day of November, 2020.

BY THE COURT:



Robert R. Otte
District Court Judge