

Western Skier, Ltd. v New York State Dept. of Taxation and Fin.
2008 NY Slip Op 32685(U)
September 19, 2008
Supreme Court, New York County
Docket Number: 600198/08
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Ramos
Justice

PART 33m

Western Shier, Ltd et al

INDEX NO. 60098108

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

New York State Dept et al

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

FILED

OCT 03 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/19/08

RD
HON. CHARLES E. RAMOS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----x
 WESTERN SKIER, LTD., f/k/a KLEIN CANDY
 CO., INC., d/b/a KLEIN WHOLESALE
 DISTRIBUTORS,

Index No. 600198/08

Plaintiff,
 -against -

NEW YORK STATE DEPARTMENT OF
 TAXATION AND FINANCE and BARBARA G.
 BILLET, As Acting Commissioner,

Defendants.
 -----x

Charles Edward Ramos, J.S.C.:

Plaintiff Western Skier, Ltd. (Western Skier) moves for a declaratory judgment that the tax assessment of \$9.4 million issued by the defendant New York State Department of Taxation and Finance (DTF) is unlawful and void, and for a preliminary injunction enjoining the DTF from taking any action against it pending a hearing on whether it is entitled to a declaration.

Defendants DTF and Barbara G. Billet, the acting commissioner of the DTF, cross-move to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a cause of action (CPLR 3211 [a] [2], [7]).

Background¹

Western Skier formerly did business under the name Klein Candy Co., Inc. (Klein). From 1997 to June 2006, Klein was a licensed tobacco distributor and wholesaler in New York. In June 2006, Klein was purchased by Core-Mark Holding Co. (Core-Mark), and took the name Western Skier. Thereafter, Western Skier began

¹ The facts set forth herein are taken from the complaint, unless otherwise noted.

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to wind down its New York operations.

As a result of the sale, the DTF commenced a post-closing audit of Klein's (Western Skier's) New York operations, covering tobacco sales for the period between August 1, 2003 and June 20, 2006. The DTF issued an initial audit report, concluding that Western Skier owed taxes totaling \$160,929.13.

On May 31, 2007, the DTF requested a three-month extension of the statute of limitations in order to complete the audit. Western Skier alleges that the DTF did explain why the audit was ongoing, but stated that if Klein did not agree to the extension, that it would issue a \$1 million jeopardy assessment against it. The DTF requested - and was granted - a second extension on September 12, 2007.

When the DTF made a third request for an extension in early December 2007, Klein refused to consent. On December 17, 2007, the DTF issued a Notice of Determination to Klein in the amount of \$216,465.57, and simultaneously sent a second Notice of Determination in the amount of \$9,468,191.67, stating that the first Notice of Determination was erroneous.

Thereafter, Western Skier commenced this action.

Discussion

Western Skier contends that the \$9,468,191.67 tax assessment was arbitrary and capricious, and was directed against it solely to extend the statute of limitations for the audit.

The DTF argues that Western Skier's application for a declaratory judgment and for an injunction vacating the tax

assessment is premature because the Tax Law requires Western Skier to exhaust its administrative remedies. The court agrees.

The DTF is responsible for enforcing the provisions of the Tax Law and regulations concerning the imposition of taxes on tobacco products, that is governed by Article 20 of the Tax.

Section 478 of the Tax Law states that if any person files an incorrect or insufficient return, the DTF shall determine the amount of tax due within three-years after the return is filed, in order to seek the actual amount of tax owed. The three-year time period may be extended upon the consent of the taxpayer.

Further, § 478 states that any determination made by the DTF is final, unless the person against whom it is assessed requests a hearing before the Division of Tax Appeals within ninety days after receiving a notice of determination.

The Division of Tax Appeals is an independent division within the DTF, whose purpose is to provide the public with a just system of resolving controversies with the DTF, and "to ensure that the elements of due process are present with regard to such resolution of controversies" (Tax Law § 2000). The taxpayer or the DTF may appeal the decision of the Division of Tax Appeals to the Tax Appeals Tribunal (Tax Law §§ 478, 2006 [7]).

