

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

FILED

JAN 09 2015 CTR-4

Anthony P. Leung, Clerk of the Circuit Court

CHRISTOPHER JENNER, LAUREL)
JENNER, THOMAS KLINGNER, ADAM)
LIEBMANN, KELLY LIEBMANN,)
MICHELLE MATHIA, KRISTINA)
RASMUSSEN, JEFFREY TUCEK, MARK)
WEYERMULLER, and JUDI WILLARD,)

Case No.

Plaintiffs,

2015MR000016

v.

ILLINOIS DEPARTMENT OF COMMERCE)
AND ECONOMIC OPPORTUNITY,)

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. This taxpayer lawsuit challenges the issuance of tax credits by Defendant Illinois Department of Commerce and Economic Opportunity (“DCEO”) that exceed the amounts authorized by the Economic Development for a Growing Economy Tax Credit Act (“EDGE Act”), 35 ILCS 10/5-1 *et seq.*

2. Under the EDGE Act, enacted in 1999, DCEO awards tax credits to select Illinois businesses.

3. The EDGE Act makes clear that the amount of a tax credit that DCEO awards to a business can be no greater than the amount of income tax withheld from the business’s “New Employees” – meaning employees hired *after* the business entered into a tax-credit agreement with DCEO to work on the project specified in the agreement.

4. DCEO, however, has adopted a regulation that purports to authorize the agency to award tax credits based on the amount of income tax withheld from employees the business hired *both before and after* the business entered into a tax-credit agreement. This regulation purportedly authorizes DCEO to issue tax credits equal to the total income taxes withheld from a business's "new employees" as well as its "retained employees" – that is, the combined amount of taxes withheld from new employees and employees who already worked for the business, who were reassigned to the project specified in the business's tax-credit agreement. As a result, DCEO gives businesses EDGE tax credits that exceed the amounts that the EDGE Act authorizes.

5. The Plaintiffs, who are Illinois taxpayers, ask this Court to (1) declare that DCEO has exceeded its authority in adopting this regulation and awarding tax credits that exceed the amounts the EDGE Act permits, and (2) enjoin DCEO from awarding further tax credits that exceed the amounts the EDGE Act permits.

Jurisdiction and Venue

6. This Court has subject matter jurisdiction over this matter, which challenges a provision of the Illinois Administrative Code for exceeding Defendant DCEO's authority under the law.

7. This Court has personal jurisdiction over Defendant DCEO because this lawsuit arises from DCEO's activity in the State of Illinois.

8. Venue is proper in Sangamon County because Defendant DCEO's principal office is in Sangamon County.

Parties

9. Plaintiff Christopher Jenner is a resident of McHenry County, Illinois, and has paid state income taxes in Illinois every year since 1973.

10. Plaintiff Laurel Jenner is a resident of McHenry County, Illinois, and has paid state income taxes in Illinois every year since 1977.

11. Plaintiff Thomas Klingner is a resident of Cook County, Illinois, and has paid state income taxes in Illinois every year since 1975.

12. Plaintiff Adam Liebmann is a resident of McHenry County, Illinois, and has paid state income taxes in Illinois every year since 1995.

13. Plaintiff Kelly Liebmann is a resident of McHenry County, Illinois, and has paid state income taxes in Illinois every year since 2002.

14. Plaintiff Michelle Mathia is a resident of Lake County, Illinois, and has paid state income taxes in Illinois every year since 1973.

15. Plaintiff Kristina Rasmussen is a resident of Sangamon County, Illinois, and has paid state income taxes in Illinois every year since 2009.

16. Plaintiff Jeffrey Tucek is a resident of Cook County, Illinois, and has paid state income taxes in Illinois every year since 2008.

17. Plaintiff Mark Weyermuller is a resident of Cook County, Illinois, and has paid state incomes taxes in Illinois every year since 1974.

18. Plaintiff Judi Willard is a resident of Sangamon County, Illinois, and has paid state income taxes in Illinois every year since 2005.

