

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

KELLOGG COMPANY, A Delaware Corporation,)
)
)
 Plaintiff-Appellant,)
)
 vs.)
)
)
 DONNA KARNES, NEBRASKA STATE TAX COMMISSIONER, and THE NEBRASKA DEPARTMENT OF REVENUE,)
)
)
 Defendants-Appellees.)

Docket 408

Page 009

Dept. of Justice
ORDER

MAR 19 1987

State of Nebraska

This matter came on for hearing upon appeal from the decision of the State Tax Commissioner dated June 24, 1986. This case has been consolidated with the matter at docket 333, page 052, and this order will be dispositive of both matters. The Tax Commissioner found and determined that Kellogg Company, plaintiff herein, was only entitled to an amended Notice of Deficiency Determination amending to "zero" the Nebraska corporate income or franchise tax deficiencies for Kellogg's tax years 1968 through 1972, together with the Department of Revenue refund to Kellogg of tax paid under protest during the pendency of its appeal to the Supreme Court. The Tax Commissioner further found and determined that Kellogg had over-reported and over-paid its actual Nebraska corporate income or franchise tax liabilities by the aggregate amount of \$181,349.00, but since no written claim for refund was filed by Kellogg within the time allowed by law, the State Tax Commissioner was without authority to allow credit or make refunds. Evidence was adduced before this Court and the Court, being fully advised in the premises, finds as follows:

1. This matter has previously been before the Supreme Court. In Kellogg vs. Herrington, 216 Neb. 138, Kellogg protested

the deficiency assessed against it and appealed the matter to the Supreme Court. The parties in this case are in dispute as to the holding in the Kellogg case, supra, and the directions from the district court on remand.

In the reading of the Kellogg case, supra, the Supreme Court held that the State Tax Commissioner had acted in excess of statutory authority and contrary to law. The court directed the trial court to remand the case to the Tax Commissioner with directions to order the Tax Commissioner to recompute the taxes for the years in question in accordance with the decision of the Court.

2. The position of the Tax Commissioner is that she is prohibited from refunding the tax already paid because of the statute of limitations. The Tax Commissioner by her order stated that Kellogg's reading of Section 77-2776, Reissue 1986, would completely eviscerate the rules governing claims filed in writing, as set out in Section 77-2793 and 77-2795; that under Kellogg's reading no claim for refund need be made; that a taxpayer need only make the Tax Commissioner aware of facts or law which indicate that any overpayment of tax may have accrued. The Tax Commissioner is correct if one were to have a taxpayer asking for a refund because the taxpayer made an error in computing the tax due. That happens, the Court believes, frequently to all taxpayers both on the federal and state level and of course a statute of limitations would apply. But such is not the case before this Court or as was before the Supreme Court. It has been previously determined that the Department of Revenue exceeded its statutory authority by using an incorrect formula in assessing

the tax of Kellogg.

Section 77-2776, Reissue 1986, providing in substance that if the Tax Commissioner finds the tax paid is more than the correct amount she shall credit the overpayment against any tax due and refund the difference, is the authority, under the facts in this case, for the State Tax Commissioner to act. Such action by the Tax Commissioner would then be in accordance with the previous Supreme Court holding.

The argument of the Tax Commissioner that the refund authorized by Section 77-2776 is restricted to the period of limitations for making refunds as provided by Sections 77-2791 and 77-2793 is not persuasive in light of the facts in this case nor of the directions of the Supreme Court. If one were to accept the Tax Commissioner's interpretation of the statute of limitations, the Commissioner by inactivity or through court proceedings could avoid making a refund.

3. Another issue is the amount of interest to be assessed on the refund. Prior to August 30, 1981, Section 77-2794(1) provided for the interest rate of 6 percent on overpayments of income tax. In 1981, the section was amended that the rate of interest shall be allowed at the rate specified in Section 45-104.01. Section 45-104.01, which went into effect on August 30, 1981, provided for interest at the rate of 14 percent per annum. Significantly, the legislature added to Section 77-2794 as well as to Section 77-2788 the words, "as such rate may from time to time be adjusted by the Legislature". There is a lack of language in the sections involved that the old rate of interest would apply until the new rate went into effect.

4. The parties have stipulated that if Kellogg is entitled to a refund of tax reported the refund would be in the amount of \$181,349.00 for the tax years 1968 through 1972, plus appropriate interest.

The Court finds that interest on said above amount should be assessed at 14 percent per annum.

5. The Court further finds and determines that the order of the State Tax Commissioner dated June 24, 1986, was affected by error of law and was arbitrary and capricious and should be modified in accordance with the above findings of the Court.

IT IS THEREFORE ORDERED that the order of the State Tax Commissioner dated June 24, 1986, is hereby modified to pay a refund to Kellogg Company for the tax years in question, 1968 through 1972, in the total amount of \$570,703.00 with interest thereon at the legal rate until paid.

IT IS FURTHER ORDERED that the order of the State Tax Commissioner dated June 24, 1986, as above modified, is affirmed. Costs are taxed to the Nebraska Department of Revenue and the State Tax Commissioner.

DATED this 18th day of March, 1987.

BY THE COURT:


Robert R. Camp
District Judge