STATE OF MINNESOTA | TAX COURT

COUNTY OF HENNEPIN | REGULAR DIVISION

More, Inc., d/b/a Blarney's Pub & Grill,

Appellant,

vs.

Commissioner of Revenue,

Appellee.

ORDER ON MOTION FOR RECONSIDERATION

Docket No. 8395-R

Filed: February 19, 2016

This matter came before The Honorable Joanne H. Turner, Chief Judge of the Minnesota Tax Court, on the motion of appellee Commissioner of Revenue for reconsideration of the portion of our January 8, 2015 decision characterizing a document dated August 28, 2014, as an "order" of the Commissioner.

Mark A. Pridgeon, Attorney at Law, Edina, Minnesota, represented appellant More, Inc.

John R. Mulé, Assistant Minnesota Attorney General, represented appellee Commissioner of Revenue.

Based upon all the files, records, and proceedings herein, the court now makes the following:

O R D E R

The Commissioner's motion to reconsider is granted.

IT IS SO ORDERED.

BY THE COURT:

Joanne H. Turner, Chief Judge
MINNESOTA TAX COURT

DATED: February 19, 2016

MEMORANDUM

Appellant More, Inc., operates Blarney's Pub & Grill near the University of Minnesota's main campus. Each month, appellant filed electronic sales and use tax returns with the Department of Revenue, reporting sales subject to Minnesota sales tax, to liquor gross receipts sales and use taxes, and to Hennepin County sales and use tax. *See, e.g.*, Ex. J3. Although Blarney's Pub is located in the City of Minneapolis, appellant inexplicably did not report sales subject to Minneapolis sales tax. *See, e.g.*, Ex. J3.

In 2010, the Commissioner selected the business for a sales and use tax audit covering the period September 1, 2007, to February 28, 2011. The auditor conducted the audit indirectly, that is, without accessing appellant's actual sales records, and concluded that appellant had underreported sales during the audit period of more than $3.2 million. In June 2011, the Commissioner issued an order assessing the taxpayer $366,358.31 in sales and use tax for the audit period on the allegedly unreported sales, interest, and a 5% penalty for late payment where applicable. The June 2011 order included assessments of Minnesota sales tax, Minneapolis sales tax, Hennepin County sales tax, Minneapolis entertainment tax, and regional transit improvement tax, all on the basis of the alleged unreported sales. Notably, the June 2011 order did *not* assess

Minneapolis sales tax on sales already reported to the Department during the audit period. The taxpayer timely appealed to our court.

During discovery, Department of Revenue staff accessed appellant's electronic sales records. On the basis of those records, the same revenue tax specialist who conducted the original (indirect) audit recomputed the additional sales and use tax allegedly due. Sometime in August 2014, months after the close of discovery, the Commissioner sent the taxpayer two documents—one captioned "Computation of Tax, Penalty, and Interest by Period" and the other captioned "Explanation of Adjustments." Pridgeon Aff. Ex. 3.

The Explanation of Adjustments bore a "Notice Date" of July 17, 2014, and explained: "Based on an examination of your records, we have made adjustments for the periods shown above," namely, the September 1, 2007 to February 28, 2011 audit period. Pridgeon Aff. Ex. 3. Attached were 26 schedules calculating sales tax, transit improvement tax, liquor gross receipts tax, use tax, and Minneapolis entertainment tax. There was no change to the schedules computing use tax on purchases of services and fixed assets or computing Minneapolis entertainment tax. Otherwise, the tax shown on each schedule was substantially less than that shown on the corresponding schedule in the June 2011 order on appeal, as shown below:

	June 2011 Order	August 2014
Taxes on liquor sales:		
General Minnesota sales tax	$218,831.32	$50,826.91[1]
Minneapolis sales tax	$16,382.94	$3,880.80[2]
Hennepin County sales tax	$4,914.84	$1,164.13[3]

[1] The sum of the amounts shown on Schedule A ($41,396.03) and Schedule U ($9,430.88) of the August 2014 recalculation.

[2] The sum of the amounts shown on Schedule B ($3,174.78) and Schedule V ($706.02) of the August 2014 recalculation.

[3] The sum of the amounts shown on Schedule C ($952.45) and Schedule W ($211.68) of the August 2014 recalculation.

