

IN THE COURT OF APPEALS OF IOWA

FILED

DEC 29 1982

CLERK SUPREME COURT

FARMERS GRAIN DEALERS ASSOCIATION OF)
IOWA, now Known As AMERICAN GRAIN AND)
RELATED INDUSTRIES,)

Plaintiff-Appellant,)

vs.)

208
Filed December 29, 1982

RALPH WOODWARD, Chairman, CHARLES)
COLBY, JR., HARRY BURGESS, WALTER POTTS,)
JR., AND EVERETT SATHER, Constituting The)
BOARD OF REVIEW OF ASSESSMENTS OF POLK)
COUNTY, IOWA, and HARRY RENAUD and)
CLIFFORD CUSTOR, Former Members of Said)
Board: JACK BISHOP, Chairman, SAM ANANIA,)
TOM WHITNEY, RICHARD BRANNAN, and)
MURRAY DRAKE, Constituting the BOARD OF)
SUPERVISORS OF POLK COUNTY, IOWA, JIM)
MALONEY, As Auditor of Polk County, Iowa, and)
FRED HORNER, as Treasurer of Polk County, Iowa,)

2-183
2-67322

Defendants-Appellees.)

Appeal from Polk District Court - Louis A. Lavorato, Judge.

Plaintiff-taxpayer appeals from the district court's adverse judgment in its mandamus action seeking to force defendants to pay plaintiff refunds for excessive property tax paid for the tax years 1972, 1973 and 1974. REVERSED.

Elmer M. Jones and Robert A. Engberg of Pryor, Riley, Jones & Aspelmeier, Burlington, Iowa; and John Carty, Winfield, Iowa, for plaintiff-appellant.

Dan L. Johnston, Polk County Attorney; Norman G. Jesse, Assistant County Attorney; and J. R. McManus, Des Moines, Iowa, for defendants-appellees.

Considered en banc.

Plaintiff-taxpayer, Farmers Grain Dealers Association of Iowa, appeals from the district court's adverse judgment in its mandamus action seeking to force defendants, Ralph Woodward, et al., to pay plaintiff refunds for excessive property tax paid for the tax years 1972, 1973 and 1974. We reverse the district court.

The plaintiff is a property owner in Polk County; defendants are members and former members of the board of review of tax assessments, members of the county board of supervisors, the county auditor and the county treasurer.

The plaintiff protested the county assessor's assessment of its property for the assessment year of 1971, but did not protest the assessment for the interim years 1972, 1973 and 1974. No reevaluations or reassessments were made during the interim years. The 1971 protest eventually resulted in an appeal to the Iowa Supreme Court in which the court reversed the district court's decision affirming the board of review's valuation of the property for the year 1971. Farmers Grain Dealers Association v. Sather, 267 N.W.2d 58 (Iowa 1978) (Sather). In that appeal, the supreme court reduced the fair market value of plaintiff's property to \$1 million and directed the board of review to make the appropriate corrections in the record and to order the tax recomputed for 1971.

Defendants made the adjustment of the valuation for 1971 as ordered by the court and admitted that plaintiff was entitled to a refund for that year. However, defendants refused to make the reduced valuation applicable for tax years 1972, 1973, and 1974, and refused plaintiff's demands for refunds for taxes paid for those years.

On July 12, 1979, plaintiff filed a combined motion for recall of procedendo, writ of mandamus, and rehearing, essentially seeking to have defendants directed to apply the reduced valuation to the interim years so that plaintiff could receive refunds. On August 24, 1979, the supreme court denied plaintiff's motions, directing that plaintiff seek such relief in district court.

On October 12, 1979, plaintiff served on the board of supervisors a demand for refund of tax asking that the board direct the county treasurer to refund to plaintiff any and all amounts erroneously paid by plaintiff as property taxes for the years 1971 through 1974. The board did not comply with this demand except for the tax year 1971. On November 29, 1979, plaintiff filed a petition for writ of mandamus against defendants praying that they be directed to apply the reduced valuation to the interim years and to give refunds to plaintiff for those years. On December 24, 1979, defendants filed an answer denying many of the material allegations of the petition. Defendants contended throughout that plaintiff was entitled to no relief since it had failed to file a protest for the interim years. Defendants further argued that plaintiff was barred from recovery by the statute of limitations (Iowa Code § 614.1(4)) and laches.

On July 31, 1981, the district court entered an order denying the petition. The district court concluded that the supreme court in Sather did not direct a refund for the interim years. The court also concluded that plaintiff was required to protest the assessment for the interim years in order to have the taxes "illegally exacted or paid," thereby permitting plaintiff to obtain a refund pursuant to section 445.60, and that, since it failed to do so, plaintiff was not entitled to maintain a mandamus action to compel a refund for the interim years. From this holding plaintiff appeals.

