

FILED

JAN 26 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**EVANGELICAL LUTHERAN GOOD SAMARITAN)
SOCIETY,)**

Plaintiff-Appellant,)

Filed January 26, 1983

vs.)

CALHOUN COUNTY BOARD OF SUPERVISORS,)

Defendant-Appellee.)

2-433
2-68300

Appeal from Calhoun District Court - Louie F. Beisser, Judge.

Plaintiff-taxpayer appeals from the district court's ruling granting defendant's motion to dismiss the plaintiff's action seeking refunds from the defendant pursuant to Iowa Code § 445.60 for property taxes allegedly erroneously paid by the plaintiff to the county for the tax years 1976-77, 1977-78 and 1978-79.

REVERSED AND REMANDED WITH DIRECTIONS.

M. Gene Blackburn of Blackburn, Stockdale & Brownlee, Fort Dodge, Iowa,
and Ann M. Ver Heul, Des Moines, Iowa, for plaintiff-appellant.

Kent Willis, Lake City, Iowa, for defendant-appellee.

Heard en banc.

JOHNSON, J.

Plaintiff-taxpayer, Evangelical Lutheran Good Samaritan Society, appeals from the district court's ruling granting defendant's, Calhoun County Board of Supervisors, motion to dismiss the plaintiff's action seeking refunds from the defendant pursuant to Iowa Code § 445.60 for property taxes allegedly erroneously paid by the plaintiff to the county for the tax years 1976-77, 1977-78 and 1978-79. We reverse and remand with directions to reinstate plaintiff's petition.

On August 25, 1981, the plaintiff filed a petition seeking refunds from defendant pursuant to Iowa Code § 445.60 for property taxes allegedly erroneously paid by the plaintiff to Calhoun County for the tax years 1976-77, 1977-78, and 1978-79. The plaintiff alleged that, as to the 1976-77 taxes, the plaintiff's lack of notice regarding the assessment and addition of its property to the tax rolls rendered the assessment and collection of the tax illegal and subject to refund and that, as to the 1977-78 and 1978-79 taxes, the defendant was estopped from asserting that the plaintiff was not entitled to a refund because plaintiff failed to exhaust administrative remedies, by its agreement with the plaintiff that such remedies would be held in abeyance and supplanted by an Iowa Court of Appeals decision expected to be determinative of the Calhoun County proceedings.

As alleged in the petition, the plaintiff is a nonprofit charitable organization which owns and operates nursing homes, including the Manson Good Samaritan Center in Calhoun County. Prior to 1975, the Calhoun County board of review had granted the Manson Good Samaritan Center a yearly exemption from property taxation in Calhoun County as a property of a nonprofit charitable society pursuant to Iowa Code § 427.1(9). On May 22, 1975, the application of the Manson Good Samaritan Center for exemption from property taxes in Calhoun County for the 1976-77 tax year was denied by the board of review and the Center was placed on the tax assessment rolls for that year. Plaintiff did not receive notice by mail as allegedly required pursuant to Iowa Code § 441.36 that the

property tax exemption for the Center had been denied and that the property had been placed on the tax assessment roles. As a result, the Center was unable to pursue the administrative remedies to protest or appeal the assessment of the board of review. Subsequently the 1976-77 property taxes on the center were paid by the plaintiff when due under written protest.

The application of the Center for a property tax exemption was again denied by the board of review for the tax years 1977-78 and 1978-79. The taxes for these years were also paid when due under written protest.

On May 7, 1976, the plaintiff filed a notice of appeal from the ruling of the board of review which denied tax exempt status to the Center for the tax year 1977-78. An agreement was reached with Calhoun County officials that the appeal would be held in abeyance pending a decision by the Iowa Court of Appeals involving the tax exempt status of similar property owned by the plaintiff in another county. The parties agreed the decision would be determinative of the Calhoun County proceedings. Taxes allegedly were paid for the tax years 1977-78 and 1978-79 pursuant to this agreement without the plaintiff pursuing further administrative review.

In April 1978, plaintiff was declared to be a charitable society for tax purposes in Evangelical Lutheran Good Samaritan Society v. Board of Review, 267 N.W.2d 413 (Iowa Ct. App. 1978). On November 30, 1978, plaintiff filed a petition pursuant to Iowa Code § 445.60 seeking refunds from the defendant for taxes allegedly erroneously paid by the plaintiff to Calhoun County for the tax years 1976-77, 1977-78 and 1978-79. Defendant denied the petition and refused to refund any taxes paid during those years. Plaintiff then filed the present action on August 25, 1981.

Defendant subsequently filed a motion to dismiss, alleging in part that the plaintiff waived its right to an appeal to the district court pursuant to Iowa Code § 441.38 by failing to pursue the remedies provided in Iowa Code § 441.37.

On February 8, 1982, the district court sustained defendant's motion to dismiss on the grounds that plaintiff's allegations of lack of notice and estoppel did not support a claim for the refund of taxes paid as provided in Iowa Code § 445.60. The district court determined that the section only applies to errors in the collection of taxes and not in the assessment of taxes.

