

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

JAMES L. SACK, )  
)  
Plaintiff, )  
)  
vs. )  
)  
DEPARTMENT OF REVENUE, STATE )  
OF NEBRASKA, and STATE TAX )  
COMMISSIONER, )  
)  
Defendants. )

DOC. 856 NO. 812

ORDER

Dept. of Justice

MAY 8 1987

State of Nebraska

Hearing was held on April 1, 1987 on the plaintiff's Motion for Summary Judgment and on the defendants' Motion for Summary Judgment. Plaintiff appeared pro se. Defendants appeared by Assistant Attorney General L. Jay Bartel. Both parties adduced evidence, rested and made argument. Both motions were taken under advisement.

The Court now finds that under Section 77-2775 R.R.S. 1943 (Reissue of 1986) any taxpayer filing an amended federal income tax return shall also file, within ninety days thereafter, an amended income tax return under the provisions of the Nebraska Revenue Act of 1967, and shall give such information as the tax commissioner may require.

There is no question but that the taxpayer, upon filing an amended federal return, must file an amended income tax return in Nebraska. The use of the word "shall" implies that the action to be taken is mandatory.

The Court further finds that plaintiff signed his 1982 Nebraska income tax return, 1040N, on May 14, 1983 and same was filed on May 16, 1983.

Plaintiff filed an amended U.S. individual income tax return 1040X for the year 1982, dated April 11, 1986 with the Internal Revenue Service on April 11, 1986. The amended U.S. return did not mention or include anything thereon that related to interest from U.S. Government obligations.

By Notice dated July 7, 1986, the Internal Revenue Service decreased plaintiff's 1982 taxes by \$2,351.00 and allowed \$8.13 interest to plaintiff.

Plaintiff filed an amended 1040XN dated July 8, 1986 with the Nebraska Department of Revenue on July 8, 1986 reflecting for the first time U.S. Treasury Note interest of \$2,786.00.

By letter dated September 8, 1986, the State of Nebraska allowed \$423.00 of plaintiff's claim, but denied a refund of \$201.00 of the Nebraska tax requested for the reason that the Nebraska adjustment was not related to the federal change, thus invoking the period of limitation stated in 77-2793(1).

Under 77-2793(4), plaintiff had two years to claim a refund from overpayment of tax from the time the notice of such change or correction or amended return was required to be filed with the Tax Commissioner (90 days) provided the refund could not exceed the amount of the reduction in tax attributable to such federal change, correction, or items amended on the taxpayers amended federal income tax return.

Here this requested refund of \$201.00 was not attributable to any change, correction or items amended on plaintiff's amended federal income tax.

Thus, the last sentence of 77-2793(4) comes into play which turns us to 77-2793(1) which provides that a refund of an overpayment of income tax must be filed within three years from the time the return was filed or two years from the time the tax was paid whichever period expires later. In this case, it would be the period of three years from May 16, 1983 or May 16, 1986. Plaintiff failed to file his amended State return until July 8, 1986. Therefore, plaintiff filed out of time.

There being no genuine issue of any material fact, summary judgment is appropriate.


IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff's Motion for Summary Judgment is overruled.

IT IS FURTHER ORDERED that the defendants' Motion for Summary Judgment be and the same hereby is sustained, and

plaintiff's Petition should be and the same hereby is dismissed  
at plaintiff's cost.

DATED this 7<sup>th</sup> day of May, 1987.

BY THE COURT:

  
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DISTRICT JUDGE