

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

FILED
AUG 30 2019
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

CITY OF ST. LOUIS)
BY GREGORY F.X. DALY,)
COLLECTOR OF REVENUE,)
)
Plaintiff,)
)
vs.)
)
)
)
)
Defendant.)

Cause No. 1822-AC10179

Division No. 26

ORDER AND JUDGMENT

This cause came before the Court on December 13, 2018, for bench trial on the Petition of Gregory F.X. Daly, the Collector of Revenue for the City of St. Louis ("Plaintiff"), seeking to collect an alleged earnings tax delinquency from Defendant [REDACTED] ("Defendant").

The Court granted Judgment in favor of Defendant on February 8, 2019. Subsequently on May 10, 2019, the Court granted Plaintiff's motion to vacate the Judgment and hear additional evidence and argument which was not presented at the December 13, 2018, bench trial. On June 13, 2019, the additional evidence was presented and argued before the Court. The matter was then taken

under submission.

Plaintiff is the duly elected Collector of Revenue of the City of St. Louis, Missouri, a constitutional charter City with earnings taxes and payroll taxes. Plaintiff alleges Defendant has been for all times mentioned in the Petition doing business or living within the City of St. Louis, and is subject to the earnings tax provisions of Section 5.22 of the Revised Code of the City of St. Louis. Plaintiff further alleges that Defendant was delinquent and in default of earnings taxes for the years 2014, 2015, and 2016, in an amount totaling \$2,949.37, including interest and penalties.

The City of St. Louis has the power to assess, levy, and collect an earnings tax of 1% on salaries, wages, commissions and other compensations earned by its residents, and on salaries, wages, commissions and other compensations earned by non-residents of the City for work done or services performed or rendered in the City. City Charter Art. I, § 4¹; § 92.111 RSMo.

Section 5.22.040 of the Revised Code of the City of St. Louis, titled "Nonresident Individual," in relevant part, states:

The earnings subject to tax of any nonresident individual, in any case in which the work done, services performed or rendered, and business or other activities

¹ The Court is authorized to take judicial notice of the City of St. Louis Charter ("City Charter"). Mo. Const. art. VI, § 33; Mo. Const. art. VI, § 19; See also Marks v. Bettendorf's, Inc., 337 S.W.2d 585, 600 (Mo. App. 1960).

conducted are done, performed, rendered or conducted both within and without the City, shall be ascertained as follows:

B. In all other cases, the portion of the earnings subject to tax shall be the portion of the earnings which the total number of working days employed within the City bears to the total number of working days within and without the City.

At trial, both parties agreed that during the years in question, Defendant did not live within the City of St. Louis ("City"), and was employed by the Fire Department of the City of St. Louis, but was stationed at the St. Louis Lambert International Airport, located in St. Louis County. The Court heard testimony from Defendant's accountant, Mr. Richard Waigand, that the earnings taxes were automatically deducted from Defendant's paycheck. Mr. Waigand further testified that for the years of 2014, 2015, and 2016, he assisted Defendant in filing a Form E-1R to obtain a refund of the earnings taxes paid because Defendant neither worked nor resided in the City. Defendant successfully obtained a refund of the earnings taxes paid in those years. The Court found this testimony to be credible.

Plaintiff presented testimony from Dennis Jenkerson, Chief of the St. Louis Fire Department, and Larry Unger, Supervisor of the Business Section of the Earnings Tax Division under the Collector

of Revenue. Plaintiff argues two reasons why Defendant owes the earnings taxes for years 2014, 2015, and 2016:

1) Defendant's exclusive remedy by which to contest a tax assessment is under § 139.031 RSMo, which he failed to do in this case; and

2) The Fire Department headquarters are located in the City, and thus Defendant, a St. Louis City Fireman, is considered as working in the City.

“Section 139.031 establishes a mechanism for a taxpayer to protest taxes assessed against the taxpayer.” Metts v. City of Pine Lawn, 84 S.W.3d 106, 109 (Mo. App. E.D. 2002). Section 139.031.1 RSMo requires a taxpayer to pay taxes under protest if he wishes to protest the assessment: The taxpayer “shall, at the time of paying such taxes, make full payment of the current tax bill before the delinquency date and file with the collector a written statement setting forth the grounds on which the protest is based.” After paying under protest, the statute requires the taxpayer to file suit against the collector within 90 days. Section 139.031.2 RSMo. If the taxpayer does not pay his taxes under protest and file suit within 90 days, he is statutorily barred from protesting the tax assessment. Id.

Plaintiff relies on State ex rel. Lohman v. Latimer, 4 S.W.3d

560, 562 (Mo. App. S.D. 1999), in which the court held that a taxpayer cannot challenge an assessment in defense of a tax collection action if the taxpayer has not complied with the exclusive remedy provided by statute.

