ORIGINAL
(e-filed)

20060366

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Joan Mann, Ken Danks d/b/a TEK Industries, Tracy Wilkie, Christa Monette, and other persons similarly situated,

Plaintiffs-Appellants,

v.

No. 20060366

ND Tax Commissioner, Cory Fong,
ND Treasurer, Kelly Schmidt,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT

MOUNTRAIL COUNTY

NORTHWEST JUDICIAL DISTRICT

APPELLANTS' PETITION FOR REHEARING

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AUG 13 2007
STATE OF NORTH DAKOTA

August 10, 2007

To: ND Supreme Court, Clerk

From: Vance Gillette

Re: Petition for Rehearing, *Mann v. ND Tax Comm'r* No. 20060366

This note makes corrections as underlined below. From the context the meaning intended is clear, but the spell-check or author overlooked them.

1. At ¶ 14, line 4: The brief does not cite ....
   It should read: The brief did not cite ....

2. at ¶ 20 line 2: This racial discriminates ....
   It should read: This racial discrimination ....

3. At ¶ 23 line 2: This rules extends ....
   It should read: This rule extends ....

4. At ¶ 25 last 6: hint that is applies ....
   It should read: hint that it applies ....

cc: ND tax attorney Dan Rouse et. al.

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Statement of the Case.

¶ 1. In a prior appeal the court remanded for a ruling on the class and on refund issues. Mann v. ND Tax Comm'r, 2005 ND 36, 692 N.W. 2d 490. On July 25, 2007 the Court said Indians can get a hearing on refund claims, and denied a class action. This petition points out ND improperly bars refunds to Indians by denying refund hearings.

Statement of Facts.

¶ 2. In 2000-01 Ken Danks applied for refunds that ND denied. Then Danks "protested" and ND again denied refunds, saying the tax on "fuel used in licensed vehicles" was nonrefundable, and this applied to Indians on a Reservation. Appendix 6. In 2003 plaintiffs sued the tax commissioner (Fong or ND) over the tax. In 2004 claimants secured a ruling that ND wrongly imposed the fuel tax illegal on tribal members living on a Reservation. Judge Holum stated the plaintiffs could seek refunds under N.D.C.C. § 57-43.1-32. App. 12A-14. The plaintiffs sought class relief for 3,000 tribal members. App. 18-23. Indians paid over $1 million per year in fuel taxes.

¶ 3. In 2005 ND enacted a refund law based on original receipts. N.D.C.C. 57-43.1-03.2. No hearing or judicial review is provided for in the statute. The 2005 law incorporated an old law designed for businesses. A refund claim must contain the seller's name and address, date, type of fuel, number of gallons, and the state tax as a separate item or a statement the state tax is included in the price, and name of claimant. The old law is designed to provide refunds over bulk sales and for businesses.

¶ 4. Plaintiffs challenged the 2005 law on due process and equal protection grounds. Plaintiffs said the original receipt rule (2005 law) harmed plaintiffs because no hearing is allowed, and no other proof is allowed to prove a refund. App. 15-17. Without a hearing

a claimant cannot get a full refund or contest a denial. App. 24-25.

¶ 5. In 2005 ND agents required original receipts with detailed information. Most is not available. For example, gas stations receipts list the gallons and price. An Indian claimant submitted receipts and owner's statement the tax was included in the gas price. App. 49-50. Despite this proof, Fong still rejected the 2005 claim. The original receipt rule, and lack of hearings, bars refunds to Indians. App. 55-56.

¶ 6. The district court denied a class action saying the Indians could file refund claims under the admin. scheme. The court said the 2005 law provided an "meaningful opportunity" for a refund, and did not violate due process or equal protection. This Court affirmed, saying the 2005 law did provide a hearing and applied back to 1997.

ARGUMENT

DUE PROCESS

¶ 7. McKesson requires a State to provide a clear and certain remedy which includes a hearing. The 2005 law does not provide a hearing or adequate remedy.

¶ 8. In the landmark case McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18, 31 (1990) held a State must pay refunds over an illegal tax. This requires a "clear and certain remedy" under the Fourteenth Amendment.

> Because extraction of a tax constitutes deprivation of property, the State must procedural safeguards against unlawful extractions in order to satisfy the commands of the Due Process Clause.

Id. 496 U.S. at 36. McKesson stated that Florida must provide an adequate post-deprivation remedy. See Matthews v. Eldridge, 424 U.S. 319 (1976), some form of hearing required before an individual is finally deprived of a property interest.

