FIRST DIVISION
April 23, 2018

No. 1-17-0485

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES R. SKRZYPEK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 12 L 050573
ILLINOIS DEPARTMENT OF REVENUE,	)	
and CONSTANCE BEARD, as Director of the	)	
Illinois Department of Revenue,	)	Honorable
	)	Carl Anthony Walker,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce and Justice Connors concurred in the judgment.

ORDER

¶ 1 ***Held*:** We find no error with the administrative decision adopted by the Director of the Illinois Department of Revenue and affirm it.

¶ 2 Plaintiff-appellant, James R. Skrzypek, filed a complaint in Cook County seeking review of an administrative decision issued by the Director of the Illinois Department of Revenue which found him personally liable for his former company's failure to remit employment taxes to the

State. After reviewing the proceedings below, the circuit court found no error in the Director's decision and affirmed it.

¶ 3 Plaintiff now appeals the Director's decision to this court. He raises three issues before us (1) an audit occurred in 1995, (2) the claim is barred by a statute of limitations or the doctrine of laches, and (3) the Department failed to show plaintiff "willfully failed" to file quarterly withholding returns. For the reasons stated below, we affirm the Director's decision.

¶ 4 JURISDICTION

¶ 5 On February 8, 2017, the circuit court entered a final order affirming the Director's decision. On March 1, 2017, plaintiff filed his notice of appeal. Accordingly, this court has jurisdiction over this matter pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 301 and 303. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. May 30, 2008).

¶ 6 BACKGROUND

¶ 7 This case stems from an administrative decision issued by the Director of the Illinois Department of Revenue, which resulted in plaintiff being found liable for $1,828,270.29 in unpaid taxes and penalties as a result of his company's, Federal Security Inc., failure to remit employment withholding taxes to the State from the third quarter of 1991 to the first quarter of 1996.

¶ 8 Prior to the circuit court's order affirming the decision of the Director, this matter had twice been remanded for additional hearings. After reversing and remanding for a second administrative hearing, the circuit court ordered the administrative law judge (ALJ) presiding over the hearing "to reopen proofs and take evidence on any audits of Federal [plaintiff's company] that occurred prior to 2006" and further ordered the ALJ "to conduct a statute of limitations analysis that include[d] a review of all audits of Federal" from September 1991

through March 31, 1996. The ALJ, over the objection of the Department, also interpreted this order to require him to treat the Department's final notice of deficiency "as though Federal had protested it – for the purposes of considering whether Federal had a statute of limitations defense against the [notice of deficiency]." Plaintiff had initially failed to protest the notice of deficiency and had been found in default.

¶ 9 After the circuit court remanded for a second time, on March 24, 2015, the ALJ conducted a status conference and hearing on plaintiff's discovery motions. Plaintiff's discovery motions sought to depose Robert V. Bartnick and Melody Lyons, both former Department employees. The Department explained neither were current employees, and Lyons was actually in State custody awaiting trial on murder charges for the death of her husband and another individual. The ALJ allowed plaintiff to take discovery of various documents under the control of the Department. Plaintiff also sought sanctions against the Department for the alleged failure to preserve and produce a criminal investigation file created in 1999 by the Department's Bureau of Criminal Investigations. The Department had destroyed the file in 2010 as part of its record retention and destruction policy. The ALJ rejected plaintiff's argument that this constituted spoliation and declined to impose sanctions.

¶ 10 On October 20, 2015, the ALJ conducted a pre-conference hearing, which plaintiff attended. Plaintiff filed several motions including a "Motion to Strike Affidavit of Completeness," a "Motion Request for Immediate Final Decision," and "Motion Request for Stipulation to Restrict Hearing to Statute of Limitations Analysis Pursuant to Order of Court." These motions were denied by the ALJ. Plaintiff also presented a letter dated October 19, 2015, in which he stated, "he would not participate or appear for any hearing in this case." The ALJ then clarified the three issues which would be addressed at the hearing: (1) whether the Department conducted an audit of Federal Security before 2006; (2) whether the Department's

deficiency notice to Federal Security and notice of personal penalty liability to plaintiff for Federal Security's withholding income taxes complied with the applicable statutes of limitations; and (3) whether plaintiff was a responsible officer of Federal Security "who acted willfully in one of the ways described by § 1002(d) of the IITA [Illinois Income Tax Act] or § 3-7 of the UPIA [Uniform Penalty and Interest Act]."

