

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

SAND LIVESTOCK SYSTEM, INC.,) Docket 502 Page 279
)
Plaintiff,)
)
vs.) ORDER
)
NEBRASKA DEPARTMENT OF)
REVENUE, M. BERRI BALKE,)
Nebraska Tax Commissioner,)
and STATE OF NEBRASKA,)
)
Defendants.)

Sand Livestock Systems, Inc. (the taxpayer) has appealed from a decision of the State Tax Commissioner denying in part a claim for refund of Nebraska Sales and use taxes paid by the taxpayer.

1. The taxpayer is a Nebraska corporation engaged in the construction of hog confinement facilities. Because of common stock ownership, the taxpayer and Sand Livestock Systems of South Dakota (South Dakota Corporation) are brother-sister corporations for the purpose of the Nebraska revenue laws.

2. There is no bill of exceptions as such in this case. Therefore, the facts as presented by the parties in their briefs cannot be verified from the record. However, since there appears to be no dispute with respect to the facts by the parties, this court assumes that the facts set forth in the briefs are correct.

3. Apparently the taxpayer purchases materials in quantity and carries it as inventory. At the time such inventory materials were purchased, the taxpayer paid Nebraska sales or use tax on the purchases. It is these sales and use taxes that are the subject of the claim for refund. However the record does not reflect the dates such inventory materials were purchased nor does it reflect the items purchased, the amount of sales or use tax paid, or the dates of such payment.

4. The South Dakota Corporation entered into a contract to construct a hog confinement facility in the State of Colorado. The record does not contain any details of this contract. The South Dakota Corporation purchased certain materials from the taxpayer which were incorporated in the hog facility. The claim for refund filed by the taxpayer described this transaction as follows:

SLS-SD [the South Dakota Corporation] was the company which contracted with National Farms in the state of Colorado to build a hog confinement unit. SLS-SD purchased some of the materials necessary to complete this hog confinement facility in Colorado from the inventory of SLS. All items which SLS-SD purchased from SLS were items on which SLS paid Nebraska sales tax. As the items were shipped to Colorado, SLS billed SLS-SD at cost which included sales tax, so the sales tax was not listed as such on the invoice. Enclosed herewith is a summary of the monthly billing between SLS and SLS-SD for inventory items and the sales tax paid on these items. (Emphasis added).

The billing summary attached to the claim lists the amounts on the invoices, the amount of the sales tax attributable to such invoice and the "date paid," which is the date the South Dakota Corporation paid the taxpayer for the invoice amount.

5. As noted above, the tax refund is for the sales and use taxes originally paid by the taxpayer, and not for sales taxes attributable to the subsequent sales to the South Dakota Corporation. The Commissioner approved a partial refund of \$13,385.00 based on the exemption under Neb. Rev. Stat. §§ 77-2702.19 and 77-2701.23 (Supp. 1993). The Commissioner denied approximately \$28,000.00 of the claim under Neb. Rev. Stat. § 77-2708(2)(b) (Supp. 1993) as the claims for these taxes were not filed within three years. The balance of the claim of \$70,644.16 was disallowed on the grounds that the sales between the taxpayer and the South Dakota Corporation were occasional sales.

6. Decisions of the Tax Commissioner are reviewed pursuant to the provisions of the Administrative Procedures Act. Neb. Rev. Stat. § 77-27,127 (Reissue 1990). Section 84-917(5)(a) provides that this court reviews the decision de novo on the record. The taxpayer has the burden of proving that the transactions here are exempt from sales or use taxes. Vulcraft v. Karnes, 229 Neb. 676, 428 N.W.2d 505 (1988).

7. As noted, the record here is meager making a de novo review difficult. In particular, there is a lack of evidence with respect to the particular transactions for which the exemption is claimed. In addition, the parties frequently have made no distinction between the purchases of the inventory material originally made by the taxpayer (the subject of this claim) and the sales of such material by the taxpayer to the South Dakota Corporation. These latter sales are not retail sales; they are "occasional sales" between brother-sister corporations pursuant to Section 77-2702.09 (Supp. 1993).

8. The taxpayer claims that it should not have paid the sales and use taxes on the materials when originally purchased by it since these were purchased by the taxpayer as a retailer for resale in the ordinary course of its business.

9. The taxpayer argues that since the taxpayer has not filed an election pursuant to Section 77-2702(3)(c), it is deemed to be a retailer and not a consumer. However, the statutory procedure for such an election did not become effective until April 18, 1989. Therefore, any goods purchased prior to that date would be subject to sales and use taxes since the taxpayer would be a consumer under the existing law. The record here does not reflect when these goods were purchased by the taxpayer although they must have been purchased prior to September of 1989, the date of the first sale by the taxpayer to the South Dakota Corporation. The taxpayer has the burden of proof with respect to its exemption from sales and use taxes and the court finds that the record fails to show such exemption.

IT IS ORDERED that the decision of the Tax Commissioner dated August 12, 1993 be affirmed. Costs of this appeal are taxed to the plaintiff-taxpayer.

Dated ~~April~~ ^{May} 4, 1994.

BY THE COURT:



District Judge