

ILLINOIS INDEPENDENT TAX TRIBUNAL

CAPITAL ONE FINANCIAL CORPORATION)	
)	
Petitioner,)	
)	
v.)	No. 16-TT-49
)	
THE ILLINOIS DEPARTMENT OF REVENUE,)	
)	
Respondent.)	

**DEPARTMENT’S § 2-619 MOTION TO DISMISS
COUNTS I, II, and V, OF FIRST AMENDED PETITION**

Respondent, the Illinois Department of Revenue (hereafter “Department”) through its attorney, Lisa Madigan, Attorney General of and for the State of Illinois, respectfully moves this Tribunal, pursuant to 735 ILCS 5/2-619(a)(1) and 86 Ill. Admin. Code 5000.315, for an order dismissing Counts I, II, and V, of the First Amended Petition of Capital One Financial Corporation (“Petitioner”) for lack of subject matter jurisdiction. These counts concern a Notice of Deficiency that has become final and is, therefore, not subject to review by this Tribunal, requests for fees, which the Tribunal is expressly prohibited from awarding, and requests for damages. 35 ILCS 1010/1-45(e)(4); 35 ILCS 1010/1-55. In support of its motion, the Department states as follows:

BACKGROUND

1. After conducting an audit of Petitioner for the tax year ending December 31, 2008, the Department issued a Notice of Deficiency (hereafter “NOD”) to Petitioner on August 11, 2014 assessing additional tax of \$7,401,349, interest of \$2,339,642.36, and penalties of \$2,961,039.60. First Amended Petition, ¶31.

2. The NOD was attached to the First Amended Petition in Exhibit B.
3. On October 1, 2014, Petitioner issued a check to the Department in the amount of \$12,702,030.96 as payment under protest pursuant to the State Officers and Employees Money Disposition Act (30 ILCS 230/1 et seq.). 30 ILCS 230/2a.
4. Petitioner failed to file a complaint pursuant to the State Officers and Employees Money Disposition Act (30 ILCS 230/2a), and therefore, failed to secure a temporary restraining order preventing the transfer of the protest payment from the protest fund. 30 ILCS 230/2a (“At the expiration of 30 days from the date of payment, the money is to be transferred from the protest fund to the appropriate fund . . . unless the party making that payment under protest has filed a complaint and secured within that 30 days a temporary restraining order or a preliminary injunction, restraining the making of that transfer and unless, in addition, within that 30 days, a copy of the temporary restraining order or preliminary injunction has been served upon the State Treasurer and also upon the officer, board, commission, commissioner, department, institute, arm, or agency to whom or to which the payment under protest was made, . . .”).
5. Because the Petitioner failed to complete all the necessary steps to protest the NOD issued August 11, 2014, the NOD became final by operation of law on Friday, October 10, 2014. 35 ILCS 5/904(d); 908(d) (“(d) Finality of decision. If the taxpayer fails to file a timely protest or petition under subsection (a) of this Section, then the Department's notice of deficiency shall become a final assessment at the end of the 60th day after the date of issuance of the notice of deficiency . . .”).
6. On or about July 22, 2015, Petitioner filed an amended return (Form IL-1120-X) for the tax year ending December 31, 2008, on which Petitioner claimed a refund of \$13,452,787. First Amended Petition, ¶35.

7. On January 13, 2016, Department issued Petitioner a Notice of Claim Denial in which Department denied Petitioner's claim for refund on its 2008 amended return (Form IL-1120-X).

8. On March 14, 2016, Petitioner filed a Petition with this Tribunal protesting the Department's January 13, 2016 Notice of Claim Denial.

9. On April 28, 2016, Petitioner filed a Motion for Leave to File (instanter) a First Amended Petition.

10. On April 28, 2016, the Administrative Law Judge entered an order accepting Petitioner's First Amended Petition.

§ 2-619 STANDARD

11. A motion filed under § 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619) provides a means for disposing of legal or easily proved factual matters at the outset of a case. *Cramsey v. Knoblock*, 191 Ill. App. 3d 756, 764 (4th Dist. 1989).

12. A § 2-619(a)(1) motion to dismiss is the proper avenue to raise lack of subject matter jurisdiction. *Zimmerman Equipment Co. v. F.R. Orr Grain Co.*, 29 Ill. App. 3d 921, 922, 330 N.E.2d 881 (3rd Dist. 1975); *Ferris, Thompson and Zweig, Ltd. v. Esposito*, 2014 IL App (2d) 130129, ¶ 10.