¶ 11 On December 17, 2015, the ALJ held its hearing on the issues laid out in the pre-hearing conference. As he had previously stated in his letter at the pre-hearing conference, plaintiff did not attend. The Department proceeded with its case and presented evidence which it contended showed (1) only one audit had been conducted, (2) no statute of limitations barred the claim, and (3) plaintiff was liable for the withholding tax liability of Federal Security.

¶ 12 In support of its contentions, the Department presented the testimony of revenue audit supervisor Laurie Evans. Evans explained the Department's actions concerning plaintiff and Federal Security. Evans testified that she had personally reviewed Federal Security's audit file for withholding taxes between 1991 and 1996. Based on her review, she testified that the Department initiated its audit of Federal Security after receiving a referral from the United States Internal Revenue Service, which had performed a federal withholding income tax audit of Federal Security. The IRS then forwarded a copy of its final report to the Department. Upon receiving the IRS audit report, revenue auditor Melody Lyons initiated the Department's audit.

¶ 13 Evans testified about the audit file history, which included Lyons's comments, her calculations of withholding income tax penalty and interest, and various notices and letters that were sent to plaintiff. Evans explained that Lyons found no Illinois withholding income tax returns for Federal Security for the relevant time period (1991-1996). Lyons determined this by starting with the IRS audit, which was based on a failure to file federal withholding income tax returns. The Department also presented the certification of the Department's record manager

explaining that she had diligently searched the Department's records and found no quarterly withholding tax return for Federal Security from January 1991 through March 1996.

¶ 14 Lyons's audit began in May 2007. Lyons initiated it by sending an audit initiation letter to "the best known address that the Department had." Lyons received no response and the letter was returned as "undeliverable." Lyons continued the audit process by sending a notice of proposed deficiency. She would eventually attempt three different mailing addresses, all of which were returned undeliverable.

¶ 15 Eventually, on November 20, 2007, the Department located and sent an audit notice to plaintiff at the federal prison in Minnesota where plaintiff was serving his federal sentence. The notice to plaintiff explained he was personally liable for Federal Security's tax liabilities. Plaintiff sent back a letter in response, which stated, "The statute of limitations precludes me from responding to your letter of 11/20/2007." After receiving the letter, Lyons closed her audit as "unagreed" and forwarded it to the audit review section for issuance of a notice of deficiency.

¶ 16 The Department then sent a notice of deficiency to plaintiff at the Minnesota federal prison. Plaintiff did not respond to the notice of deficiency. The Department's record manager confirmed this after a diligent search of the Department's records. The Department then sent a final notice of tax due to plaintiff. Evans explained the Department sends a final notice upon a default of the notice of deficiency. A default occurs when a taxpayer does not protest the notice of deficiency within 60 days. The Department provided the ALJ with printouts from the Department's electronic audit information system used to keep track of audits. Evans described the information in the system, which identified the taxpayer, the audit period, when the audit was assigned, and any prior audits. Evans testified the Department's systems showed no prior audits of Federal Security. The Department also presented the ALJ with computer printouts from the audit system which showed only the May 2007 audit.

¶ 17 Evans then testified about the Department's Bureau of Criminal Investigation's (BCI) 1999 criminal investigation of Federal Security. Evans explained the special revenue agents in the BCI investigate only "[t]he criminal intent of taxpayers or preparers to evade taxes." A special agent in the BCI does not conduct audits and has no authority to issue a notice of deficiency. Utilizing printouts from the Department's BCI database, the Department showed BCI opened a case on Federal Security in January 1999 but closed it June 2000. The documentation showed the BCI opened an investigation after the Department's income tax processing division discovered a Federal Security employee filed an individual income tax return, but Federal Security had not filed its own return. The notes in the database further showed BCI discovered the IRS had initiated its own audit of Federal Security and plaintiff. BCI decided to let the IRS proceed with its case and closed its own investigation without taking any action.

¶ 18 Evans also provided testimony about the employment of Robert V. Bartnick, who plaintiff contended audited Federal Security with Lyons sometime in 1995. Evans stated Department records showed Bartnick worked for the Department from 1983 through 1991 as a revenue collection specialist. She explained this position collects unpaid taxes from taxpayers who have not paid their tax bills. However, this action would only be taken by a revenue collection specialist if a final notice of tax had previously been issued. Finally, she noted the position did not perform audits, did not establish tax liability and had no authority to issue a notice of deficiency.

