

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

E. I. DU PONT DE NEMOURS AND)	Case No. CI 19-4141
COMPANY & SUBSIDIARIES,)	
)	
Petitioner,)	
)	
v.)	
)	ORDER
NEBRASKA DEPARTMENT OF)	
REVENUE; TONY FULTON, NEBRASKA)	
TAX COMMISSIONER; and the STATE OF)	
NEBRASKA,)	
)	
Respondents.)	

This case is before the Court on the Petitioner’s Motion for Remand and Petition for Review under the Administrative Procedure Act. On August 27, 2020, the Court heard argument and evidence was submitted. Matthew Ottemann, Patrick Brookhouser Jr., Hollis Hyans, and Matthew Cammarata appeared for the Petitioner E. I. du Pont de Nemours and Company and Subsidiaries (“EID”). L. Jay Bartel appeared for the Respondents. Being fully advised on the premises, the Court overrules the Motion to Remand but remands the matter for further proceedings on EID’s Petition for Review.

I. BACKGROUND

The Nebraska Department of Revenue (“Department”) issued EID a Notice of Deficiency Determination (“Notice”) dated September 9, 2019. T8. The Department alleged that EID owed combined taxes, interest, penalties of more than \$15 million for an audit period between 2001 and 2011. *Id.* The Notice informed EID that it had 60 days to file a written protest if it disagreed with the results of the audit. *Id.* The record does not include a return receipt for the Notice.

EID eventually sent the Department a written Request for Review which asked for a hearing. The Request for Review was dated November 11, 2019. The record shows that it was postmarked by “Neopost” on November 12 and received by the United States Postal Service on the same day. T4–6. On November 27, the Tax Commissioner denied the protest without a hearing because it was untimely. T1–2.

On December 24, 2019, EID filed a Petition for Review under the Administrative Procedure Act (APA). EID argues that the Tax Commissioner’s decision was erroneous for the following reasons: the Department deprived EID of due process and violated state statutes because the Notice was issued after the limitations period had expired; the Department incorrectly determined that EID’s protest was untimely; the Notice was sent to the wrong address; the Notice did not adequately apprise EID of the basis for the alleged deficiency; and the Tax Commissioner refused to hold a hearing. Pet. ¶ 1. In the Request for Relief, EID asks the Court to “overrule[]” the Notice or, alternatively, remand the matter for a hearing.

On April 8, 2020, EID filed a Motion for Remand asking the Court to remand the matter for a hearing. The Court heard the matter on August 27, at which time EID offered evidence in support of the motion.

II. STANDARD

Any final action of the Commissioner may be appealed under the APA. Neb. Rev. Stat. § 77-27,127 (Reissue 2018). A court reviews the agency’s action without a jury de novo on the agency’s record. Neb. Rev. Stat. § 84-917(5) (Reissue 2014). A court may affirm, reverse, or modify the agency’s decision, or remand for further proceedings. § 84-917(6)(b). The taxpayer carries the burden of proof in proceedings before the Commissioner, subject to a few exceptions that do not apply here. Neb. Rev. Stat. § 77-2781 (Reissue 2018).

III. ANALYSIS

A. Motion for Remand.

EID moves to remand the matter based on evidence offered at the August 27, 2020 hearing. This case, however, is before the Court on a petition for review under the APA. A district court's role in such cases is very different from its usual role as Nebraska's trial court of general jurisdiction:

In reviewing final administrative orders under the APA, the district court functions not as a trial court but as an intermediate court of appeals. In a review de novo on the record, the district court is not limited to a review subject to the narrow criteria found in § 84-917(6)(a), but is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *And the APA does not authorize a district court reviewing the decision of an administrative agency to receive additional evidence, whether by judicial notice or other means.*

Med. Creek LLC v. Middle Republican Nat. Res. Dist., 296 Neb. 1, 8 (2017) (emphasis added).

It is the last, emphasized sentence that is the most pertinent here. The rule that district courts cannot receive additional evidence is based on Neb. Rev. Stat. § 84-917(5)(a) (Reissue 2014), which states that “the review shall be conducted by the court without a jury de novo *on the record of the agency.*” (emphasis added). See *Betterman v. Dep't of Motor Vehicles*, 273 Neb. 178 (2007); *Wolgamott v. Abramson*, 253 Neb. 350 (1997); see also Neb. Rev. Stat. § 84-915.01(4) (Reissue 2014) (“Except as otherwise provided by law, the agency record shall constitute the exclusive basis for agency action in contested cases under the act and for judicial review thereof.”).