19. Defendant DCEO is the unit of Illinois state government charged with awarding tax credits under the EDGE Act.

Factual Allegations

The EDGE Act gives select businesses tax credits for new projects in Illinois.

20. The EDGE Act authorizes DCEO to award tax credits to select businesses. 35 ILCS 10/5-15.

21. To receive a tax credit under the EDGE Act, a business “that proposes a project to create new jobs in Illinois must enter into an Agreement with [DCEO] for the Credit.” 35 ILCS 10/5-15(b).

22. Any business “proposing a project located or planned to be located in Illinois” may apply to receive EDGE tax credits. 35 ILCS 10/5-20(a).

23. To qualify for EDGE tax credits, however, a business’s proposed project must:

(1) “involve an investment of at least \$5,000,000 in capital improvements to be placed in service and to employ at least 25 New Employees within the State as a direct result of the project”;

(2) “involve an investment of at least an amount (to be expressly specified by [DCEO] and the [Business Investment] Committee [of the Illinois Economic Development Board]) in capital improvements to be placed in service and will employ at least an amount (to be expressly specified by [DCEO] and the Committee) of New Employees within the State, provided that [DCEO] and the Committee have determined that the project will provide a substantial economic benefit to the State;” or

(3) “if the applicant has 100 or fewer employees, involve an investment of at least \$1,000,000 in capital improvements to be placed in service and to employ at least 5 New Employees within the State as a direct result of the project.”

35 ILCS 10/5-20(b).

24. After a business applies for an EDGE tax credit, the Business Investment Committee of the Illinois Economic Development Board (the “Committee”), a body within DCEO, must consider the application and make a recommendation as to whether it should be accepted. 35 ILCS 10/5-25.

25. In deciding whether to recommend acceptance of an application for an EDGE tax credit, the Committee considers seven factors, including whether the applicant’s project “intends to hire the required number of New Employees in Illinois.” 35 ILCS 10/5-25(b).

26. The Committee also provides “guidance” to DCEO on the amount of an EDGE tax credit, considering eight factors enumerated in the statute. 35 ILCS 10/5-40.

27. DCEO, in turn, determines the amount and duration of an EDGE tax credit. 35 ILCS 10/5-45.

28. When DCEO awards an EDGE tax credit, it must enter into an “Agreement” with the business receiving the credit, which must include, among other things: a “detailed description of the project that is the subject of the Agreement”; the duration and amount of the tax credit; a minimum number of years for the project; a “specific method for determining the number of New Employees employed during a taxable year”; and a requirement that the business report to DCEO “the number of New Employees, the Incremental Income Tax withheld in connection with the New Employees, and any other information the [DCEO] Director needs.” 35 ILCS 10/5-50.

The EDGE Act limits the amounts of its tax credits.

29. The EDGE Act limits the amount of the tax credit a business can receive through an Agreement, tying the amount to the new employees the business hires in the state.

30. Under the Act, the amount of tax credits a business receives under an Agreement “shall not exceed the Incremental Income Tax attributable to the project that is the subject of the Agreement.” 35 ILCS 10/5-15(d).

31. The Act defines the “Incremental Income Tax” attributable to a project as “the total amount withheld during the taxable year from the compensation of New Employees under Article 7 of the Illinois Income Tax Act arising from employment at a project that is the subject of an Agreement.” 35 ILCS 10/5-5 (internal footnote omitted).

32. To qualify as a “New Employee,” an employee must be: (1) “first employed by [the] Taxpayer in the project that is the subject of an Agreement” and (2) “hired after the Taxpayer enters into the tax credit Agreement.” 35 ILCS 10/5-5.

33. The Act also allows a business to treat an employees as a “New Employee” if he or she “performs a job that was previously performed by someone who was: (1) treated under the Agreement as a New Employee; and (2) promoted by the Taxpayer to another job.” 35 ILCS 10/5-5.