¶ 9. Hibbs v. Winn, 542 U.S. 88 (2004) (suit over tax credits) noted a state-court

remedy is adequate only if it provides a *full hearing* and judicial determination. Accord, Reich v. Collins, 513 U.S. 106 (1994) (when State has refund law, it cannot substitute a law to bar court suit for refunds). Service Oil v. State, 479 N.W. 2d 815 (ND 1992) (due process required retroactive refund, over fuel additive tax).

¶ 10. Statutes involved. Plaintiffs seek refunds under an old refund law. It requires the tax commissioner to pay out refunds when a tax is "erroneously or illegally" collected. N.D.C.C. §§ 57-43.1-32 (gas), 57-43.2-20 (diesel). ND relies on a 2005 law that says an Indian can apply for a refund for on-Reservation purchases. N.D.C.C. § 57-43.1-03.2. It adopted an old original invoice rule. N.D.C.C. § 54-43.1-04.

¶ 11. ND's misleading information. At oral argument ND's counsel said the tax laws provide a "right to protest, hearing, then appeal to district court, citing Ch. 28-32 and 57-43.1-17 (7)." This Court took the bait. The Court ruled an Indian can get a hearing, and the 2005 law complied with due process. This ruling has to be revisited under McKesson and for reasons below.

¶ 12. How ND denies hearings. Defendant Fong denies due process via the tax regulations. N.D.A.C. 81-01.1-02, Formal hearing before tax commissioner, says: "When provided by statute, a taxpayer may request a formal hearing before the tax commissioner." The 2005 law and original receipt law do not provide for a hearing. So Fong uses the tax regulation to bar hearings. To implement this no hearing scheme Fong demands original receipts. Claim Form (admin. process). ND App. p. 47.

¶ 13. N.D.A.C. 81-01-02-02, Taxpayer's right to administrative hearing on refund issue. It says:

> If the tax commissioner denies any portion of a taxpayer's request for a refund, the taxpayer has the right to *protest* and right of administrative review

> *only when such protest or review is specified by the statutes* governing the specific tax type. When there is no specific statutory provision giving a taxpayer the right of administrative review, the decision by the tax commissioner is final and irrevocable.

(emphasis added). Again, ND uses this regulation to bar hearings.

¶ 14. ND cited a law that authorizes audits, for the proposition that ND allows an Indian to protest and get a hearing. N.D.C.C. § 57-43.1-17 (7) Commissioner to audit report and assess tax, states:

> If a tax credit or refund is disallowed the determination becomes final unless the person *protests* under the rules adopted by the commissioner and in the manner provided in chapter 28-32.

This law covers audits – after a payment. ND's appeal brief does not cite this law. The Court adopted ND's position, and held a claimant may protest under tax rules ... and in the manner provided in N.D.C.C. ch. 28-32. N.D.C.C. 57-43.1-17 (7). A claimant is entitled to a hearing to contest the denial of his refund claim. N.D.C.C. § 28-32-21. Opinion at ¶ 14-15. It appears the Court relied on ND's defective authority.

¶ 15. N.D.C.C. § 28-32-21 merely lists the duties of a hearing office; it does not authorize a refund hearing. Absent a hearing, there is nothing to appeal under Ch. 28-32.

¶ 16. Protest: a road to nowhere. In 2002 Plaintiff Ken Danks protested and never had a hearing yet. App. 6. Fong decided that Ch. 57-43.1 does not provide for a review or hearing. So the "decision by the tax commissioner is final and irrevocable." This scheme violates due process, McKesson and Winn.

¶ 17. ND bait & switch. Reich v. Collins prohibits a State from holding out a remedy, and then denying refunds through a bogus remedy. In this case, ND's refund law NDCC 57-43.1-32. is identical to the GA law in Reich. A refund must be paid when a tax is "erroneously or illegally" collected. The 2005 law blocks refunds by the original receipt

rule and no hearing scheme. Contrary to Reich, ND substituted a bogus remedy.

¶ 18. A retroactive application of the 2005 law to 1997 violates due process. United States v. Carlton, 512 U.S. 26 (1994) (imposing tax retro. one year okay). Retroactive application of tax law more than one year likely unlawful. Id. The Court extended the 2005 law ten years back. Making Indians produce ten year old receipts is gross.