EID offered Exhibits 1 to 10 in support of its Motion for Remand. The Department made a “global objection” that a district court cannot receive additional evidence under § 84-917. The Court received Exhibit 1 and took Exhibits 2 to 10 under advisement. After reviewing the matter further, the Court sustains the Department’s “global objection” to Exhibits 1 to 10. The Court therefore overrules EID’s Motion for Remand and will not consider Exhibits 1 to 10 in deciding the Petition for Review.

B. Petition for Review.

The issues that EID raised in its Motion for Remand are also embraced by its Petition for Review. That is, the Petition for Review alleges that the Department did not send the Notice within the limitations period, that the manner in which the Department mailed the Notice violated statutory and constitutional requirements, that EID timely protested the Notice, and that the Department should have held a hearing. The Petition for Review also asks the Court, as an alternative to “overrul[ing]” the notice, to remand the matter for a hearing so that EID can offer evidence.

The parties have thoroughly argued and briefed these issues. Notwithstanding EID’s offer of additional evidence, the Department argued that the agency transcript alone shows that the case should not be remanded. EID responded to this argument based on the agency transcript. The Court has carefully considered the parties’ arguments and the record. Holding another hearing at which the parties would reargue the same issues and the same evidence would be a waste of judicial resources and the parties’ time. The Court has concluded that, on EID’s Petition for Review, the matter should be remanded for a hearing.

Two subsections of § 84-917 empower the Court to remand this case. Section 84-917(6)(b) generally provides that a district court may “affirm, reverse, or modify the decision of

the agency or remand the case for further proceedings.” Section 84-917(5)(b)(i) gives district courts the discretion to remand a case to the agency if the court “determines that the interest of justice would be served by the resolution of any other issue not raised before the agency.” See *Betterman v. State of Neb. Dep’t of Motor Vehicles*, 273 Neb. 178 (2007).

The Department argues that a hearing is unnecessary because the transcript indisputably shows that EID did not file a petition for redetermination within 60 days after the Notice was mailed. The Court disagrees. There is no return receipt for the Notice. The transcript only shows that the Notice of Deficiency was dated September 9, 2019. That establishes when the letter was dated, not when it was mailed.

The Court is also concerned about the due process consequences of denying EID an evidentiary hearing. Generally, due process requires that notice be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *State v. Teablo P.*, 293 Neb. 337, 343 (2016) (citation omitted). In Nebraska, filing a protest with the Tax Commissioner and then appealing under the APA is a taxpayer’s exclusive remedy for challenging an assessed deficiency. Neb. Rev. Stat. § 77-27,128 (Reissue 2018); *Sack v. State*, 259 Neb. 463 (2000). If taxpayers cannot show that the notice was deficient through the protest and appeal process, then they have no remedy under state law to right the deprivation of due process.

The Department argues that if a taxpayer does not file a timely protest, then the Tax Commissioner simply lacks jurisdiction to hold a hearing because the deficiency has become final. See Neb. Rev. Stat. § 77-2777 (Reissue 2018). This is so, according to the Department, even if the taxpayer wants to show that it could not timely file a protest because the notice was deficient. Again, the Court disagrees. Even if the filing of a timely protest is “jurisdictional”

under *Sack, supra*, the Tax Commissioner, like a court, has jurisdiction to decide whether he has jurisdiction. Further, the APA expressly gives district courts the power to remand cases for further proceedings, including when the interest of justice would be served by the resolution of an issue not raised before the agency. The Court decides to exercise those powers here.

Thus, the Court remands the matter for further proceedings. On remand, the Department shall hold a hearing limited to whether the Notice complied with statutory and constitutional requirements (including whether it was sent within the limitations period) and whether EID's protest was timely. If the Tax Commissioner determines that that EID timely protested a valid notice of deficiency, then it shall conduct a further hearing on EID's protest.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Motion for Remand is **OVERRULED**. On the Petition for Review, the Court **REMANDS FOR FURTHER PROCEEDINGS**.

DATED this 13th day of November, 2020.

BY THE COURT:



Robert R. Otte
District Court Judge