¶ 19 In closing, the Department's attorney stated the notice of deficiency was *prima facie* correct, no protest had been filed and therefore liability had been established. The attorney noted the notice of penalty liability was timely issued to plaintiff. The evidence also established plaintiff was the president of Federal Security and could therefore be held liable in a personal capacity for Federal Security's tax liability. Plaintiff's federal indictment and conviction for his

willful failure to pay or file federal income taxes under section 7202 of the United States revenue code (26 U.S.C. § 7202 (2000)) during the same time period established plaintiff's willful conduct in failing to pay state income taxes. The Department concluded by arguing the evidence showed no viable statute of limitation defense and only one audit, in 2007, had occurred.

¶ 20 After reviewing the evidence and testimony put forward by the Department, the ALJ made several factual findings. The ALJ found Federal Security was an Illinois corporation and plaintiff was president from 1991 through 1996. The majority of Federal Security's revenue came from a contract to provide armed security to Chicago Housing Authority buildings. The ALJ concluded Federal Security did not file Illinois quarterly withholding tax returns with the Department to report the amounts of Illinois income taxes it withheld.

¶ 21 The ALJ also made factual findings regarding the BCI investigation. In 1999, the BCI initiated a criminal investigation of Federal Security and plaintiff regarding the failure to file withholding income tax returns. The investigation lasted about a year and concluded with the BCI taking no action against Federal Security or plaintiff. The BCI file was destroyed in 2010 in accordance with Department retention and destruction procedures. The Department did produce the remaining records it did have, which showed that in 2000, BCI closed the investigation because federal authorities had all the records and would not provide them to the BCI. The ALJ noted the federal investigation resulted in a criminal indictment against plaintiff on 127 counts and he was convicted on 126 of them. Eighteen of those counts stemmed from plaintiff's willful failure to file federal income tax returns for Federal Security from the fourth quarter of 1991 through the first quarter of 1996 (the same period alleged in the Department's notice of deficiency).

¶ 22 In May 2007, the Department initiated an audit of Federal Security for the period beginning January 1, 1991 through March 31, 1996. This audit revealed a failure to file quarterly

income tax withholdings with the Department during this time frame. The ALJ noted that while some of the Department's records incorrectly stated the company's name as "Federal Securities Inc," all of the documents contained Federal Security's FEIN tax number. The Department issued a proposed notice of deficiency in November 2007 which was received by plaintiff while serving his prison term. Plaintiff acknowledged receipt by sending a letter to Lyons. In September 2008, the Department issued a notice of deficiency to Federal Security, which was sent to plaintiff, regarding the company's failure to file income tax withholdings. Federal Security did not protest and, in December 2008, the Department issued 19 final notices (one for each quarter) of tax due. In February 2011, the Department initiated a collection action against plaintiff for Federal Security's unpaid Illinois tax, because plaintiff had been found to be a responsible officer for Federal Security.

¶ 23 The ALJ found that the BCI criminal investigation from 1999 did not constitute an audit of Federal Security, and even if it was an audit, no notice of deficiency had been issued. Only one notice of deficiency had been issued and it resulted from the audit initiated in 2007. While the ALJ concluded plaintiff waived any statute of limitations defense, it still conducted an analysis. The ALJ concluded, pursuant to section 905(c) (35 ILCS 5/905(c) (West 2012)), Federal Security's failure to file any quarterly returns during the relevant period meant the Department could take action at any time and no statute of limitations applied.

¶ 24 The ALJ concluded Federal Security had failed to pay its withholding taxes as required by IITA and UPIA and plaintiff was liable for the entire sum as its president during the time period. The federal criminal indictment showed Federal Security conducted business in Illinois and its employees were paid for services rendered entirely within the state. The indictment also established plaintiff as the officer responsible for Federal Security's taxes.

¶ 25 The findings of the ALJ were then adopted by the Director of the Department. Plaintiff appealed to the circuit court, which affirmed the decision of the Director. The circuit court concluded (1) the ALJ's determination that no audit occurred was not against the manifest weight of the evidence, (2) no statute of limitations applies when there is a failure to file returns, and (3) the determination that the BCI file was properly destroyed in accordance with Department guidelines was not against the manifest weight of the evidence.

¶ 26 Plaintiff timely appealed to this court.

¶ 27 ANALYSIS

¶ 28 This is an appeal from a final administrative decision issued by the Illinois Department of Revenue. When a party seeks appellate review of a decision issued by an administrative body, this court reviews the agency's decision, not the order of the circuit court. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 504 (2007). Pursuant to the Administrative Review Law, our review extends to all questions of law and fact presented in the entire record. 735 ILCS 5/3-110 (West 2016). The standard of review applied to an issue depends on whether the question is one of fact, one of law, or a mixed question of law and fact. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2010). The Administrative Review Law limits our review and we may not consider new or additional evidence. *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 272 (2009).

