

STATE OF MINNESOTA

TAX COURT

COUNTY OF CARVER

REGULAR DIVISION

Ronald L. Schober,

Appellant,

vs.

Commissioner of Revenue,

Appellee.

**Order Granting Motion to Dismiss
for Lack of Subject Matter
Jurisdiction and Failure to State a
Claim and
Denying Motion to Amend**

Docket 8352-R
No.

Dated: March 2, 2012

The Honorable Kathleen H. Sanberg, Judge of the Minnesota Tax Court, heard this matter, on September 7, 2011, and January 20, 2012, at the Minnesota Judicial Center, St. Paul, Minnesota.

Ronald L. Schober appeared as the Pro Se Appellant.

Rita Coyle De Meules, Assistant Attorney General, represented the Appellee, the Commissioner of Revenue.

Both parties submitted post hearing briefs. The matter was submitted to the Court for decision on February 14, 2012.

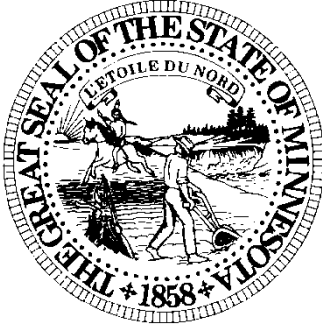
The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

1. The Commissioner's Motion to Dismiss is hereby granted.
2. Appellant's Motion to Amend is hereby denied.

IT IS SO ORDERED. LET JUDGMENT BE ENTERED ACCORDINGLY.
A STAY OF FIFTEEN DAYS IS HEREBY ORDERED. THIS IS A FINAL
ORDER.

BY THE COURT,



Kathleen H. Sanberg, Judge
MINNESOTA TAX COURT

DATED: March 2, 2012

Memorandum

Background

There are two motions before the Court. First is a Motion to Dismiss brought by Appellee Commissioner of Revenue ("Commissioner") seeking dismissal of the appeal for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The Commissioner asserts that the Tax Court does not have subject matter jurisdiction because Ronald L. Schober ("Appellant") does not have an appealable order from the Commissioner from which relief can be sought and the relief Appellant seeks is barred by the doctrine of res judicata.

Second is a Motion to Amend brought by Appellant. Appellant seeks to amend his appeal to include claims for constitutional violations arising out of the

Department of Revenue's ("Department") refusal to allow Appellant to file amended returns.

For the reasons discussed below, we grant the Motion to Dismiss and dismiss the appeal because the Tax Court, as affirmed by the Minnesota Supreme Court, has already determined Appellant's liability for the sales tax at issue. We also deny the Motion to Amend because there is no order from which Appellant may appeal and thus, no appeal to amend.

Facts

This is the second case arising out of an assessment against Appellant for sales tax. In the first case, the tax liability arose from the Commissioner's Notice of Determination on Appeal dated April 18, 2007 "(Order)". Appellant timely appealed the Order to the Tax Court. The Tax Court found Appellant had erroneously collected sales tax for the period 2000 through 2005, but had not remitted the sales tax to the Department as required by statute. The Tax Court issued its decision affirming the Order on February 3, 2009.¹ Appellant appealed to the Minnesota Supreme Court and the Tax Court order was affirmed on February 4, 2010.² Appellant filed a Petition for Rehearing with the Minnesota Supreme Court, which was denied by order dated March 8, 2010. This is the "Schober 1" case.

After the Schober 1 case was final, the Department began collection efforts against Appellant. On March 4, 2011, Appellant delivered documentation to the Department and informally requested a refund for the sales tax at issue in

¹ Schober v. Commissioner of Revenue, Docket No. 7935 (Minn. Tax. Ct. Feb. 3, 2009).

² Schober v. Commissioner of Revenue, 778 N.W.2d 289 (Minn. 2010).

the Schober 1 case, even though he had admittedly paid no sales tax to the Department. On March 5, 2011, Appellant made a formal request for a refund to the Department. On March 7, 2011, the Department sent a letter regarding the documentation stating that the years at issue were covered in the Schober 1 case. On March 9, 2011, Appellant filed a Notice of Appeal with the Tax Court citing the Department's March 7, 2011, letter as the order from which he was appealing.

The Commissioner filed this Motion to Dismiss. Appellant objected to the motion and stated that he wanted to raise constitutional issues of due process and double taxation. Appellant made a Motion requesting that the case be transferred to the District Court. An Erie Transfer was completed and the case was transferred back to the Tax Court.³ Subsequently, on December 3, 2011, Appellant filed this Motion to Amend.

Arguments

Appellant argues the Commissioner has denied his request for a refund where one should have been given. He argues that he had no sales tax liability as it was paid by the vendor when he purchased materials or that he gave his clients a credit. Appellant asserts that his formal request for a refund to the Department was timely, as was his Notice of Appeal. Appellant also asserts that the Minnesota Supreme Court's opinion on his sales tax liability made available the opportunity for a refund. Finally, Appellant argues the denial of a refund is a

³ At the hearing on the Motion to Amend, Appellant agreed that the matter should stay before the Tax Court, making the Motion to Transfer moot.

violation of the Fourteenth Amendment of the U.S. Constitution, which protects against double taxation.

The Commissioner presents several arguments. First, the Commissioner argues the March 7, 2011 letter from the Department is not an appealable order, as it discusses the fact that the sales tax for the years at issue were already determined in Schober 1. Because there is no appealable order, the Tax Court has no subject matter jurisdiction. Further, the Tax Court lacks jurisdiction because res judicata bars the appeal--Appellant's sales tax liability has been previously adjudicated by the Tax Court and affirmed by the Minnesota Supreme Court. Finally, the Commissioner argues that because none of Appellant's sales tax liability was paid to the Department, there is no basis for a refund.