13. "It is well settled that the issue of subject matter jurisdiction cannot be waived, stipulated to, or consented to by the parties. It can be raised at any time and even *sua sponte* when necessary." *Eschbaugh v. Industrial Comm'n.*, 286 Ill. App. 3d 963, 967-68 (5th Dist. 1996) (internal citations omitted).

TRIBUNAL'S JURISDICTION

14. The Illinois Independent Tax Tribunal Act of 2012 (hereafter the "Tribunal Act")

contains the following jurisdictional limitations:

Sec. 145. Jurisdiction of the Tax Tribunal.

(a) Except as provided by the Constitution of the United States, the Constitution of the State of Illinois, or any statutes of this State, including, but not limited to, the State Officers and Employees Money Disposition Act, the Tax Tribunal shall have original jurisdiction over all determinations of the Department reflected on a Notice of Deficiency, Notice of Tax Liability, Notice of Claim Denial, or Notice of Penalty Liability issued under [specific tax acts]

* * *

Jurisdiction of the Tax Tribunal is limited to Notices of Tax Liability, Notices of Deficiency, Notices of Claim Denial, and Notices of Penalty Liability where the amount at issue in a notice, or the aggregate amount at issue in multiple notices issued for the same tax year or audit period, exceeds \$15,000, exclusive of penalties and interest.

* * *

(e) The Tax Tribunal shall not have jurisdiction to review:

* * *

(4) any action or determination of the Department regarding tax liabilities that have become finalized by law, including but not limited to the issuance of liens, levies, and revocations, suspensions, or denials of licenses or certificates of registration or any other collection activities;

Sec. 1-55. Fees.

(d) The Tax Tribunal shall not assign any costs or attorney's fees incurred by one party against another party. Claims for expenses and attorney's fees under Section 10-55 of the Illinois Administrative Procedure Act shall first be made to the Department of Revenue. If the claimant is dissatisfied because of the Department's failure to make any award or because of the insufficiency of the award, the claimant may petition the Court of Claims for the amount deemed owed.

35 ILCS 1010/1-45(a); 1/45(e); 1/55(d).

15. An administrative agency's powers are "strictly confined to those granted in [its] enabling statutes." *City of Chicago v. Fair Employment Practices Comm'n.*, 65 Ill.2d 108, 115 (1976). See also *Vuagniaux v. Dep't of Prof'l Regulation*, 208 Ill.2d 173, 186 (2003) (holding that an administrative agency "has no general or common law authority. The only powers it possesses are those granted to it by the legislature, and any action it takes must be authorized by statute.").

16. In *City of Chicago v. FEPC*, the Illinois Supreme Court held: "Since the Commission is a statutory creature, its powers are dependent thereon, and it must find within the statute the authority which it claims. Such agencies have no general or common law powers." *FEPC*, 65 Ill.2d at 113 (internal citations omitted). See also *Vuagniaux*, 208 Ill.2d at 186 (holding that an administrative agency "has no general or common law authority. The only powers it possesses are those granted to it by the legislature, and any action it takes must be authorized by statute."); *Commonwealth Edison Co. v. Illinois Commerce Comm'n.*, 2014 IL App (1st) 130544, ¶ 16 (holding that administrative agencies, including quasi-judicial ones, do not possess any common law powers or general jurisdiction that a circuit court exercises or possesses).

A. This Tribunal does not have Subject Matter Jurisdiction over the Notice of Deficiency issued August 11, 2014 or Petitioner's claims arising thereunder in Counts I, II, and V because the Notice of Deficiency is final.

17. The NOD issued August 11, 2014 became final by operation of law on Friday October 10, 2014. 35 ILCS 5/904(d); 908(d) ("(d) Finality of decision. If the taxpayer fails to file a timely protest or petition under subsection (a) of this Section, then the Department's notice of deficiency shall become a final assessment at the end of the 60th day after the date of issuance of the notice of deficiency . . .").

18. First Amended Petition Counts I, II, and V claim:
- a. “The Department’s Notice of Deficiency was without effect because the statute of limitations bared the assessment,” First Amended Petition, pg. 5, Count I (heading);
 - b. “The Department’s Notice of Deficiency is without effect because the Department did not supply a basis for the deficiency,” First Amended Petition, pg. 7, Count II (heading);
 - c. “The Department’s Notice of Deficiency is invalid because the Department lacked a sufficient basis for its determination that COB has nexus,” First Amended Petition, pg. 12, Count V (heading).