Transit improvement sales tax	$6,241.28	$1,223.54[4]
Gross receipts sales tax	$81,915.54	$39,799.03[5]
Taxes on liquor purchases:		
Minnesota use tax	$9,262.90	$1,270.48
Minneapolis use tax	$693.42	$693.42
Hennepin County use tax	$207.90	$28.56
Transit improvement tax	$264.32	$36.16
Gross receipts use tax	$3,467.52	$475.44
Taxes on purchases of services:		
Minnesota use tax	$1,297.81	$1,297.81
Minneapolis use tax	$96.65	$96.65
Hennepin County use tax	$28.99	$28.99
Transit improvement use tax	$36.82	$36.82
Taxes on purchases of fixed assets		
Minnesota use tax	$3,303.38	$3,303.38
Minneapolis use tax	$248.97	$248.97
Hennepin County use tax	$74.69	$74.69
Transit improvement use tax	$96.41	$96.41
Minneapolis entertainment tax	$18,992.61	$18,992.61

Although the statute of limitations for assessment had long expired with respect to virtually all of the audit period, the August 2014 document included $23,245.37 described as a tax on "Minneapolis Sales – Not Reported."[6] In fact, this calculation was based on retail sales *as actually reported by the taxpayer on its sales and use tax returns filed years earlier*. For example, the entry on Schedule Z for September 2007 shows "Mpls Sales Not Reported" of $88,726.00, but *that is the exact amount of retail sales actually reported on the taxpayer's sales and use tax return for September 2007*. *See* Ex. J3 (Sales and Use Tax Return for September 2007 showing "taxable units" subject to General Rate Sales Tax of $88,726). Similarly, the entry on Schedule Z for

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[4] The sum of the amounts shown on Schedule D ($954.42) and Schedule X ($269.12) of the August 2014 recalculation.

[5] The sum of the amounts shown on Schedule E ($29,567.87), Schedule T ($6,700.64), and Schedule Y ($3,530.52) of the August 2014 document.

[6] Schedule Z of the August 2014 document.

July 2010 shows "Mpls Sales Not Reported" of $70,021.00, *the exact amount of retail sales actually reported on the taxpayer's sales and use tax return for July 2010. See* Ex. J6 (Sales and Use Tax Return for July 2010 showing "taxable units" subject to $70,021). The August 2014 document offered no explanation whatsoever for the auditor's failure to assess Minneapolis sales tax, on retail sales previously reported to the Department of Revenue, in June 2011.

As previously indicated, the June 2011 order assessed a 5% penalty for late-filing where applicable but did not assess any other penalties. Although the statute of limitations had long expired with respect to virtually all of the audit period, the August 2014 document also included, for the first time, a penalty for "negligence or intentional disregard of the provisions of the Minnesota sales and use tax law." Pridgeon Aff. Ex. 3; *see* Minn. Stat. § 289A.60, subd. 5 (2014). Again, the August 2014 document offered no explanation whatsoever for the auditor's failure to assess this penalty in the June 2011 order.

In response to the Commissioner's apparent untimely attempt to assess additional tax and penalties, appellant moved in limine to bar the Commissioner "from asserting that any additional sales and use tax is due from Appellant" and "from introducing evidence relating to" certain months during the audit period that, according to appellant, were more than three and one-half years before the issuance of the August 2014 document and were therefore beyond the applicable statute of limitations for assessment. Appellant's Not. Mot. & Mot. Lim. 1-2; *see* Minn. Stat. § 289A.38, subd. 1 (2014). Relying on the face of the document, appellant characterized the August 2014 document as "a new Order." Appellant's Mem. Support Mot. Limine 4. We agreed.

We noted that under Minn. Stat. § 270C.33, subd. 1 (2014), "[a]ll orders of the commissioner, or any subordinates, respecting any tax, assessment, or other obligation, must be in writing and entered into the records of the Commissioner." Order 7 (Jan. 8, 2015). We further

relied on the Minnesota Supreme Court's decision in *Schober v. Commissioner of Revenue*, in which the supreme court held that, provided the order is final, subdivision 1 defines an "appealable order" of the Commissioner. 853 N.W.2d 102, 107 (Minn. 2013). The document at issue in *Schober* was a letter from the Commissioner denying Schober's request for a tax refund, which the supreme court determined was a "final decision" appealable to our court. *Id.* at 109.