Discussion

Appellant seeks to appeal a letter from the Department regarding the Department's collection effort of Appellant's sales tax liability. Appellant characterizes the letter as a denial of a refund claim. The Commissioner argues that because no amounts were paid, there can be no refund. Ultimately, Appellant is seeking to have this court retry the Tax Court decision in Schober 1 (which was affirmed by the Minnesota Supreme Court) that determined his sales tax liability.⁴ Because the issues have been determined with finality, res judicata bars the appeal. We turn first to subject matter jurisdiction.

⁴ Schober v. Commissioner of Revenue, Docket No. 7935 (Minn. Tax. Ct. Feb. 3, 2009), *aff'd* 778 N.W.2d 289 (Minn. 2010).

Appealable Order

The Commissioner argues that the court has no subject matter jurisdiction because there is no appealable order or determination of the Commissioner as required by Minnesota Statutes § 270C.33. Further, Minn. Stat. § 271.06, subd. 6 (2010) provides that “Appeals to the tax court ... may be taken only ‘from any official order of the commissioner of revenue.’ Minn. Stat. § 271.06, subd. 1 (Supp. 2005).” Piney Ridge Lodge, Inc. v. Commissioner of Revenue, 718 N.W.2d 861 (Minn. 2006). The Commissioner argues that here, there is no appealable order as the letter is not an order of the Commissioner and thus, we have no subject matter jurisdiction.

Appellant argues that the letter denies a refund and is an appealable order. We disagree. The letter indicated that the years at issue were covered in the Schober 1; it was not an order of the Commissioner. “Subsequent administrative actions by the Commissioner, such as correspondence, telephone calls and meetings with the taxpayer, neither constitute appealable orders nor operate to extend the time limitations for filing an appeal.” Wierschke v. Commissioner of Revenue, Docket No. 4600 (Minn. Tax Ct. Oct. 9, 1986). The Commissioner’s response to Appellant’s attempt to revive his claims finalized by the Supreme Court in Schober 1 is not an appealable order. We therefore have no subject matter jurisdiction.

Res Judicata

The Commissioner’s next argument is that the doctrine of res judicata bars Appellant’s claim.

Res judicata applies as an absolute bar to a subsequent claim when (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair opportunity to litigate the matter. *Joseph*, 636 N.W.2d at 327; *accord Wilson*, 619 N.W.2d at 198. All four prongs must be met for res judicata to apply. See *Joseph*, 636 N.W.2d at 327-29.

Hauschildt v. Beckingham, 686 N.W.2d 829, 840 (Minn. 2004).

The Commissioner argues that the case should be dismissed as the sales tax liability has already been determined and res judicata bars this case.

Appellant argues that the Commissioner's attempt to collect the sales tax is unlawful as he did not owe the sales tax. We find all factors establishing res judicata are met here. First, this appeal is based on the same facts as the prior litigation. Appellant admits he did not pay the sales tax but claims it is not owed. It was determined in *Schober 1* that the sales tax was due and owing. Second, this appeal involves the same parties as the prior case. Third, a final decision was made against Appellant in the prior case.⁵ Fourth, Appellant's appeal of his assessment of the sales tax at issue was heard by the Tax Court and the Supreme Court, giving him a full and fair opportunity to litigate the matter.

All factors are met; the doctrine of res judicata bars this Court from hearing the matter.

Refund

Finally, the Commissioner argues that no claim for a refund can be made as no sales tax was remitted to the Department. While Appellant admits making

⁵ "Upon any appeal taken by a taxpayer, the decision of the Tax Court, or the decision of the Supreme Court upon review thereof, as the case may be, shall be final and conclusive upon all parties to the proceedings as to all matters at issue determined by such decision." Minn. Stat. § 271.09, subd. 1 (2010).

no payment, he argues that he did not owe the sales tax. A refund claim is available to “a taxpayer who has *paid a tax in excess of the taxes lawfully due* and who files a written claim for refund will be refunded or credited the overpayment of the tax determined by the commissioner to be erroneously paid.” Minn. Stat. § 289A.50 (2010) (emphasis added).

Appellant claims that the Supreme Court's opinion in Schober 1 allowed him to file a claim for a refund. A refund would only be allowable after the sales tax had been paid.⁶ Here, Appellant admittedly failed to pay the sales tax to the state and failed to file a return. Appellant argues that he has given a “service credit” to his customers and that constitutes payment. This under Schober 1 is insufficient; the sales tax collected must be remitted to the Department. Because no amounts were remitted to the Department, there was nothing that could have been refunded.

Appellant's Motion to Amend

Appellant made a Motion to Amend, seeking to add claims for constitutional violations. These claims also arise out of the establishment of his tax liability; the issue of double taxation was determined in Schober 1. Res judicata also applies to these claims.

Conclusion

We find that Appellant does not have an appealable order or valid claim for a refund because he made no payment to the Department. We also find that

⁶ Acton Constr. Co. v. Commissioner of Revenue, 391 N.W.2d 828, 832 (Minn. 1986) (“In *Acton*, we granted tax refunds for erroneously collected sales tax, but only where the tax had been paid to the state. *Id.* at 832-33.”).

we lack subject matter jurisdiction and res judicata bars this case. We, therefore, grant the Commissioner's Motion to Dismiss and deny Appellant's Motion to Amend.

K. H. S.