SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 14

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MLB ENTERPRISES CORP.,

Plaintiff,

- v -

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE

Defendant.

INDEX NO. 655924/2020

MOTION DATE 05/05/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54

were read on this motion to/for DISMISSAL.

Defendants' motion to dismiss is granted.

Background

Plaintiff, MLB Enterprises Corp. ("MLB") brings this action for a declaratory judgment to challenge sales taxes assessed by New York State. MLB operated a "gentleman's club." According to MLB, it employed dancers to provide live entertainment and used a form of internal currency called "scrip" that patrons could purchase only to provide tips to the dancers. MLB argues that it should not have to pay taxes on the dancers' tips – the tips would be income to the dancers. However, according the NYS Department of Finance and Taxation ("DOF"), the scrip was used "to pay for exotic dances and allegedly also used to tip the dancers working there" (NYSCEF Doc. No. 22 at 5). So there is a clear issue of fact: was the scrip used only to tip the dancers or was it also used to pay the club for the dancers' time and other charges, such as for private rooms.

DOF audited MLB and found that it had "substantial amounts in taxable receipts on which it paid no sales tax" including party room rentals and "purchase and redemption of scrip" (*id.* at 10). As a result of the audit, MLB was found to owe sales tax, plus penalties and interest.

In this motion, there is no indication that MLB ever went through the administrative law process – challenging the auditor's determination, appealing (if necessary) through the agency's process and, if the final agency determination was not to MLB's liking, ultimately bringing a proceeding pursuant to CPLR Article 78 to challenge that agency determination. It appears as if MLB wants to circumvent that entire process by bringing this declaratory judgment action. Because MLB has failed to exhaust its administrative remedies, the motion to dismiss is granted.

Generally, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). There are two exceptions to the exclusive remedy requirement: "[w]hen a tax statute . . . is alleged to be unconstitutional, by its terms or application, or where 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" (*id.* at 322). "This exception to the rule is limited to those cases where no factual issue is raised" (*Kallenberg Meat Prods. v O'Cleireacain*, 209 AD2d 381, 382-383 [2nd Dept 1994]). The exception is not applicable here because there are clear issues of fact – was the scrip limited to tips or was it used for other purchases. Moreover, MLB has not, and cannot, allege that the agency had no jurisdiction over it or the matter that was taxed. Obviously, DOF has authority to make the sales tax assessment.

Additionally, "[t]he judicial doctrine of exhaustion of remedies is subject to exceptions not available when the statute has an exclusive remedy provision. The exceptions include when exhaustion of administrative remedies would be futile or would cause irreparable harm. Courts lack the discretion to rely on these exceptions where the [l]egislature itself has specifically delineated the exclusive steps a party must undertake in order to seek judicial relief" (*Bankers Trust*, 1 NY3d at 321).

The legislature has determined how to challenge the type of tax assessment at issue here. Tax Law § 1140 provides that "remedies provided by sections eleven hundred thirty-eight and eleven hundred thirty-nine shall be exclusive remedies available to any person for the review of tax liability imposed by this article; and no determination or proposed determination of tax or determination on any application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received, or by any action or proceeding other than a proceeding under article seventy-eight of the civil practice law and rules."

In other words, the statute relegates MLB's challenge to an Article 78, which is only available after exhausting the administrative process. In fact, the statute specifically prohibits what MLB has done here- going straight to a declaratory judgment action.

Additionally, because of the factual issues still to be resolved – whether the scrip was only used as gratuity for the dancers or if it was also be used to pay for the dances themselves – MLB cannot claim the "wholly inapplicable" exception to the exhaustion requirement.

With respect to the futility argument, MLB contends that the Second Circuit "definitively held that MLB could seek a declaratory judgment in state court with regard to the taxability of scrip" (NYSCEF Doc. No. 50 at 8). The Second Circuit also held that "MLB can seek judicial review of the Tax Tribunal's decision in an Article 78 proceeding in New York state court."

(NYSCEF Doc. No. 37 at 5). Although the exception applies when exhaustion of administrative remedies would be futile or would cause irreparable harm, this Court lacks the discretion to rely on the exception where the legislature itself has specifically delineated the exclusive steps a party must undertake in order to seek judicial relief. As cited above, Tax Law § 1140 provides the exclusive remedies available. Therefore, MLB is barred from the futility exception to administrative exhaustion. Besides, there is no indication that a hearing before an administrative law judge and/or appeal within the agency would be futile.

Because plaintiff has not exhausted its administrative remedies and because this proceeding is not an Article 78, contrary to the express provisions of Tax Law, defendants' motion to dismiss is granted.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted, and the Clerk is directed to enter judgment in favor of defendants and against plaintiff, with costs and disbursements, upon presentation of proper papers therefor.

5/28/2021
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE