

IN THE COURT OF APPEALS OF IOWA

No. 2-622 / 11-0291
Filed August 22, 2012

IOWA DEPARTMENT OF REVENUE,
Plaintiff-Appellee,

vs.

DAVID YUSKA,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Defendant appeals the district court's ruling on a motion to quash a garnishment to collect unpaid individual income taxes. **AFFIRMED.**

Patrick W. O'Bryan of O'Bryan Law Firm, Des Moines, for appellant.

David E. Yuska, Waterloo, pro se.

Thomas J. Miller, Attorney General, and Donald D. Stanley Jr., Assistant Attorney General, for appellee.

Considered by Vogel, P.J., Danilson, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

PER CURIAM**I. Background Facts & Proceedings.**

On March 25, 2010, the Iowa Department of Revenue (Department) sent a notice of assessment to David Yuska for failure to file income tax returns or pay income taxes in Iowa in 2005 and 2006. Yuska was assessed taxes, penalties, and interest of \$38,547.80. The notice of assessment provided, "This assessment will become final unless you appeal within 60 days or pay the amount shown and file a timely refund claim. If you do not appeal and you do not pay, we will begin additional collection steps after the due date shown above." Under Iowa Code section 422.28 (2009), a taxpayer may appeal to the director of the Department within sixty days from the date of a notice of assessment. Yuska did not appeal to the Department or pay the tax.

The Department then began proceedings to collect the tax due. On August 31, 2010, the Department filed a distress warrant with the Black Hawk County Sheriff stating at that time the total due was \$39,103.10 and commanding the seizure and garnishment of all real or personal property belonging to Yuska. See Iowa Code § 422.26(7). The Department gave notice to Yuska that it intended to garnish farm rental payments owed to him by Tom Schneider.

Yuska filed a motion to quash the garnishment in district court, challenging the legality of the Department's determination of his tax liability and resulting assessment. The motion was not served on the Department. On September 15, 2010, the court set the motion for hearing on September 22, 2010, and sent a copy of its order to the Department. The Department requested a continuance because it had received insufficient notice of the hearing. On September 20,

2010, Judge Todd Geer rescheduled the hearing for October 13, 2010. Yuska, who was appearing pro se, filed a request for trial by jury. The Department filed a resistance to the motion to quash garnishment.

A hearing on the matter was held January 20, 2011. At the beginning of the hearing, Yuska asked Judge George Stigler to recuse himself based on a previous case Yuska had before the judge. Judge Stigler stated he did not remember Yuska and did not remember the case. He refused to recuse himself. Yuska also asked for more time to consider the resistance filed by the Department, but the court did not grant this request. Furthermore, the court denied Yuska's request for a jury trial. Yuska submitted several exhibits relating to tax protests in other jurisdictions. He claimed the Department did not have the legal ability to tax him.

The Department presented evidence that it had collected \$20,791.38 from Schneider, Yuska's farm tenant. The Department had an ongoing garnishment so that it expected to collect additional rental payments from Schneider. The Department stated that Black Hawk County Sheriff would not return the garnishment until the full amount of \$39,103 had been collected.

The court filed an order on January 21, 2011. The court found Yuska's position was frivolous and without merit, stating, "When the second garnishment is completed, effective on or about March 1, 2011, the court will approve an order to condemn funds seized from Mr. Yuska." Yuska has appealed the decision of the district court.¹

¹ We have serious concerns about whether the district court's order of January 21, 2011, was a final order because it anticipated there would be further action

II. Motion to Quash Garnishment.

Yuska contends the district court did not have subject matter jurisdiction to enforce the garnishment proceeding by the Department.² He claims the tax assessments made against him for 2005 and 2006 were fraudulent, thus making the garnishment unenforceable. Yuska asserts that he should have been able to challenge the validity of the underlying tax assessment at the hearing on his motion to quash the garnishment.

The Department points out that section 422.28 clearly provides an administrative remedy for taxpayers who seek to challenge a tax assessment. Iowa Administrative Code rule 701-7.41 provides, “Any person wishing to contest an assessment, . . . shall file a protest, in writing, with the department,” within the applicable time period.³ When a party contests a tax assessment under section 422.28, “[t]he director must then grant a hearing and determine if the tax, interest or penalties are excessive or incorrect.” *Ashland Oil, Inc. v. Iowa Dep’t of Revenue*, 452 N.W.2d 162, 163 (Iowa 1990). After the director enters a decision, a party may file a petition for judicial review in the district court. Iowa Code

by the court. See Iowa R. App. P. 6.103(1). We may, however, treat Yuska’s notice of appeal as an application for interlocutory appeal. See Iowa R. App. P. 6.108. In this case, we find a determination on the merits will better serve the interests of justice and conclude the action may proceed as an interlocutory appeal. See Iowa R. App. P. 6.104(2).

² Yuska frames this argument as raising a claim of subject matter jurisdiction, but he is not actually challenging the jurisdiction of the district court. Subject matter jurisdiction is the power of the court to hear a general class of cases, not merely the specific case in question. *Klinge v. Bentien*, 725 N.W.2d 13, 15 (Iowa 2006). Yuska is not claiming the court did not have the power to hear garnishment actions in general.

³ A taxpayer who fails to timely protest may still contest an assessment by paying the assessed tax, interest, and penalty and by filing a refund claim within the time period provided by law for filing such claims. Iowa Code § 421.60(2)(h); Iowa Admin. Code r. 701-7.41. A taxpayer could also seek abatement of assessed taxes that are erroneous, illegal, or excessive. Iowa Code § 421.60(2)(i); Iowa Admin. Code r. 701-7.31.

§ 422.29. Alternatively, a challenge to the decision of the director may be appealed to the State Board of Tax Review. Iowa Code § 421.1(5). The decision of the State Board may then be the subject of a petition for judicial review. *Pruss v. Iowa Dep't of Revenue*, 330 N.W.2d 300, 303 (Iowa 1983).

We conclude that in order to challenge the assessment, Yuska was required to exhaust his administrative remedies. See *IES Utils., Inc. v. Iowa Dep't of Revenue*, 545 N.W.2d 536, 541 (Iowa 1996) (finding plaintiffs seeking to challenge the valuation of property for tax purposes chose wrong procedural avenue by filing an original action in district court rather than exhausting all adequate administrative remedies at the agency level); *McManus v. Iowa Dep't of Revenue*, 499 N.W.2d 726, 727 (Iowa 1993) (noting that in the case of a party seeking a refund of income taxes, “even an inadequate administrative remedy still must be exhausted if judicial review from the final action is adequate”).

Here, Yuska did not avail himself of the opportunity to challenge the tax assessment through the administrative process, and therefore did not exhaust his administrative remedies. We do not consider issues raised on appeal where adequate administrative remedies have not been exhausted. *Preuss Elevator, Inc. v. Iowa Dep't of Natural Resources*, 477 N.W.2d 675, 677 (Iowa 1991). We determine the district court did not err by failing to address the correctness of the underlying assessment.

III. Recusal.

Yuska claims Judge Stigler abused his discretion by denying his request for the judge to recuse himself. A party seeking recusal of a judge has the burden of showing grounds for the recusal. *Campbell v. Quad Cities Times*, 547

N.W.2d 608, 611 (Iowa Ct. App. 1996). Mere speculation as to judicial bias is not sufficient; the party must show actual prejudice. *McKinley v. Iowa Dist. Ct.*, 542 N.W.2d 822, 827 (Iowa 1996). A judge's decision as to whether to grant a motion to recuse is reviewed for an abuse of discretion. *In re Marriage of Clinton*, 579 N.W.2d 835, 837 (Iowa Ct. App. 1998).

We conclude Judge Stigler did not abuse his discretion by denying Yuska's request to recuse himself. Yuska's sole reason for his request was that he had a previous case before the judge where he felt Judge Stigler had done him an injustice. Generally, however, past judicial encounters with a judge provide no basis for recusal by the judge. *State v. Smith*, 282 N.W.2d 138, 142 (Iowa 1979). "Only personal bias or prejudice stemming from an extrajudicial source constitutes a disqualifying factor." *State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005).

IV. Ex Parte Communications.

Yuska claims Judge Geer improperly engaged in ex parte communication with attorneys from the Department. He asserts there was some type of communication, where he was not present, before the court continued the hearing on his motion to quash from September 22 to October 13, 2010. We find there is nothing in the record to show Yuska brought his claims of ex parte communication before the district court. We thus conclude he has failed to preserve error on this issue. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (noting we do not consider issues raised for the first time on appeal).

V. Trial by Jury.

Yuska asserts the district court should have granted his request for a trial by jury on his motion to quash the garnishment. We disagree. The Department may proceed under chapter 642, regarding garnishment, to collect on an unpaid tax assessment.⁴ Iowa Code § 422.26(7).

Iowa Code section 626.31, which pertains to garnishments under a distress warrant issued by the director of revenue, states in part that “the proceedings shall conform to proceedings in garnishment under attachments as nearly as may be.” A defendant may only seek relief from a garnishment by seeking discharge of the garnishee pursuant to Iowa Code section 642.15. Under section 642.15, a defendant may seek to claim the property being garnished is either exempt, or is otherwise not liable for the plaintiff’s claim. In that event, section 642.15 states that any contested issues “shall be tried”—and the section does not proscribe a jury trial. Moreover, our supreme court has concluded that a garnishee is entitled to a jury trial where the plaintiff files a pleading controverting the garnishee’s answers to interrogatories. *Neff v. Manuel*, 97 N.W. 73, 74 (Iowa 1903).

Here, Yuska demands a jury trial on a motion to quash garnishment. The motion is not a pleading and motions are to be ruled upon by the court, not a jury. See Iowa R. Civ. P. 1.431(1), (7). However section 642.15 only requires a “suitable pleading” to be filed by the defendant, and our court has concluded a

⁴ Chapter 642 does not apply in its entirety to the collection efforts of the Department; the protections from garnishment found in section 642.21 do not apply against the Department when it garnishes to enforce a tax lien. *Iowa Dep’t of Revenue v. Peterson*, 532 N.W.2d 805, 807 (Iowa 1995).

motion to quash *may* serve as a “suitable pleading.” See *In re Marriage of Schonts*, 345 N.W.2d 145, 146 (Iowa Ct. App. 1983). Notwithstanding, Yuska’s motion states, “[N]o proper assessment done in ascertaining (sic) proper tax situation of defendant.” Because the motion alleges neither of the grounds identified in section 642.15, but rather challenges the amount of taxes owed, the motion to quash was simply a motion to be ruled upon by the court, and the court properly denied Yuska’s request for a jury trial. See Iowa R. Civ. P. 1.413(1), (7).

We affirm the decision of the district court.

AFFIRMED.