In the current action, all parties agree that Defendant did, in fact, initially pay the earnings tax for years 2014, 2015, and 2016. However, Defendant subsequently applied for, and was given, a refund of such tax by Plaintiff.

Plaintiff argues the fact that Defendant initially paid the taxes but was "erroneously" issued a refund is of no consequence. However, such argument is not accurate. Section 143.721 RSMo titled "Recovery of Erroneous Refund" states in pertinent part: "An erroneous refund shall be considered an underpayment of tax on the date made, and an assessment of deficiency arising out of an erroneous refund may be made at any time within two years from the making of the refund..."

Defendant's accountant, Mr. Waigand, testified Defendant received refunds for tax years '14 and '15 in 2016 and for tax year '16 in 2017. Plaintiff then notified Defendant on April 4, 2018, that such refunds were given "erroneously" and that Defendant had 30 days to again pay the tax to avoid any penalty interest. See *Exhibit C, Letter to Defendant from Plaintiff dated April 4, 2018.*

Therefore, pursuant to Section 143.721 RSMo, Plaintiff had authority to assess tax deficiencies on erroneous refunds which were made within two years prior to April 4, 2018; which would be April 4, 2016. The only evidence in the record of when the refunds were made to Defendant from Plaintiff came from Mr. Waigand who testified Defendant received refunds for tax years '14 and '15 in 2016 and for tax year '16 in 2017.

The year 2016 tax refund was made sometime in 2017, within two years of April 4, 2018. Therefore Plaintiff had authority to assess the 2016 tax deficiency. Defendant did not provide any evidence that he complied with Section 139.031 RSMo by paying the tax under protest and filing suit to challenge the application of the tax to him. Therefore, Defendant is precluded from litigating whether he owes the 2016 tax. The 2016 tax of \$661.67 is owed to Plaintiff from Defendant.

However, with respect to the 2104 and 2015 tax years, there is no evidence in the record showing Plaintiff assessed the tax delinquencies to Defendant within two years of issuing the erroneous refunds. Mr. Waigand testified Defendant received refunds for tax years '14 and '15 in 2016. The Court was not provided any evidence of when in 2016 the refunds were made; specifically before or after April 4, 2016.

As Plaintiff's admitted error caused the refunds to be issued, the fact Defendant did initially pay the taxes, and the fact Plaintiff's own website stated the earnings tax was only owed by people who live or work in the City², the Court finds it was Plaintiff's burden to prove the 2014 and 2015 refunds were given after April 4, 2016. Plaintiff failed to prove such. Therefore, pursuant to Section 143.721 RSMo, Plaintiff is precluded from assessing tax on Defendant for years 2014 and 2015.

Based on the totality of the evidence and after making credibility determinations of the witnesses, the Court concludes Defendant is not subject to the assessment and collection of earnings taxes for years 2014 and 2015 due to Plaintiff's failure to comply with Section 143.721 RSMo. As to the 2016 tax, the Court finds Plaintiff did comply with Section 143.721 RSMo and Defendant failed to comply with Section 139.031 RSMo, precluding Defendant from litigating whether he owes the 2016 tax. The 2016 tax of \$661.67 is owed to Plaintiff from Defendant.

Having ruled on all issues in this matter, the Court need not address Plaintiff's second point; whether Defendant owes the earnings tax for "working in" the City.

² At the December 13, 2018 portion of the trial, Plaintiff's counsel stated "the City recognizes that the web site should have been changed".

JUDGMENT

The Court has considered the evidence and arguments of the parties and now orders, adjudges, and decrees as follows:

Judgment is entered in favor of Defendant for tax years 2014 and 2015 and in favor of Plaintiff for the 2016 tax year in the amount of \$661.67³; each party to bear their own costs.

SO ORDERED:

Dated: 8-30-19

T. A. McCarthy 56703
THOMAS A. MCCARTHY, Judge

³ The Court is intentionally not including the penalty or interest requested by Plaintiff at trial. Plaintiff's witness, Mr. Unger, testified on December 13, 2018 that the penalty and interest sought by Plaintiff was calculated, not from when Plaintiff issued a notice of tax deficiency due to Plaintiff's error, but instead, from when the tax was originally due. However, Mr. Unger admitted Defendant had paid the tax when originally due. Therefore, Plaintiff was asking the Court to order Defendant to pay interest and a penalty which began to accrue on a date Defendant's tax payments had actually been made and were in the possession of Plaintiff. At the continuation of the trial on June 13, 2019, Plaintiff failed to provide any new interest or penalty amounts which may have accrued from the date Plaintiff issued a notice of tax deficiency to Defendant.