¶ 19. Harm. Without a hearing to contest a denial or to offer other proof such as mileage logs and oral testimony, no refunds will be paid out. For tax year 2005 ND paid out a measly $13,000 in refunds. ND App. p. 41. ND rakes off $1.9 million per year from 3,000 Indians. Appendix citing ND data, p. 12. In 2006 had a budget surplus of $500 million. Part belongs to Indian claimants who wait for refunds.

EQUAL PROTECTION

¶ 20. ND singles out Indian claimants by imposing the 2005 original receipts rule – back to 1997 – to bar refunds. This racial discriminates violates the Equal Protection Clause.

¶ 21. The 2005 law looks "neutral" on its face, but ND singles out Indians for arbitrary treatment. See Village of Willowbrook v. Olech, 120 S. Ct. 1073 (2002) (prohibits arbitrary acts). Selective use of laws creates an unlawful classification. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (law eliminated Chinese wooden laundries, while white brick laundries exempted). ND must show a compelling interest to justify differing treatment.

¶ 22. Claim. The Court said plaintiffs sued because the receipts must have a state tax as a "separate item." The claim is the original receipt rule (2005 law) discriminated against Indians: use of original receipt rule was arbitrary, and ND demands a type of

receipt that does not exist. Appendix p. 15-17, 23.

¶ 23. Violations. First, the 2005 law requires an *original invoice* or history of accounting from a seller. This rules extends to 1997. Second, the law is applied unequally: a) Fong gives refunds to white business claimants based on business receipts, who had prior notice of the rules and applied each year;

b) ND imposes the same original receipt rule – back in time without prior notice.

c) ND requires a receipt that has the tax "separately stated." Such receipts do not exist as gas stations change prices all the time, and do not give out detailed receipts. App. 49-52. Fong rejected a $105 refund claim though receipts and owner's statement were submitted. Id. White tax agents use draconian standards in a manner that bars refunds to Indians, contrary to Yick Wo.

¶ 24. To find the 2005 receipt rule applied back to 1997, the Court stood the 2005 law on its head. The 2005 law said an Indian on a Reservation can apply for a refund, and the law is not effective until "after December 31, 2004." The Court cited a Legislative Note, it states:

> Sections 13 and 16 of this Act "may not be construed to preclude claims for motor vehicle and special fuel tax refunds by tribal members ... for taxes on purchases made before January 1, 2005."

¶ 25. The Court said this means the 2005 law does not really apply "after 2004." Rather, Section 13 means the Act applies to claims arising *before* January 1, 2005. The Court disregards the plain command of Section 13 - the 2005 law applies "after 2004." The language of "after 2004" should apply. Werlinger v. Champion Healthcare Corp.. 1999 ND 173, 598 N.W. 2d 820 (use statute first). The term "after 2004" does not hint that is applies back in time to 1997. Smith v. Baumgartner, 2003 ND 120, 665 N.W.

12 (a statute applies retro. only when the legislative intent is shown or implied).

CLASS ACTION

¶ 26. Under McKesson, the general refunds law, NDCC § 57-43.1-32, should apply as the substantive law to decide the class action.

¶ 27. The district court denied the class action, saying 2005 admin. scheme applied. This Court agreed. Opinion at ¶ 34-35. The 2005 law should not apply for reasons herein. Without a class action Indians cannot offer relevant proof for refunds. To require over 3,000 administrative claims would not promote efficiency. See our prior brief.

CONCLUSION

¶ 28. ND agents constructed a Rube Goldberg contraption designed to deny refunds to Indians. The 2005 law used the old original receipts law, with its no hearing scheme. ND agents constructed a model of how to deny due process: require receipts from ten years ago, demand non-existent data (tax sep. stated), no hearing, and no judicial review. The district court and this Court erred by not applying McKesson to require hearings.

¶ 29. Relief. The Court should rule the refund law N.D.C.C. § 57-43.l-32 applies. Or, a ruling should issue the 2005 law is unconstitutional on due process and equal protection grounds. The class action issue should be decided under N.D.C.C. § 57-43.l-32. The petition for rehearing should be granted, and the district court reversed.

Dated August 7 , 2007.

s/
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Certificate of Service

I certify on August 7, 2007 I sent electronically APPELLANTS' PETITON FOR REHEARING to:

[d.rouse@nd.gov] Daniel Rouse, ND Attorney General Wayne Stenehjem, et. al. State Capitol, 600 E. Blvd. Avenue, Bismarck, ND 58505. and to

[supclerkofcourt@ndcourts.gov] Clerk of ND Supreme Court, 600 E. Blvd Ave. Dept. 180 Bismarck, ND 58505.

s/
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