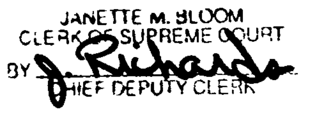
IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENT CORBRIDGE, D.M.D.; JOHN LOHSE, D.D.S.; ROBERT H. THALGOTT, D.M.D.; STEPHEN D. CHENIN, D.D.S.; AND VINCENT D'ASCOLI, D.D.S.,
Appellants,
vs.
THE STATE OF NEVADA EX REL THE NEVADA DEPARTMENT OF TAXATION,
Respondent.

No. 38867

JUN 18 2003



ORDER OF AFFIRMANCE

This is an appeal from a district court's order dismissing, for lack of jurisdiction, a complaint by Brent Corbridge, John Lohse, Robert Thalgott, Stephen Chenin and Vincent D'Ascoli to recover sales and use taxes. For the following reasons, we affirm.

The appellants, all orthodontists, sent two letters to the Department seeking a refund of sales and use taxes paid on various items of tangible personal property that they buy and use to treat patients. The letters outlined the types of supplies that they claimed were tax-exempt, but did not provide supporting evidence for their claims. The Department responded by letter that some of the listed supplies would be tax-exempt but others would not. Appellants appealed the Department's determination to the Nevada Tax Commission, which affirmed the Department's determination.

Ninety days later, appellants filed a complaint in district court under NRS 372.680 to recover the sales and use taxes paid on the items used in treating patients. The Department moved to dismiss for lack of

subject matter jurisdiction, arguing that its determination had been an advisory opinion from which appellants were required to seek judicial review within thirty days under NRS 233B.130, rather than a claim denial from which appellants had ninety days to challenge in a district court action under NRS 372.680. The district court determined that the Department's letter had been an advisory opinion and that NRS 233B.130 applied, making appellants' action untimely. Therefore, the district court dismissed the complaint for lack of jurisdiction.

The issue presented to this court is whether the district court properly applied NRS 233B.130 rather than NRS 372.680, which is a question of law subject to de novo review.[1]

First, appellants contend that they sufficiently stated a claim for a tax refund under NRS 372.645 because that statute only requires that a claim for a refund be in writing and that it state the specific grounds upon which the claim is based.[2] Appellants argue that they submitted sufficient information, in compliance with NAC 360.480,[3] to

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[1]Banegas v. SIIS, 117 Nev. 222, 224, 19 P.3d 245, 247 (2001).

[2]NRS 372.645 provides that "[e]very claim must be in writing and must state the specific grounds upon which the claim is founded."

[3]NAC 360.480(1) provides:

> 2. A claim for a refund must be accompanied by:
>
> (a) A statement setting forth the amount of the claim;
>
> (b) A statement setting forth all grounds upon which the claim is based;

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allow the Department to investigate the claim and claimants[4] because they provided: (1) a list of all the items on which sales and use tax was paid; (2) a comprehensive legal analysis of the grounds supporting a tax exemption; and (3) an estimate of the amount of the claim. Appellants further assert that the fact that the Department considered the merits of their claims and issued a written decision, based on the merits, supports their argument that they submitted enough information for the Department to investigate their claims.

In Hansen-Neiderhauser, a suit by a foreign corporation seeking recovery of sales tax, we reasoned that the purpose for requiring a claim to be filed with the agency before the claimant could file suit in district court against the agency was to "enable the agency to investigate the claim and the claimant while the occurrence is recent and the evidence available to the end that it may protect itself against spurious and unjust claims."[5] We held that substantial compliance with the claim statute,

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> (c) All evidence the claimant relied upon in determining the claim, including affidavits of any witnesses; and
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> (d) Any other information and documentation requested by the department.

[4]See Hansen-Neiderhauser v. Nev. Tax Comm'n, 81 Nev. 307, 311, 402 P.2d 480, 482 (1965) ("The purpose of the statute requiring the filing of a claim as a predicate to the commencement of suit against a government agency is to enable the agency to investigate the claim and the claimant while the occurrence is recent and the evidence available to the end that it may protect itself against spurious and unjust claims. Thus, when the claim substantially complies with the legislative requirements, these ends are subserved.").

[5]81 Nev. at 311, 402 P.2d at 482.

rather than complete compliance, was sufficient because it provided enough information to the agency to allow the agency to investigate the claim.[6]

Here, while appellants provided more information to the Department than was provided in Hansen-Neiderhauser, appellants' letters were ambiguous regarding whether a refund claim or an advisory opinion was being sought. The language of the letters seemed to indicate that the appellants were seeking a refund claim. The letters stated the subject matter as "RE: Claim for Refund;" the first letter finished with a statement that "I would appreciate hearing from whoever is assigned to review this refund claim;" and the second letter ended with a request to "Please include your consideration of this claim with those submitted to you on April 28, 2000." However, the substance of the letters provided legal analysis regarding why certain categories of materials should be tax exempt, lending itself more to a request for an advisory opinion than to a refund claim. The Department did not need sales receipts and other evidence to interpret whether the categories of supplies purchased by the appellants were tax exempt under NRS 372.283.