I. Scope of Review. Mandamus actions are tried in equity, Iowa Code § 661.3 (1981), and are reviewable *de novo*. Schrader v. State, 213 N.W.2d 539, 540 (Iowa 1973); Phelps v. Board of Supervisors of Muscatine County, 211 N.W.2d 274, 277 (Iowa 1973); Iowa R. App. P. 4.

II. Propriety of Trial Court's Denial of Writ of Mandamus. Plaintiff contends that the Iowa Supreme Court decreed that there be a refund of taxes paid by plaintiff for the years 1972, 1973 and 1974, and that the district court erred in denying plaintiff's request for a writ of mandamus. Defendants have elected not

to file briefs in this appeal. "The failure to file an appellee brief does not entitle petitioner to a reversal as a matter of right, but does provide a basis for sanctions." State ex rel. Buechler v. Vinsand, 318 N.W.2d 208, 209 (Iowa 1982). In the present controversy we will limit our analysis to the controverted rulings of the district court as raised by plaintiff.

A mandamus action is "one brought to obtain an order commanding an inferior tribunal, board, corporation or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station." Iowa Code § 661.1 (1981). "Since mandamus is a summary and extraordinary writ it will not be issued in doubtful cases but only where the rights and duties are clear and there is no other speedy and adequate remedy in the ordinary course of the law." Reed v. Gaylord, 216 N.W.2d 327, 332 (Iowa 1974). "Mandamus is not available to establish legal rights, but only to enforce legal rights that are clear and certain." Stafford v. Valley Community School District, 298 N.W.2d 307, 309 (Iowa 1980).

We first note the distinction between this case and Sather. In Sather plaintiff sought correction of an assessment; in the present action plaintiff seeks a refund for an alleged overpayment of taxes. Refunds for such payment of taxes is governed by Iowa Code § 445.60 (1981), which provides: "[t]he board of supervisors shall direct the treasurer to refund the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon." "[I]f the board of supervisors refuses to do its duty and order a refund of the portion of taxes erroneously or illegally exacted, an action in mandamus will lie, to compel such refund." Steele v. Madison County, 198 Iowa 902, 904-05, 200 N.W. 330, 331-32 (1924).

Of crucial importance to our disposition of this matter is the court's holding in Sather, 267 N.W.2d at 58. Succinctly stated, Sather "involve[d] a valuation of plaintiff's terminal grain elevator at Avon Lake for property tax purposes for the

tax year 1971." Id. at 59. The supreme court found that the trial court had "erred in concluding plaintiff had failed to establish by competent evidence that the assessed valuation placed on its property by the assessor as of January 1, 1971, was either excessive or inequitable" and ordered the following:

We, therefore, reverse the judgment of the trial court, and fix the fair market value of plaintiff's real estate for the year 1971 at \$1,000,000. The defendant Board is directed to correct its records accordingly, and to certify the same to the Board of Supervisors of Polk County so that plaintiff's tax for the year 1971 may be recomputed on the basis of such assessment.

Id. at 63. The precise issue presented to this court is whether the supreme court's holding in 1978 regarding the 1971 assessment permits or requires the recovery of a refund by plaintiff for tax payments based on an improper valuation for the tax years 1972, 1973 and 1974, where plaintiff filed no protest.¹

A. Voluntary Payment. Under the common law, taxes which are voluntarily paid cannot be recovered. Hammerstrom v. Toy National Bank of Sioux City 81 F.2d 628, 633 (8th Cir.) cert. denied, 299 U.S. 546, 57 S. Ct. 9, 81 L. Ed. 402 (1936). "[This] court, in the absence of mistake or fraud, [has never] allowed a taxpayer to recover taxes voluntarily paid, based on such over or under valuation." Cedar Rapids Hotel Co. v. Stirm, 222 Iowa 206, 211, 268 N.W. 562, 564 (1936). However, where the tax exacted is erroneous or illegal, a party "would be entitled to a refund thereof under section 445.60 even though payment was voluntary." Jewett Realty Co. v. Board of Supervisors of Polk County, 239 Iowa 988, 995 33 N.W.2d 377, 380 (1948). See also Crown Concrete Co. v. Conkling, 247 Iowa 609, 617, 75 N.W.2d 351, 356 (1956) (involving tax on personalty).

¹ "A protest is for the purpose of inviting the attention of taxing officers to the illegality of the collection." Fulton Bag & Cotton Mills v. United States, 57 F. 2d 914, 917 (Ct. Cl. 1932).