Relying on *Schober* and subdivision 1 of section 270C.33, we concluded that the August 2014 document was necessarily an "order." Order (Jan. 8, 2015), at 4. We noted that the August 2014 document was in writing and came from the records of the Commissioner, therefore satisfying the requirements of Minn. Stat. § 270C.33, subd. 1. Order (Jan. 8, 2015), at 4. Although the Commissioner characterized the August 2014 document as simply a "recalculation based on evidence the Commissioner intends to present at trial," Appellee's Resp. Mem. Opp. Appellant's Mot. Lim. 1, it seemed to us that the document went far beyond a mere "recalculation." The August 2014 document purported to "ma[ke] adjustments for the periods shown above," Pridgeon Aff. Ex. 3, language plainly suggesting that the Commissioner had actually made changes to the taxpayer's liability. To reinforce the point, we noted that the August 2014 document specifically informed appellant of its right to "file a written claim for refund within . . . one year from the date of *an order assessing tax*," provided the appellant paid "in full the amount shown on *the order*." Order (Jan. 8, 2015), at 4 (emphasis added).

The Commissioner argues on reconsideration that our reliance on *Schober* was misplaced, because *Schober* concerned the denial of a refund claim, to which different statutory requirements apply. Mem. Law Supp. Comm'r's Mot. Recons. 3-4. In particular, the Commissioner points out that, she "must make a determination . . . and issue written findings" with respect to a refund claim but need not issue a formal order. Mem. Law Supp. Comm'r's Mot. Recons. 3-4; *see* Minn.

Stat. § 289A.50, subds. 1, 4 (2014). In contrast, the Commissioner notes, Minn. Stat. § 270C.33, subd. 4, requires that an "order of assessment" of more than $1,000 be signed by the Commissioner or her delegate. Mem. Law Supp. Comm'r's Mot. Recons. 4.

On reconsideration, we agree with the Commissioner that, on this record, our characterization of the August 2014 document as an "order" was mistaken. Minnesota Statutes § 270C.33, subdivision 4, requires that an "order of assessment" of more than $1,000 be signed by the Commissioner or her delegate.[7] The August 2014 document itself bears no signature; if it was transmitted to the appellant (or the appellant's counsel) with a signed cover letter, that cover letter is not part of our record here. We therefore grant the Commissioner's motion for reconsideration.[8]

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[7] Other parts of the assessment process are by statute explicitly optional. Notably, under Minn. Stat. § 270C.33, subd. 2 (2014), an assessment, determination, or order should be accompanied by a written notice that describes the taxpayer's appeal rights, lists the amounts of tax, interest, and penalties due, and explains the basis for the assessment. Subdivision 2(b) of section 270C.33 makes these elements explicitly optional, provided the assessment "contains sufficient information to advise the taxpayer that an assessment has been made." Minn. Stat. § 270C.33, subd. 2(b) (2014). That there is no similar exception for a signature further indicates that a signature is an absolute requirement.

[8] The Commissioner contends that we further erred in characterizing the August 2014 document as an "order" because Minn. Stat. § 270C.33, subd. 1, requires that orders "be entered into the records of the commissioner," and the August 2014 document "was not entered into the Commissioner's records as an assessment or liability of the Appellant." Mem. Law Supp. Comm'r's Mot. Recons. 3. On this point we disagree, for several reasons.

First, to be an "order" or "decision" of the Commissioner, section 270C.33, subdivision 1, requires that the document be "entered into the records of the commissioner," but does not specify *how* or *as what* a document be entered. To limit subdivision 1 as the Commissioner argues is to add language to the statute, which we decline to do. *Wallace v. Comm'r of Taxation*, 289 Minn. 220, 230, 184 N.W.2d 588, 594 (1971) (noting "the well-established ground that courts cannot supply that which the legislature purposely omits or inadvertently overlooks").

Second, as we have previously noted elsewhere, "an Order of the Commissioner should be identifiable as such and should have objective criteria for a taxpayer to understand when

correspondence received is or is not an Order." *Wells Fargo & Co. and Wells Fargo Bank Minnesota N.A. v. Comm'r of Revenue*, No. 7429 R, 2002 WL 1077735, at *3 (Minn. T.C. May 15, 2002) (noting the Commissioner's agreement with the proposition). The Commissioner's proposed addition to the statute would require the taxpayer to know how the document was entered in the Commissioner's records—something this case demonstrates is neither apparent from the face of the document nor determinable by the taxpayer.

Finally, the Commissioner contends that we should reconsider our characterization of the August 2014 document because its characterization as an "order" "leads to impractical results for the Court and the parties." Mem. Law Supp. Comm'r's Mot. Recons. 4. We note that any confusion or impracticability has been entirely the result of the Commissioner's choice of language and form, as to which the Commissioner had complete and exclusive control.