Significantly, § 478 states that this remedy for the review of a decision of the Tax Appeals Tribunal is the "exclusive remedy available to any taxpayer to judicially determine the liability of such taxpayer for taxes under this article." The

two exceptions to the exclusive remedy requirement are when a tax statute is alleged to be unconstitutional, or the statute is attacked as wholly inapplicable (*Bankers Trust Corp. v New York City Dept. of Fin.*, 1 NY3d 315, 321 [2003]). To challenge a statute as wholly inapplicable, the taxpayer must allege that the agency had no jurisdiction over it or the matter that was taxed.

The DTF undoubtedly has authority to determine and seek the amount of tax owed on the sale of tobacco products in the state of New York, pursuant to Article 20 of the Tax Law.

Otherwise, where, as here, the statute at issue includes an exclusive remedy provision, courts lack discretion to rely on other exceptions to the exhaustion of remedies rule (*Bankers Trust Corp.*, 1 NY3d at 315).

Although Western Skier alleges that the DTF acted improperly, Western Skier does not allege facts that the DTF acted beyond its statutory authority in rendering the assessment (*Bankers Trust Corp.*, 1 NY3d at 323; compare *Brown*, 199 Misc at 353).

In opposition to Western Skier's application and in support of its cross-motion, DTF submits a sworn affidavit from its tax auditor, Brian Horbas, who participated in the audit of Klein (now Western Skier). Horbas states that during Klein's audit, it received information from the New Jersey Department of Treasury that Klein and a New Jersey cigarette wholesale distributor (the New Jersey Distributor) were engaging in circular transactions (Affidavit of Brian Horbas, ¶ 12). Consequently, the DTF

concluded that it was likely that some of the tobacco products that Klein sold to the New Jersey Distributor were subsequently re-sold in New York on Klein's behalf, in order to avoid paying the New York tobacco sales tax. (*id.*). As a result, Horbas states that the DTF decided to pursue a complete accountability audit of Klein, that required more time to complete the audit and was the basis for its requests for extensions of the statute of limitations (Horbas Affidavit, ¶ 19).

Horbas states that the initial \$1 million dollar assessment was not "pulled out of thin air," as Western Skier contends, but was based upon the DTF's preliminary estimate of sales to the New Jersey Distributor that the DTF suspected were being re-sold in New York (Horbas Affidavit, ¶ 19). Horbas adds that the DTF was forced to render an estimate of the taxes on New York sales, because Klein refused to provide the DTF with complete documentary information about its transactions with the New Jersey Distributor (Horbas Affidavit, ¶¶ 17, 20).

Further, Horbas states that, while it told Western Skier that extensions of the statute of limitations were necessary because the DTF was conducting a total accountability audit, rules regarding taxpayer confidentiality relating to the audit of third-parties did not allow the DTF to tell Western Skier the exact basis for the extension (Horbas Affidavit, ¶ 18).

The DTF states that the \$9,468,191.67 tax assessment represents the total amount of unpaid taxes from Klein's New York sales to the New Jersey Distributor, plus interest and penalties.

Specifically, the DTF determined that Klein made \$15,671,013 in sales to the New Jersey Distributor during the audit period, at 37% tobacco tax (Horbas Affidavit, ¶¶ 20, 27).

Although Western Skier contends that the DTF improperly sought extensions of the statute of limitations and acted beyond its authority causing it irreparable harm, Western Skier does not dispute that its New York tobacco sales are subject to taxation or that the DTF has the authority to tax those sales. Moreover, the sworn statement submitted by the DTF would refute any contention that the DTF was acting beyond its statutory authority under the Tax Law.

In any event, the inclusion of an exclusive remedy provision in section 478 of the Tax Law makes evident that the Legislature has "specifically delineated the exclusive steps a party must undertake in order to seek judicial relief" (*Bankers Trust Corp.*, 1 NY3d at 322). Therefore, because Western Skier did not exhaust its administrative remedies, this court lacks jurisdiction over the subject matter of this action (*Ancrum v St. Banabas Hosp.*, 301 AD2d 474, 474 [1st Dept 2003]).

Western Skier's motion for a preliminary injunction and for a declaratory judgment vacating the tax assessment is denied. The DTF's cross-motion to dismiss the complaint for lack of subject matter jurisdiction is granted.

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction and for a declaratory judgment is denied, and it is further

ORDERED that defendants' motion to dismiss the complaint based upon lack of subject matter jurisdiction is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of the defendants accordingly.

Dated: September 19, 2008

ENTER:



J.S.C.

HON. CHARLES E. RAMOS

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