A review of the record before this court indicates that the plaintiff voluntarily paid taxes for 1972, 1973 and 1974. Since mere voluntary payment is not a bar to recovery of taxes erroneously or illegally exacted, we must examine the precise nature of the taxes paid by plaintiff. Inextricably intertwined with the concept of the erroneous or illegal nature of the taxes is the doctrine of exhaustion of all adequate administrative remedies.

B. Administrative Remedies. Plaintiff argues that the \$1 million valuation ordered by the Iowa Supreme Court in Sather for the assessment year 1971 was to prevail until the next assessment year of 1975 because there were no interim year reassessments and, accordingly, no new assessments to appeal for the years in question. Plaintiff contends that it preserved its right to refund for 1972, 1973 and 1974 by appealing the valuation in the assessment year (1971) and that no waiver resulted from plaintiff's failure to protest the collection of taxes in 1972, 1973 and 1974.

We begin our analysis with the principle that administrative law is solely a matter of statute. Administrative agencies do not possess common law or inherent powers. See Franklin v. Iowa Department of Job Service, 277 N.W.2d 877, 881 (Iowa 1979). Prior to judicial review of agency actions generally there must be an exhaustion of all adequate administrative remedies. The court in Ellis v. Iowa Department of Job Service, 285 N.W.2d 153 (Iowa 1979), determined that for the exhaustion of remedies doctrine to apply, "[a]n administrative remedy must exist for the claimed wrong and the statute must expressly or impliedly require that remedy to be exhausted before resort to the courts." Id. at 155. The trial court in the present action concluded "The taxpayer in this case did not pursue the statutory assessment review procedure in 1972, 1973 and 1974. Therefore . . . the taxes paid as to 1972, 1973 and 1974 were not 'erroneously or illegally exacted or paid' within the meaning of Section 445.60" The trial court further stated that ". . . it is concluded that the statutory administrative-judicial review is adequate." We disagree.

In determining the proper remedy for the interim years, we believe consideration of two statutes is crucial. The first is Iowa Code § 441.37 which provides:

Any property owner or aggrieved taxpayer who is dissatisfied with his or her assessment may file a protest against such assessment with the board of review on or after April 16, to and including May 5, of the year of the assessment. . . .

1. That said assessment is not equitable as compared with assessments of other like property in the taxing district. . . .
2. That his property is assessed for more than the value authorized by law. . . .
3. That his property is not assessable and stating the reasons therefor.
4. That there is an error in the assessment and state the specific alleged error.
5. That there is fraud in the assessment which shall be specifically stated.

In addition to the above, the property owner may protest annually to the board of review under the provisions of section 441.35, but such protest shall be in the same manner and upon the same terms as heretofore prescribed in this section. (emphasis added).

The second statute is section 441.35. This states, in pertinent part:

In any year after the year in which an assessment has been made of all of the real estate in any taxing district, it shall be the duty of the board of review to meet as provided in section 441.33, and where it finds the same has changed in value, to revalue and reassess any part or all of the real estate contained in such taxing district, . . . and any aggrieved taxpayer may petition for a revaluation of his property, but no reduction or increase shall be made for prior years. . . . (emphasis added).

In discussing the interrelationship of these sections, the court in In re James Black Dry Goods Co. v. Board of Review, 260 Iowa 1269, 1279-78, 151 N.W.2d 534, 539 (1967), quoting Simmons Warehouse Co. v. Board of Review, 229 Iowa 191, 193, 294 N.W. 286, 288 (1940), stated:

The words "same manner and upon the same terms" do not refer to the grounds of complaint. They refer to how and when an interim year protest shall be heard. The manner and terms for the protest are set forth in the first part of section 441.37 . . . The authorized ground for an interim year protest appears in section 441.35, . . . the only ground applicable to interim years is a change in value. During an assessment year an individual taxpayer by following the provisions of section 441.37 may protest on any or all of the grounds set forth therein, but in interim years the grounds for protest are limited by section 441.35. (emphasis supplied).

* * *

It is the duty of the court to give effect to the language of the statute and the words, "where it finds the same has changed in value" can only be construed as a limitation upon the enlarged jurisdiction of the Board of Review to make changes in assessments "in any year after the year in which an assessment has been made." . . . (emphasis added).

Despite the underlined language, the trial court reasoned that the first sentence of section 441.35, discussing the duties of the board, could be excised from that part of section 441.35 which relates to the "aggrieved taxpayer." The trial court further reasoned that if the words in section 441.35 ("but no reduction or increase shall be made for prior years,") "did not mean that taxpayer could protest in subsequent years because of claims that the property value stated in former years was excessive, and would not be limited to change in value, there would be no need to specifically provide there would be no reduction for prior years." We believe such an interpretation is strained and gives undue significance to isolated portions of the statute. Additionally, in construing tax statutes, "doubt should be resolved in favor of the taxpayer." Armstrong's, Inc. v. Iowa Department of Revenue, 320 N.W.2d 623, 626 (Iowa 1982).