I. Scope of Review. ¹ Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4. In reviewing the trial court's granting of defendant's motion to dismiss, we are guided by the general principles stated in Weber v. Madison, 251 N.W.2d 523 (Iowa 1977).

Overruling or sustaining a motion to dismiss does not depend upon trial court's discretion. It must rest on legal grounds and is subject to review by this court. [citations omitted]

A motion to dismiss is a waiver of any ambiguity or uncertainty in the pleadings. [citation omitted] Such a

¹ Unlike most actions for refunds which are brought as petitions for mandamus, plaintiff brings this action at law. Upon remand the trial court should examine the impact of the following quote from Steele v. Madison County, 198 Iowa 902, 904, 200 N.W. 330, 331-32 (1924):

Actions at law, to recover taxes paid under protest, in which a judgment was entered against the county, have been sustained; but the distinction between the holding of those cases and those in which we have held that an action against the county will not lie, and that mandamus is the proper remedy, has been repeatedly pointed out. . . .

* * *

. . . where the property was subject to taxation, but had been erroneously or illegally assessed, it has been held that an action against the county would not lie and that the remedy provided by Section [445.60] must be followed, and that, if the board of supervisors refuses to do its duty and order a refund of the portion of the taxes erroneously or illegally exacted, an action in mandamus will lie, to compel such refund. [citations omitted]

The trial court should note that Steele refers to "the" remedy of section 445.60 and an action at law as an alternative. See also First National Bank v. Harrison County, 57 F.2d 56, 58 (8th Cir.) cert. denied 287 U.S. 611, 535 S. Ct. 13, 77 L. Ed. 531 (1932).

motion grounded on failure to state a cause of action is sustainable only when it appears to a certainty the pleader has failed to state a claim upon which any relief may be granted under any state of facts which could be proved in support of the claim asserted. In making this determination the pleading should be construed in the light most favorable to the pleader with doubts resolved in his favor and the challenged allegations accepted as true. [citations omitted]

Id. at 525. (emphasis added). With these principles in mind, we review plaintiff's contentions.

II. Taxes for the Tax Years 1977-1978 and 1978-1979 (Count II). Plaintiff argues the trial court erred in sustaining defendant's motion to dismiss since plaintiff alleged it had an agreement with defendant that plaintiff would hold its administrative remedies for erroneous assessment of taxes in abeyance while awaiting an appellate decision expected to be determinative on the issue of exemption from tax. Plaintiff premises its argument on the theories of equitable or promissory estoppel. Plaintiff further alleges that a refund under Iowa Code § 445.60 (1981) is proper for erroneously or illegally exacted taxes despite its failure to pursue administrative remedies.

The district court granted defendant's motion to dismiss Count II on the basis that section 445.60 applies to errors in collection and that sections 445.37-39 apply to errors in assessment. To invoke section 445.60, the court concluded, a taxpayer must have exhausted administrative remedies. We agree with this conclusion.

A tax 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." See Cedar Rapids Hotel Co. v. Stirm, 222 Iowa 206, 217, 268 N.W. 562, 567 (1936). "If a person pays taxes without availing himself of the remedy provided by law, it cannot be regarded as an illegal exaction, provided the power and jurisdiction existed to make the assessment and levy." Van Wagenen v. Supervisors of Lyon County, 74 Iowa 716, 718, 39 N.W. 105, 106 (1888).

It cannot be disputed that the local county officials had the authority to determine whether plaintiff's property was exempt and, on finding it was not, had the ability to tax the property. See Iowa Code § 427.1(9) (1981). See also Evangelical Lutheran Good Samaritan Society v. Board of Review of Fayette County, 267 N.W.2d 413, 414-15 (Iowa Ct. App. 1978). The decision is, however, subject to review, but the ability to review does not negate the county's ability to determine the propriety of exemptions in the first place. See generally, id. All adequate administrative remedies must be exhausted to recover a tax illegally collected before resort to the court is permitted. First National Bank v. Harrison County, 57 F.2d 56, 58 (8th Cir.) cert. denied, 287 U.S. 611, 53 S.Ct. 13, 77 L. Ed. 531 (1932).

Plaintiff, however, claims that it was excused from exhausting the appropriate administrative remedies on the theory of estoppel. We note that "... boards of supervisors have only such powers as are expressly conferred by statute or necessarily implied from the power so conferred." McMurry v. Board of Supervisors of Lee County, 261 N.W.2d 688, 690 (Iowa 1978) (quoting Manicino v. Kelly, 158 N.W.2d 754, 760 (Iowa 1968)). "[O]fficial action of local authorities must be in legal session and they may not act on such ordinances, resolutions, or regulations as individuals, but only as a body where records of action may be duly preserved." Lemke v. Mueller, 166 N.W.2d 860, 864 (Iowa 1969). A county officer's unauthorized act does not make estoppel applicable against the county. See Mitchell County v. Odden, 219 Iowa 793, 800, 259 N.W. 774, 779 (1935).