34. The Act also allows a business to treat an employee as a “New Employee” if the following three conditions are all met: “(1) the Applicant is in receipt of a letter from the Department stating an intent to enter into a credit Agreement; (2) the letter . . . is issued by the Department not later than 15 days after the effective date of [the EDGE] Act; and (3) the employee was hired after the date the letter . . . was issued.” 35 ILCS 10/5-5.

35. Thus, in sum, the Act limits the amount of the tax credit a business can receive under an Agreement to the amount of income tax withheld from employees who are both (1) hired to work on the project that is the subject of the Agreement and (2) hired *after* the business enters into the Agreement, with the limited exceptions noted above.

DCEO regulations purport to authorize greater tax credits than the EDGE Act permits.

36. Despite the EDGE Act's clear language, DCEO has adopted regulations that purport to authorize EDGE tax credits exceeding the amount that the EDGE Act permits.

37. DCEO's regulations define a "Credit" as "the amount agreed to between the Department and applicant under the Act, but not to exceed the incremental payroll attributable to the applicant's project." 14 Ill. Admin. Code § 527.20 (citing 35 ILCS 10/5-15).

38. DCEO's regulations, in turn, define "incremental payroll" as "the total amount withheld by the taxpayer during the taxable year from the compensation of new employees *and retained employees* under Article 7 of the Illinois Income Tax Act [35 ILCS 5/Art. 7] arising from such employees' employment at a project that is the subject of an Agreement." 14 Ill. Admin. Code § 527.20 (emphasis added).

39. DCEO's definition of "new employee" comports with the Act's definition: "a full-time employee first employed by a taxpayer in the project that is the subject of an Agreement and who is hired after the taxpayer enters into the Tax Credit Agreement." 14 Ill. Admin. Code § 527.20. DCEO adds another exception to its definition, however, which allows a business to treat an employee as "new" if he or she "fills a vacancy that had been continuously vacant for the 184 day period immediately preceding the date of the Agreement." *Id.*

40. DCEO's definition of "retained employee" goes beyond the Act's definition of a "New Employee" and to include a "full-time employee employed by a taxpayer during the term of the agreement whose job duties are directly and substantially-related (sic) to the project." For purposes of the definition, "'directly and substantially-related (sic) to the project' means at least two-thirds of the employee's job duties must be directly related to the project and the employee must devote at least two-thirds of his or her time to the project." 14 Ill. Admin. Code § 527.20.

41. DCEO applies the foregoing definitions from its regulations in determining the amounts of the tax credits it issues. *See* 14 Ill. Admin. Code §§ 527.20, 527.70.

42. Thus, DCEO's regulations allow a business to receive a larger tax credit than it could receive under the Act's language alone: Instead of having its tax credit limited to the amount of income tax withheld from *new* employees' paychecks, a business can receive a tax credit up to the amount of income tax withheld from both new *and retained* employees who work on the project that is the subject of the Agreement.

DCEO awards EDGE tax credits that exceed the amounts the EDGE Act permits.

43. Although the EDGE Act grants DCEO the power to “[p]romulgate procedures, rules, or regulations deemed necessary and appropriate for the administration of the programs,” it does not grant DCEO the power to broaden or change the definitions of the EDGE Act's terms, nor does it grant DCEO the power to issue tax credits that exceed the amounts authorized by the Act. *See* 35 ILCS 10/5-10(a).

44. Nonetheless, DCEO has effectively broadened and changed the Act's terms by adopting its regulation purportedly authorizing tax credits in greater amounts than the Act permits.

45. Applying its regulations, DCEO has awarded tax credits that exceed the amounts the Act permits.

46. By adopting a regulation increasing the amounts of the tax credits it can award under the EDGE program, and by awarding tax credits that exceed the amounts the EDGE Act permits, DCEO has acted in excess of its authority.

Plaintiffs' Injury

47. Plaintiffs are all Illinois taxpayers; all have paid Illinois state taxes for years, as described in Paragraphs 9 through 18 above, and all expect to continue to pay Illinois state taxes every year for the foreseeable future.