19. First Amended Petition Counts I, II, and V ask this Tribunal to:

- a. “enter an order that: finds and declares that the Notice of Deficiency was issued after the statute of limitations had run; finds and declares that the Notice of Deficiency was without effect;” First Amended Petition, pg. 6, Count I (prayer for relief).
- b. “enter an order that: finds and declares that the Notice of Deficiency does not comply with the Taxpayer Bill of Rights; finds and declares that the Notice of Deficiency does not comply with 35 ILCS 5/904(c)[;] finds and declares the Notice of Deficiency invalid;” First Amended Petition, pg. 8, Count II (prayer for relief).
- c. “enter an order that: finds and declares that the Department lacked sufficient knowledge to include COB in Plaintiff’s Illinois apportionment factor; finds and declare that the Department did not make its prima facie

case against Petitioner;” First Amended Petition, pg. 13, Count V,
(prayer for relief).

20. The General Assembly has expressly stated that this Tribunal has no jurisdiction over a “determination of the Department regarding tax liabilities that have become finalized by law,” 35 ILCS 1010/1-45(e).

21. Because the Notice of Deficiency issued to Petitioner on August 11, 2014 became final by operation of law on Friday October 10, 2014, this Tribunal has no authority to review the correctness of that Notice, including its *prima facie* correctness, or any other determinations of the Department encompassed by the Notice.

22. The only Notice properly before this Tribunal is the January 13, 2016 Notice of Claim Denial. First Amended Petition, Exhibit A.

WHEREFORE, Department prays this Tribunal enter an Order:

- a. Holding that the Notice of Deficiency issued August 11, 2014 became final by operation of law on Friday October 10, 2014;
- b. Holding that, as a matter of law, this Tribunal does not have subject matter jurisdiction to review the Notice of Deficiency issued August 11, 2014;
- c. Dismissing with prejudice Counts I, II, and V of the First Amended Petition; and
- d. Granting any further relief this Tribunal deems just and appropriate.

B. Taxpayer’s Requests for Fees in Counts II, V, and VIII Must Be Dismissed because this Tribunal is Statutorily Prohibited from Awarding Costs or Attorneys’ Fees.

23. The Tribunal Act provides:

The Tax Tribunal shall not assign any costs or attorney's fees incurred by one party against another party. Claims for expenses and attorney's fees under Section 10-55 of the Illinois Administrative Procedure Act shall first be made to the Department of Revenue. If the claimant is dissatisfied because of the Department's failure to make any award or because of the insufficiency of the award, the claimant may petition the Court of Claims for the amount deemed owed.

35 ILCS 1010/1-55(d) (emphasis added).

24. It is well established that “attorney fees and the ordinary expenses and burdens of litigation are not allowable to the successful party in the absence of a statute, or in the absence of some agreement or stipulation specially authorizing the allowance thereof.” *FEPC*, 65 Ill.2d at 113 (emphasis added).

25. In *City of Chicago v. FEPC*, the Illinois Supreme Court held: “Since the Commission is a statutory creature, its powers are dependent thereon, and it must find within the statute the authority which it claims. Such agencies have no general or common law powers.” *FEPC*, 65 Ill.2d at 113 (internal citations omitted). See also *Vuagniaux*, 208 Ill.2d at 186 (holding that an administrative agency “has no general or common law authority. The only powers it possesses are those granted to it by the legislature, and any action it takes must be authorized by statute.”); *Commonwealth Edison Co.*, 2014 IL App (1st) 130544, ¶ 16 (holding that administrative agencies, including quasi-judicial ones, do not possess any common law powers or general jurisdiction that a circuit court exercises or possess).

26. In *City of Chicago v. FEPC*, the Illinois Supreme Court held that the agency had no authority to award attorneys’ fees or cost and that its order was void *ab initio*. *FEPC*, 65 Ill.2d at 115.

27. Counts II and V ask this Tribunal to “grant[] Petitioner damages to the extent allowed by the Taxpayer Bill of Rights, including attorney fees up to \$100,000.” First Amended

Petition, pg. 8, 13 (prayers for relief).

28. The Tribunal should dismiss Counts II and V of the First Amended Petition because the Tribunal is expressly prohibited by statute from awarding attorneys' fees to Petitioner. 35 ILCS 1010/1-55(d).

WHEREFORE, Department prays this Tribunal enter an Order holding that this Tribunal is statutorily prohibited from awarding attorneys' fees and dismissing Counts II and V of the First Amended Petition, with prejudice.

C. Taxpayer's Requests for Damages in Counts II, V, and VIII Must Be Dismissed because this Tribunal Lacks Subject Matter Jurisdiction to Hear Suits Filed Under the Taxpayer's Bill of Rights.