¶ 29 The statute mandates the "findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." 735 ILCS 5/3-110 (West 2016). When reviewing an agency's factual findings, we will not reweigh the evidence or substitute our judgment for that of the agency. We may only determine whether the findings of fact are against the manifest weight of the evidence. *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board, State Panel*, 216 Ill.

2d 569, 577 (2005). Questions of law, however, are reviewed *de novo*. *Id.* Mixed questions of law and fact asks the legal effect of a given set of facts. *Cinkus*, 228 Ill. 2d at 211. Mixed questions of fact and law are " 'questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.' " *American Federation of State, County & Municipal Employees*, 216 Ill. 2d at 577, quoting *Pullman–Standard v. Swint*, 456 U.S. 273, 289 n. 19 (1982). An agency's conclusion on a mixed question of fact and law is reviewed for clear error. An administrative decision is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed. *American Federation of State, County & Municipal Employees*, 216 Ill. 2d at 577–78.

¶ 30 Before turning to the issues raised by plaintiff in his brief, we note that he does not challenge calculation of the $1.8 million tax deficiency set forth in the notice of deficiency sent out by the Department. He also does not dispute that Federal Security was required yet failed to file quarterly withholding returns from January 1, 1991 through March 31, 1996. He also does not dispute he was president of Federal Security during the time frame at issue.

¶ 31 In his first issue, plaintiff argues an audit occurred in 1995. The ALJ concluded only one audit of Federal Security took place and it occurred in 2007.

¶ 32 Whether or not an audit occurred is a question of fact and we are required to presume the ALJ's finding on the issue is *prima facie* true and correct. 735 ILCS 5/3-110 (West 2016); *Strube v. Pollution Control Board*, 242 Ill. App. 3d 822, 826 (1993). Plaintiff must be able to demonstrate this conclusion is against the manifest weight of the evidence presented at the administrative hearing. *American Federation of State, County & Municipal Employees*, 216 Ill. 2d at 577.

¶ 33 Upon review of the record before us, we conclude the decision of the ALJ that only one audit occurred and it was in 2007 was not against the manifest weight of the evidence. We note plaintiff did not participate in the hearing and therefore presented no evidence on this issue. The Department presented several pieces of evidence to demonstrate only one audit occurred. The ALJ heard testimony from the Department's record manager that a diligent search of the Department's records showed only one audit of Federal Security had been conducted. The Department initiated its only audit in 2007 after receiving information from the IRS. The manager testified the Department had never received a quarterly withholding filing from Federal Security for the time period in question. The only notice of deficiency in the Department records was sent in 2008 after auditor Lyons concluded her audit investigation.

¶ 34 Before this court, plaintiff points to the business card of Robert V. Bartnick and argues this shows Bartnick and auditor Lyons showed up to audit Federal Security sometime in 1995. Plaintiff also points to the destruction of the 1999 BCI investigation file as part of a conspiracy on behalf of the Department to cover-up the 1995 audit.

¶ 35 Even if it had been presented, the business card does not help plaintiff's case. The card has no date on it, so plaintiff's contention he received it in 1995 is pure speculation. The Department's record manager testified that Department records showed Bartnick left the Department in 1991, four years before he allegedly showed up at Federal Security. She also testified Bartnick was a revenue collector not an auditor. A revenue collector does not perform audits, establish tax liability or issue a notice of deficiency. While plaintiff claims he directed Bartnick and Lyons to his accountant after their encounter in 1995, nothing plaintiff presents supports this contention.

¶ 36 The Department also presented testimony that the BCI investigation was not an audit. BCI investigations deal with a taxpayer's criminal intent in avoiding taxes owed and does not

deal with the amount of taxes owed to the Department. The BCI had no authority to conduct an audit or issue a notice of deficiency. We find nothing nefarious about the destruction of the BCI file. The investigation was opened in 1999 and closed a year later, after the BCI agents were unable to obtain the cooperation of the IRS. The investigation was closed with no action being taken against plaintiff or Federal Security. The file was destroyed in 2010 as part of the Department's standard record destruction policy. Plaintiff received the notice of deficiency in November 2007 while in federal prison and responded in January 2008. Plaintiff's response simply indicated "the statute of limitations preclude[d him] from responding." The Department received no further communications from plaintiff until he filed his initial complaint for administrative review in April 2012. Given the testimony from the Department and the above timeline of events, plaintiff's argument regarding the destruction of the BCI file is unpersuasive.