48. As Illinois taxpayers, Plaintiffs have an equitable ownership interest in public funds and will be liable to replenish the public treasury for the unlawful depletion of public funds.

49. Because DCEO's issuance of tax credits causes the state to have less money in its general revenue fund than it otherwise would have, DCEO's awards of tax credits that exceed the amounts authorized by the EDGE Act constitute an unlawful depletion of public funds and injure Plaintiffs.

COUNT I

DCEO has exceeded its authority by adopting 14 Ill. Admin. Code § 527.20 and by issuing EDGE tax credits exceeding the amounts authorized by the EDGE Act.

50. Plaintiffs reallege Paragraphs 1 through 48 of this Complaint as though fully set forth herein.

51. Any power or authority claimed by an administrative agency must find its source within the statute creating it.

52. The EDGE Act unambiguously limits the amount of a tax credit a taxpayer can receive through an EDGE Agreement to the amount of income taxes withheld from a business's *new* employees, defined as those employees who were hired *after* the business entered into the Agreement for the purpose of working on the project specified in the Agreement.

53. The EDGE Act does not authorize DCEO to redefine the EDGE Act's terms or to grant tax credits exceeding the amount authorized by the EDGE Act.

54. By adopting a rule authorizing tax credits that exceed the amount authorized in the EDGE Act – increasing the limit to include not only the amount of income taxes withheld from new employees, but also the total amount withheld from “retained” employees already employed by the business – DCEO has exceeded its statutory authority.

55. By issuing tax credits that exceed the amount authorized in the EDGE Act, DCEO has exceeded its statutory authority.

56. DCEO’s issuance of tax credits that exceed its statutory authority injures Plaintiffs because they are liable for replenishing the public revenues that businesses receiving excessive EDGE tax credits would otherwise pay to the State’s general revenue fund.

57. Plaintiffs have a right to enjoin the unlawful depletion of public funds.

58. Plaintiffs have no adequate or available administrative remedy.

59. Plaintiffs’ injury is irreparable.

60. Plaintiffs have no adequate remedy at law.

Relief Requested

Plaintiffs respectfully request that this Court:

A. Declare that DCEO has exceeded its statutory authority by adopting a rule, 14 Ill. Admin. Code § 527.20, that purportedly authorizes it to issue tax credits in amounts that exceed the amount authorized by the EDGE Act;

B. Declare that DCEO has exceeded its statutory authority by issuing tax credits in amounts that exceed the amounts authorized by the EDGE Act;

C. Declare that the tax credit a business receives under the EDGE Act may not exceed the total amount withheld during the taxable year from the compensation of “New Employees” as defined in the Act, which must not include the amount of income tax withheld

from the compensation of employees hired before the business entered its tax-credit agreement with DCEO, except as stated in the Act's limited exceptions to this general rule;

D. Enjoin DCEO from entering into any agreement to award a tax credit to a business that exceeds the total amount withheld during the taxable year from the compensation of "New Employees" as defined in the Act;

E. Enjoin DCEO from granting any tax credit to a business that exceeds the total amount withheld during the taxable year from the compensation of "New Employees" as defined in the Act;

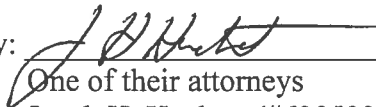
F. Award Plaintiffs their reasonable costs and attorneys' fees as authorized by 5 ILCS 100/10-55(c); and

G. Award Plaintiffs any additional relief the Court deems just and proper.

Dated: January 8, 2014.

Respectfully submitted,

**CHRISTOPHER JENNER,
LAUREL JENNER, THOMAS
KLINGNER, ADAM LIEBMANN,
KELLY LIEBMANN, MICHELLE
MATHIA, KRISTINA RASMUSSEN,
JEFFREY TUCEK, MARK
WEYERMULLER, and JUDI
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