29. In Counts II and V of the First Amended Petition, Petitioner specifically invoked Section 5 of the Taxpayers' Bill of Rights Act, (20 ILCS 2520/5) (hereafter the "TBRA") as a basis for its demand for "damages to the extent allowed by the Taxpayer Bill of Rights, including attorney fees up to \$100,000." First Amended Petition, ¶¶ 60, 104; pgs. 8, 13. 20 ILCS 2520/5.

30. This Tribunal's authority to hear taxpayer claims brought against the Illinois Department of Revenue is expressly limited to "determinations of the Department reflected on a Notice of Deficiency, . . . issued under the Illinois Income Tax Act" 35 ILCS 1010/1-45(a).

31. This Tribunal is not expressly granted authority to hear claims arising under the Taxpayers' Bill of Rights, and this Tribunal may exercise only the powers given to it by the Legislature. *FEPC*, 65 Ill.2d at 115; *Vuagniaux*, 208 Ill.2d at 186; 35 ILCS 1010/1 et seq.

32. Further evidence that the Legislature did not vest this Tribunal with jurisdiction over Taxpayer Bill of Rights claims can be found in comparing/contrasting the language in the Tribunal Act and the TBRA.

33. Section 5 of the TBRA provides:

Sec. 5. Taxpayer's suits. Taxpayers have the right to sue the Department of Revenue if such Department intentionally or recklessly disregards tax laws or regulations in collecting taxes. The maximum recovery for damages in such a suit shall be \$100,000. If a taxpayer's suit is determined by the court to be frivolous the court may impose a penalty on the taxpayer not to exceed \$10,000 to be collected as a tax.

20 ILCS 2520/5 (emphasis added.)

34. A longstanding canon of statutory construction holds that where the legislature uses one term in one instance and a different but analogous term in another, it intends different results. *Julie Q v. Dep't of Children and Family Servs.*, 2011 IL App (2d) 100643, ¶ 43, 963 N.E.2d 401 (2d Dist. 2011) (citing *Collins v. Bd. of Trs. of Firemen's Annuity & Ben. Fund of Chicago*, 155 Ill.2d 103, 113 (1993) (“the use of different language indicated that the legislature intended different meanings and results.”); *Nelson v. Union Wire Rope Corp.*, 31 Ill.2d 69, 100 (1964) (“use by the legislature of certain language in one instance and wholly different language in another indicates that different results were intended.”)).

35. In the TBRA, the Legislature used the terms “sue,” “suit,” and “court” when it provided for the recovery of damages from the Department. 20 ILCS 2520/5.

36. However, in the Tribunal Act, the legislature used the terms “protest,” “petition,” and “Tribunal.” 35 ILCS 1010/1-1 et seq.

37. Therefore, “court” and “suit” as used in the TBRA mean something different than “Tribunal” and “petition” as used in the Tribunal Act. See *Collins*, 155 Ill.2d at 113.¹

¹ The Department’s research revealed no decisions in which a circuit or appellate court awarded damages to the taxpayer pursuant to Section 5 of the Taxpayer’s Bill of Rights Act. 20 ILCS 2520/5. Thus, the Department asserts that “court” in Section 5 of the Taxpayer’s Bill of Rights Act refers to the Illinois Court of Claims (705 ILCS 505/1 et seq.).

38. Because the “Tribunal” is not the same as a “court,” it follows that the Legislature did not intend for the Independent Tax Tribunal to have jurisdiction to hear Taxpayers’ Bill of Rights claims. *Id.*

39. Finally, pursuant to Section 8(a) of the Court of Claims Act, “the Court of Claims has exclusive jurisdiction to hear: (a) All claims against the State founded upon any law of the State of Illinois or upon any regulation adopted thereunder by an executive or administrative officer or agency.” 705 ILCS 505/8. This provision encompasses Section 5 of the TBR. 20 ILCS 2520/5.

40. For the above reasons, this Tribunal does not have jurisdiction to hear or render an award of damages as requested in Counts II and V of Petitioner’s First Amended Petition.

WHEREFORE, Department prays this Tribunal enter an Order holding that this Tribunal does not have jurisdiction to hear claims brought pursuant to the Taxpayer Bill of Rights (20 ILCS 2520/5) and granting Department’s Motion to Dismiss, with prejudice, Counts II and V of Petitioner’s First Amended Petition without delay so as to prevent the parties from the needless time and expense of litigating Counts I, II, and V.

Respectfully Submitted,

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