¶ 37 After considering the evidence before the ALJ and the arguments plaintiff raises before us, we find the ALJ's decision that only one audit occurred was not against the manifest weight of the evidence.

¶ 38 Plaintiff next argues that the Department's claim is barred by a statute of limitations and the doctrine of laches. Again, we note plaintiff did not attend the hearing and therefore did not present these arguments to the ALJ. However, even if he had presented them, they would have been unsuccessful. We view this issue as a question of law, which we review *de novo*. *American Federation of State, County & Municipal Employees, Council 31*, 216 Ill. 2d at 577.

¶ 39 Plaintiff argues that the five year statute of limitation found in section 13-205 applies to this matter. 735 ILCS 5/13-205 (West 2016). We disagree. "As a general rule, the statute of limitations will not apply to bar a claim by a governmental entity acting in a public capacity. However, where the entity is acting in a private capacity, its claim may be subject to a limitations defense." *Champaign Cnty. Forest Preserve District. v. King*, 291 Ill. App. 3d 197, 200 (1997)

citing *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 472-76 (1989). Here, it is obvious the Department was acting in a purely public capacity by seeking to collect employee withholding taxes owed to the State by Federal Security. The collection of taxes is purely a public function. Accordingly, section 13-205 does not apply to this matter.

¶ 40 The same general rule also means the doctrine of laches does not apply to this matter. Like the statute of limitations defense, laches or estoppel "will not be applied against the State in its governmental, public or sovereign capacity and it cannot be estopped from the exercise of its police powers or in its power of taxation or the collection of revenue." (citations omitted) *Hickey v. Illinois Cent. R. Co.*, 35 Ill. 2d 427, 448 (1966). Here, the Department sought to collect withholding taxes owed by Federal Security. This is undoubtedly part of the "power of taxation or collection of revenue" so as to bar the application laches.

¶ 41 In his last issue, plaintiff argues the ALJ failed to consider plaintiff's lack of willfulness in failing to pay the required withholding tax obligations. Section 1002(d) of IITA (35 ILCS 5/1002(d) (West 2016)) and section 3-7(a) UPIA (35 ILCS 735/3-7(a) (West 2016)) allow for a responsible employee to be held personally liable for an entity's failure to pay a tax if such action on the part of the responsible employee is "willful." The ALJ was presented with evidence that the Department had no record of Federal Security ever filing a quarterly withholding tax form from January 1991 through March 1996. The Department also presented documents showing plaintiff was the president of Federal Security during this time. The ALJ also relied heavily on plaintiff's federal indictment on various federal tax related charges stemming from the same time period. The ALJ concluded the circumstantial evidence showed a willful failure on the part of plaintiff to make the required Illinois withholding tax payments. This issue presents a mixed question of law and fact, which is reviewed for clear error. *American Federation of State, County & Municipal Employees*, 216 Ill. 2d at 577–78.

¶ 42 Considering plaintiff's argument before us (which was not made to the ALJ) the decision of the ALJ to hold plaintiff liable for the failure of Federal Security to make its required withholding tax payments was not clear error. Before this court, plaintiff does not attack the factual findings of the ALJ. Instead, plaintiff relies exclusively on the settlement agreement and subsequent federal appellate brief of Federal Security's former certified public accountant, Henry Pawlik, to argue Pawlik embezzled the withholding money earmarked for the State of Illinois. In 2001, Pawlik pled guilty to one count of willfully and intentionally filing a materially false income tax return. The plea agreement states that in 1992, Pawlik fraudulently obtained $30,000 from Federal Security and then failed to pay income tax on the $30,000.

¶ 43 Plaintiff's reliance on the Pawlik plea agreement and subsequent appellate brief from the appeal is misplaced for several reasons. Neither the plea agreement nor the appellate brief makes any mention that the $30,000 was Federal Security's withholding tax payments. Nothing in either document demonstrates or even suggests the $30,000 was earmarked to be used as Federal Security's withholding payment. Moreover, the facts of Pawlik's plea agreement are confined to 1992, and do not address the other quarters (between 1991-1996) that Federal Security failed to make the withholding payments. The plea agreement also demonstrates Pawlik ceased acting as Federal Security's accountant sometime in 1994. These two documents do not support plaintiff's contention before this court.

¶ 44 Based on the evidence presented at the hearing, and considering plaintiff's argument before this court, we find the decision of the ALJ to hold plaintiff liable based on a willful failure to pay Federal Security's tax obligations was not clearly erroneous.

¶ 45 CONCLUSION

¶ 46 For the reasons stated above, the administrative decision appealed from is affirmed.

¶ 47 Affirmed.