The invocation of estoppel against sovereigns and their subdivisions is severely restricted. See Fryer v. United States, 440 F.Supp. 769 (S.D. 1977) (United States not bound by unauthorized act of agent); Incorporated City of Denison v. Clabaugh, 306 N.W.2d 748 (Iowa 1981) (estoppel not permitted against municipality); Department of Transportation v. Nebraska-Iowa Supply Co., 272 N.W.2d 6 (Iowa 1978); Sullivan v. Iowa Departmental Hearing Board, 325 N.W.2d

923, 927 (Iowa Ct. App. 1982) ("The Iowa Supreme Court has consistently stated, however, that the doctrine of equitable estoppel cannot be invoked against the State.") There are exceptions to the general rule forbidding estoppel against governmental units, see e.g., Department of Transportation, 272 N.W.2d at 14, but equitable estoppel is "not generally invoked against the state, particularly when the collection of revenue is involved." In re McAllister's Estate, 214 N.W.2d 142, 146 (Iowa 1974). Nevertheless, the law appears to permit assertions of equitable estoppel in limited instances upon proof of the appropriate facts, even in the collection of revenue. See S & M Finance Co. of Fort Dodge v. Iowa State Tax Commissioner, 162 N.W.2d 505, 510 (Iowa 1968).

Based upon the principle that on review of a motion to dismiss we are bound to construe the pleadings² in a light most favorable to the non-movant, Weber v. Madison, 251 N.W.2d at 525, and to take the pleaded allegations as true, we find plaintiff has stated a claim for relief. While plaintiff's proof problems may be considerable, plaintiff remains entitled to present its evidence. This makes dismissal inappropriate. Accordingly, we reverse the court's dismissal of Count II.

III. Taxes for Tax Year 1976-1977 (Count I). Plaintiff also claims that the district court erred in dismissing the action when plaintiff alleged it did not receive the statutorily prescribed notice that its property had been added to the tax rolls for that year and was unable to pursue the appropriate administrative remedies. Again, we review the pleadings in a light most favorable to plaintiff.

Iowa Code § 441.36 (1981) provides:

All changes in assessments authorized by the board of review, and reasons therefor, shall be entered in the minute book kept by said board and on the assessment roll. Said minute book shall be filed with the assessor after the

² This court notes possible defects in the pleading of estoppel, however, "the issue of estoppel must ordinarily be plead but it need not be so designated. It is enough the facts relied upon are set out." Johnson v. Pattison, 185 N.W.2d 790, 795 (Iowa 1971). Regardless, defendant failed to attack the pleadings and a "motion to dismiss is a waiver of any ambiguity or uncertainty in the pleadings." Weber v. Madison, 251 N.W.2d 523, 525 (Iowa 1977).

adjournment of the board of review and shall at all times be open to public inspection. In case the value of any specific property or the entire assessment of any person, partnership, or association is increased, or new property is added by the board, the clerk shall give immediate notice thereof by mail to each at the post-office address shown on the assessment rolls, and at the conclusion of the action of the board therein the clerk shall post an alphabetical list of those whose assessments are thus raised and added, in a conspicuous place in the office or place of meeting of the board, and enter upon the records a statement that such posting has been made, which entry shall be conclusive evidence of the giving of the notice required. The board shall hold an adjourned meeting, with at least five days intervening after the posting of said notices, before final action with reference to the raising of assessments or the adding of property to the rolls is taken, and the posted notices shall state the time and place of holding such adjourned meeting, which time and place shall also be stated in the proceedings of the board.

Iowa Code § 441.35 (1981) provides in part that when property is added to the tax rolls, the taxpayer will be notified in accordance with section 441.36. The court in Good Development v. Horner, 260 N.W.2d 524 (Iowa 1977), in considering Iowa Code § 441.23 (1981), stated:

... Standing alone, failure of an assessor to give timely notice under the section will not invalidate a tax. But failure of an assessor to give timely notice coupled with resulting actual prejudice to the taxpayer will invalidate the additional amount of tax brought about by an increased amount of valuation. In order to establish actual prejudice caused by the assessor's tardy notice, a taxpayer must show that (a) the assessor overvalued the property (since otherwise the taxpayer is not hurt) and (b) as a result of the delay in notification the taxpayer was unable to file a protest with the board of review by the time the board finally adjourned for the year (since the purpose of § 441.23 is to enable the taxpayer to protest)— for example, as where the taxpayer establishes he was unaware until after the board finally adjourned that taxpayers have a right to protest or that the assessor had raised the valuation.

Id. at 520 (emphasis added).

We agree with the lower court's conclusion that failure to provide notice regarding an assessment alone may not be sufficient to warrant a refund. See id. at 528-29. However, where the taxpayer also alleges prejudice arising from lack of notice, a refund may be appropriate. In this case, plaintiff has alleged

prejudice as a result of its failure to receive notice. We therefore conclude that dismissal of this count was erroneous. Since we dispose of the issue on statutory grounds, we do not address plaintiff's due process arguments. We reverse the district court's judgment and remand this case with directions to reinstate plaintiff's action.

REVERSED AND REMANDED WITH DIRECTIONS