Based upon the foregoing, we conclude that there was no mandatory administrative procedure by which plaintiff should have sought an interim appeal of the assessment absent a charge in the property's valuation. Accordingly, we find there was no administrative remedy which remained unexhausted.

C. Illegal or Erroneous Tax. We must now determine whether the taxes paid by plaintiff in the interim years were erroneously or illegally exacted. Irregularities in taxes must be distinguished from those taxes illegally or erroneously exacted.

Griswold Land & Credit Co. of Manson v. County of Calhoun, 198 Iowa 1240, 1245, 201 N.W. 11, carefully considers the meaning of "erroneously or illegally exacted or paid" as used in what is now section 445.60. The rule there laid down from a consideration of our prior decisions is that a tax is erroneous or illegal so that a refund may be enforced when: (1) the tax is levied without statutory authority or (2) upon property not subject to taxation or (3) by some officer or officers having no authority to levy the same or (4) in some other similar respect illegal.

Jewett Realty Co., 239 Iowa at 993, 33 N.W.2d at 380. "This court has repeatedly held that the tax paid on an excessive valuation is not 'erroneously or illegally exacted or paid' where the taxpayer has failed to make use of the administrative body in having the correction made at the proper time." Cedar Rapids Hotel, 222 Iowa at 217, 268 N.W. at 567 (taxpayer failed to make payment under protest or objection to the assessor or local board of review). Where a remedy is available and remains unexercised an overassessment does not fall within the purview of "erroneously and illegally" and as such the taxpayer is not entitled to a refund under 445.60. See, e.g., Insurance Exchange Building, 231 Iowa 133, 140, 300 N.W. 717, 721 (1941).

In the present controversy we have previously determined that, unlike the situation in Cedar Rapids Hotel and its progeny, plaintiff exhausted its administrative remedies. In determining whether the taxes paid by plaintiff were erroneous or illegal, we turn to the supreme court's holding in Sather.

In construing a judgment, we must give effect to that which is clearly implied as well as that which is expressed. See Batliner v. Sallee, 254 Iowa 561, 563, 118 N.W.2d 552, 554 (1962). We construe the judgment in its entirety to make it consistent, effective and reasonable. Id. at 564, 118 N.W.2d at 554.

The court's decision in Sather clearly establishes the respective rights of the parties with regard to the 1971 assessment. The court in 1978 in fact substituted its valuation as the proper 1971 assessment. As a result, the million dollar valuation became the only legal valuation for 1971. It was on this basis that the taxes due for 1971 were ordered by the supreme court to be recomputed. This legal valuation likewise became the basis for the interim years, absent a reassessment. In this case there was no interim year reassessment. We thus conclude that the million dollar valuation imposed by the supreme court was the only legal valuation of the property for the assessment year 1971 and that such a valuation was to be used as the basis for assessing plaintiff's taxes for the interim years 1972, 1973 and 1974. Accordingly, we hold that the taxes were erroneously or illegally withheld and that plaintiff is entitled to the refund of taxes paid for the interim years.

In so holding, we are mindful of strong policy arguments running contrary to our holding. The need for stability in the State's tax structure has long been recognized by the courts. The ability of a taxpayer to recover tax payments five years later, after the taxing body has already appropriated and expended the sums sought in refund, places a burden on the taxing body. Our ruling, however, will not "render the basis of taxation as unstable as the shifting sands or the tide of the ocean" as the court found in the facts of Cedar Rapids Hotel, 222 Iowa at 218, 268 N.W. at 568, where, unlike the present situation, the taxpayer failed to exercise the required administrative remedy.

III. Laches and Statute of Limitations. In the pleadings, defendants asserted both laches and the statute of limitations as a bar to plaintiff's refund. Since the trial court found for defendants on other grounds, the issues were not addressed. As mentioned previously, the defendants chose not to file a brief in this matter and it is only the controverted rulings of the trial court as raised by appellant's brief that concern us. Why a party would not chose to file a brief when

the appellate review is *de novo* is not apparent to this court on the record. We have, however, reviewed the record and find that neither would bar plaintiff's action in light of the fact that plaintiff's cause of action for a refund for the years 1972, 1973 and 1974 did not ripen until 1978 when the supreme court determined the legal valuation of plaintiff's property. See Eyerly v. Supervisors of Jasper County, 77 Iowa 470, 42 N.W. 374 (1889).

In summary, we find that plaintiff is entitled to its requested relief and order defendants to refund the excess taxes paid for the years 1972, 1973 and 1974 in amounts stated by the parties in their stipulation filed January 8, 1981. The judgment of the district court is reversed.

REVERSED.