NAC 360.190 sets forth the requirements for requesting an advisory opinion from the Department. Appellants' letters complied with all but one: "[a] statement that an advisory opinion is requested." In contrast, NAC 360.480(1), the regulation governing claims for refunds, requires the claimant to set forth the amount of the claim, the grounds for the claim and all evidence used to determine the claim. Although appellants stated in their letters that the letters constituted claims for

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[6]Id. at 311, 402 P.2d at 481-82.

refunds, they did not submit any supporting evidence to establish their estimates of the refunds allegedly owed to them. Because evidence to support a refund claim was not submitted, and because the letters did not state that they were requesting an advisory opinion, the letters did not fit squarely within the requirements of either NAC 360.190 or NAC 360.480. Given that the letters were deficient in both respects, the Department could properly construe the letters as a request for an advisory opinion, especially since the substance of the letters seemed to comply more with a request for an advisory opinion than a claim refund.

Furthermore, the language of the Department's letter indicates that the Department viewed its determination as an advisory opinion rather than as a claim denial. The Department's letter begins with the statement that it has "reviewed your letters dated April 28, 2000 and May 26, 2000 on behalf of several clients who practice orthodontic dentistry and who will be requesting refunds." (Emphasis added.) The letter goes on to outline the legal reasoning used to determine which categories of supplies came under the medicine exemption and which supplies did not, a legal analysis that was more in the nature of an advisory opinion than a denial of a refund claim. The letter concludes with a statement that "I hope these guidelines assist you in compiling information for your clients' refund requests." The letter, read in its entirety, indicates that it was meant as an advisory opinion, especially given the language regarding claims to be filed in the future.[7] Therefore,

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[7]Appellants' assertion that the Department issued its decision based on both the factual and legal merits of their claims lacks merit because the Department had no factual evidence to support a refund claim. Its

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neither the Commission nor the district court abused its discretion by construing the Department decision as an advisory opinion rather than as a claim denial.

Second, appellants argue that they had no notice that the Department's letter was an advisory opinion rather than a claim denial, and that the Department, at the hearing before the Commission, unilaterally recharacterized its decision as an advisory opinion. This argument lacks merit because the record reflects that appellants had ample notice that the Department considered its letter to be an advisory opinion. They were not prejudiced by the characterization of the Department's decision; they could have filed a petition for judicial review within thirty days of the Commission's decision pursuant to NRS 233B.130. Because they failed to do so, the district court properly found that their petition was untimely and that it lacked jurisdiction.

Third, appellants argue that the Department's letter could not have constituted an advisory opinion because it failed to meet the requirements of NAC 360.200 because the letter was not delivered in person or by certified mail.

NRS 360.245(2) requires delivery in person or by certified mail for any decision of the Department. The manner in which this letter was delivered was deficient regardless of whether it was an advisory opinion or a claim denial. Regardless, appellants waived this argument because they appealed the decision to the Commission. We have held, in regard to NRCP 12, that objections to process or service of process are waived if not

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decision was based only upon legal analysis, which is consistent with an advisory opinion.

timely made either in an answer or a pre-answer motion.[8] "The primary purpose underlying the rules regulating service of process is to insure that individuals are provided actual notice of suit and a reasonable opportunity to defend."[9] Similarly, the requirement that a decision of the Department be delivered personally or by certified mail is to ensure that the parties receive notice of the decision and have an opportunity to pursue additional remedies, such as an appeal. There is no dispute that appellants actually received the Department's letter. They had actual notice of the decision, and the aim of proper service was fulfilled. Because appellants never objected to the insufficient service, they have waived the argument.

Fourth, appellants contend that the Department's argument that it did not have enough information upon which to grant or deny a refund claim has been waived because the Department never raised the issue of an incomplete refund claim in the administrative proceedings. This argument also lacks merit.

The Department did not need to inform appellants that their letters were defective as claims for refunds because the Department properly treated the letters as requests for an advisory opinion. The fact that the Department never requested more information from appellants in order to process a refund claim is consistent with its treatment of the letters as a request for an advisory opinion. Because the legal analysis upon which the Department based its determination was sufficiently

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[8]Fritz Hansen A/S v. Dist. Ct., 116 Nev. 650, 656-57, 6 P.3d 982, 986 (2000).

[9]Orme v. District Court, 105 Nev. 712, 715, 782 P.2d 1325, 1327 (1989).

outlined in the appellants' letters, the Department did not need further information to review and interpret the statutes governing the exemptions. The Department did not waive its argument that the appellants' letters were insufficient to support a refund claim merely by treating the letters as a request for an advisory opinion. Accordingly, the Commission and the district court did not err in characterizing the Department's letter as an advisory opinion.[10]

For the foregoing reasons, we conclude that substantial evidence supports both the Commission's and district court's determinations that the Department's decision was an advisory opinion rather than a claim denial. Because appellants failed to timely file their petition for judicial review within thirty days of the Commission's decision, the district court properly determined that it was divested of jurisdiction.

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[10]The Department argues that the district court lacked jurisdiction because appellants failed to exhaust their administrative remedies by properly filing a refund claim. While we conclude that the district court properly found that it lacked jurisdiction, we conclude that appellants exhausted their administrative remedies. However, as appellants had notice that the Department's decision was an advisory opinion rather than a refund claim, appellants improperly invoked NRS 372.680, governing an action for refund, rather than NRS 233B.130, governing petition for judicial review of a final administrative decision, and their complaint was untimely.

Therefore, we

ORDER the judgment of the district court AFFIRMED.

____________________, J.
Rose

____________________, J.
Gibbons

cc: Hon. Michael R. Griffin, District Judge
John S. Bartlett
Attorney General Brian Sandoval/Carson City
Carson City Clerk

MAUPIN, J., dissenting:

The majority reasoning in this matter is technically flawless. However, in my view, the ambiguities in these administrative procedures are so profound that I would allow the NRS 372.680 claim to proceed in district court.

____________________, J.
Maupin