

STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Brian A. Bolden,
Petitioner,

v

MTT Docket No. 313745

Revenue Division,
Department of Treasury,
State of Michigan,
Respondent.

Tribunal Judge Presiding
Jack Van Coevering

ORDER

On February 27, 2006, a Prehearing Conference was held in this matter. At the conference, Petitioner advised that Respondent had garnished roughly \$5,000. Upon further inquiry, Petitioner's representative stated he contacted the Michigan Department of Treasury and advised "Collections" that the matter was in litigation at the Tribunal and that garnishment was not permitted while the case was under appeal. The representative also stated that despite several calls, Petitioner's accounts were still subjected to garnishment. Petitioner advised he was being evicted from his apartment and had lost his truck to collectors. It was unclear whether or not Treasury's garnishment contributed to Petitioner's default to his creditors.

Respondent's representative agreed with Petitioner's representative that the garnishment was improper. Respondent's representative was directed to cease garnishment immediately. On February 28, 2006, the Tribunal received a letter from Respondent's representative, advising that the Collections Division of the Department of Treasury had been contacted, that this case has been properly coded to reflect the appeal and no additional garnishments should occur while this case is on appeal.

It is well founded that a "State [cannot] deprive any person of life, liberty, or property, without due process of law." US Const, Am XIV, § 1. Some form of hearing is required before an individual is deprived of property. *Mathews v Eldridge*, 424 US 319, 333, 96 S Ct 893, 902, 47 L Ed 2d 18 (1976); *Central of Georgia R Co v Wright*, 207 US 127, 138-142, 28 S Ct 47, 51-53, 52 L Ed 134 (1907); *Davidson v New Orleans*, 96 US 97, 104-105, 24 L Ed 616 (1878). "Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." *McKesson Corporation v Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida*, 496 US 18, 36; 110 S Ct 2238, 2250 (1990).

[A] State must provide procedural safeguards against an unlawful tax exaction because such exaction constitutes a deprivation of property under the Due Process Clause. A State may do so either by providing a form of predeprivation process – e.g., by authorizing taxpayers to sue to enjoin imposition of the tax prior to its

payment or to withhold payment and then interpose their objection as defenses in a state-initiated tax enforcement proceeding – or by providing retrospective relief as part of its postdeprivation procedure. *McKesson, supra* at 19, 2241. “The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause...” *Id* at 39, 2251, *Mississippi Tax Comm’n*, 412 US 363; 93 S Ct 2183; 37 L Ed2d 1 (1973).

Section 22 of the Revenue Act provides two constitutionally mandated safeguards contained in MCL 205.22. This statute guarantees that an appeal stays payment of the contested portion of the assessment while an appeal is pending to the Michigan Tax Tribunal.

Apart from denying a taxpayer’s constitutional right to a hearing, garnishment of any amount contested at the Tribunal deprives the taxpayer of his statutorily guaranteed procedural due process right to choose the predeprivation remedy of the Tribunal. And in a very real sense, may inhibit the taxpayer’s ability to secure legal representation.

A State has the flexibility to provide that remedy before the disputed taxes are paid (predeprivation), after they are paid (postdeprivation), or both. But what it may not do...is hold out what plainly appears to be a “clear and certain” postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists. *Reich v Collins, Revenue Commissioner of Georgia*, 513 US 106, 108; 115 S Ct 547, 549; 130 L Ed2d 454; 63 USLW 4032, 74 AFTR2d 94-7071, 18 Employee Benefits Cas 2377. “[W]hat a state may not do...is...reconfigure its scheme, unfairly, in midcourse – to ‘bait and switch’....” *Id* at 111, 550.

It is not sufficient that illegal, unconstitutional garnishment cease. A remedy, one that meaningfully makes the harmed party whole, must also be given. “The State would have had no choice but to ‘undo’ the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to ‘collect these unlawful taxes by coercive means and not incur any obligation to pay them back ...would be in contravention of the Fourteenth Amendment.’” *Ward v Board of County Com'rs of Love County, Okl*, 253 US, 17, 24; 40 S Ct 419, 422; 64 LEd 751 (1920), as cited in *McKesson, supra* at 39, 2251. Failure to allow recovery of taxes exacted in contravention of law or the constitution is itself a violation of the Due Process Clause. *Carpenter v Shaw*, 280 US 363, 369; 50 S Ct 121, 123; 74 L Ed 478 (1930).

Petitioner properly appealed Respondent’s final assessment to the Michigan Tax Tribunal within 35 days of its final assessment. Collection activity by the Michigan Department of Treasury is improper under the above cited statute once the Michigan Tax Tribunal acquires jurisdiction. The Michigan Department of Treasury has an affirmative duty to know what is unlawful. The actions in this matter effectively deprived Petitioner of his predeprivation remedy and as a result deprived Petitioner of due process and violated state statute.

JUDGMENT

IT IS ORDERED that Respondent must return the amount garnished to Petitioner, including interest from the date of garnishment, within 21 days of this Order, and

IT IS FURTHER ORDERED that Respondent shall file with the Tribunal an accounting of the amount garnished and accrued interest reimbursed to Petitioner.

IT IS FURTHER ORDERED that Petitioner may submit a bill of costs that Petitioner may have incurred in regards to the illegal garnishment within 21 days of this Order.

MICHIGAN TAX TRIBUNAL

John S. Gilbreath, Jr., Tribunal Member

Patricia L. Halm, Tribunal Member

Sherry A. Lee, Tribunal Member

Micheal R. Lohmeier, Tribunal Member

Michael A. Stimpson, Tribunal Member

Judith R. Trepeck, Tribunal Member

Jack Van Coevering, Tribunal Chairman

Entered: March 16, 2006
mml