

Barber

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

IN THE MATTER OF MIRACLE HILL)
GOLF AND TENNIS CENTER, HERBERT)
H. DAVIS, JR., PERSONAL)
REPRESENTATIVE OF THE ESTATE OF)
HERBERT H. DAVIS, Deceased,)

Docket 549, Page 142.

Petitioner,)

ORDER

vs.)

STATE OF NEBRASKA, NEBRASKA)
DEPARTMENT OF REVENUE and)
M. BERRI BALKA, TAX COMMISSIONER)
FOR THE STATE OF NEBRASKA)

DEPT. OF JUSTICE

MAY 29 1997

Respondents.)

STATE OF NEBRASKA

The petitioner brings this appeal under Neb. Rev. Stat. § 84-917, asking the Court to reverse the Order of the Tax Commissioner dated October 23, 1996, Docket Number 95-098-01 & 04D. The Tax Commissioner's order upheld a tax deficiency issued against petitioner in the amount of \$3,433.00 related to the purchase and use of yellow golf balls and bags. The Court reviews an administrative appeal under Neb. Rev. Stat. § 84-917, de novo on the record. *Slack Nursing Home v. Dept. of Soc. Svcs.* 247 Neb. 452, 528 N.W.2d 285 (1995).

The substantive facts of the case are not in dispute, and revolve around yellow golf balls and bags used by patrons of the Miracle Hill Golf and Tennis Center. Miracle Hill includes an 18 hole golf course, clubhouse, maintenance and service areas and buildings, and various practice areas. The practice areas include

practice greens, sand traps and approaches, which generally involve short range golf strokes such as putting and sand shots. The other practice areas include tee boxes and practice tees, range and target greens, and other open areas. These areas involve longer range golf strokes used when teeing off, etc. Miracle Hill makes two kinds of golf balls available to practicing golfers. White balls, which are provided free, are generally used for practicing short range putting and sand shots. The yellow balls, more visible from a distance than the white balls, are available for a rental fee which varies depending upon the amount of balls. These 'range balls' are used for practicing long range strokes.

Miracle Hill does not require that golfers at the long range practice areas use the yellow range balls. Nor are yellow balls banned from short range practice areas. On the long range practice areas golfers are free to use white balls or their own worn out balls. A bag of yellow balls, once purchased, can be used by more than one golfer. Unused yellow balls left by someone else can be picked up and used by other practicing golfers. Golfers are discouraged from attempting to retrieve any ball hit onto the long range practice areas, because of the danger of being struck. Anyone is free to use the long range and short practice areas, with any kind of golf ball, unless their use of the area is dangerous to themselves or others. The practice areas are not restricted from the public.

Petitioner, when the yellow balls and bags were purchased,

claimed them as exempt from sales tax because they were purchased for the sole intent of renting the balls to customers to use while practicing. Neb. Rev. Stat. § 77-2702.16. Purchases exempt from sales tax include "a sale of property...to a purchaser for the sole purpose of that purchaser renting or leasing such property to another person". Id. Petitioner did pay sales tax based on the rental receipts from the yellow balls and bags. On September 12, 1995 the Department of Revenue issued a deficiency notice, based on an audit done by the Department. The Department determined that the fee for the balls was an 'admission' under Neb. Rev. Stat. § 77-2703(1) and not a rental. Under Nebraska Sales and Use Regulations 1-044.07 regarding admissions, sales tax was due on the initial purchase of the balls and bags, as well as a tax on the admission paid each time the balls are used.

The state's argument is that the golfer, when he purchases a 'rental' bag of yellow balls, is actually purchasing the use of a driving range at Miracle Hills golf, ie, an admission. The rental of the balls is incidental to the admission fee to the driving range.

Nebraska Sales and Use Tax Regulations 1-044.01 define admission as "the right or privilege to have access to or use a place or location where...recreation is provided." A driving range is specifically listed as a location where recreation is provided. The tax auditor at least in part based her deficiency determination on the fact that the yellow balls were noted as 'range supplies' in

Miracle Hills' records, implying the balls were used particularly for a driving range. The exact definition of a driving range was disputed during the hearing before the tax commissioner. However, neither side disputes that the long range practice areas at issue here are a place of recreation. The dispute centers on the nature of the use of the yellow balls, and what the customer purchases when he pays money for a bag of balls.

The facts included in the stipulations make it clear that the golfer is not purchasing a right of access to the long range practice areas when purchasing the balls. Access to the long range practice areas is available to anyone. Instead the State asserts that, because the only logical use of the yellow balls is on the long range practice area, the fee paid by the golfer is actually a use fee, or admission, to the long range practice area.

The evidence adduced at the hearing shows that the right of use of the long range practice areas belongs to all who care to use the practice areas, and not particularly to the purchasers of yellow balls. It may be that the majority of golfers practicing at the long range area use the rented yellow balls, but the evidence provides no specific statistics either way. While the intended use of the yellow balls is clearly for long range practicing, a golfer can have the use of the long range practice area without purchasing the yellow balls. The golfer can also choose to use yellow balls for short range practice areas.

The relational gap between paying a fee for the balls and the

right to use the long range practice areas distinguishes this case from those advanced by the state regarding admission fees. 1968-69 Rep. of Att'y Gen 131 (*A fee charged for participating in a 'line' of bowling at a bowling alley constitutes an 'admission' for Nebraska tax purposes*), and *School District of Millcreek Township v. Tracydale Driving Range et al*, 34 Erie Co. L. J. 198 (1951). (The only way to be admitted to use the driving range was to purchase balls, and each person admitted was required to make the purchase.)

Miracle Hill has no such limitations on the use of their long range practice areas. Jerry Wilke, Director of Miracle Hill, testified at the tax hearing that people can use the long range practice area with their own worn out balls, or with balls they have scavenged. The long range practice areas are not restricted to yellow balls only. Yellow balls can also be used on short range practice areas. Scavenging or retrieving balls is discouraged, but it regularly happens on the long range practice areas. Golfers may also buy a bag of balls and share it with others who have not made a purchase. (Dep. 41:25-68:22)

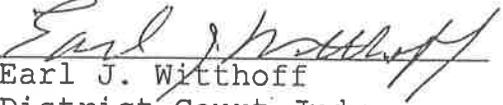
The right to the use the long range practice areas is distinct and unrelated to the purchase of yellow balls. While golfers buying the yellow balls intend to use the balls on the long range practice areas, the golfers also have a right of use independent of the purchase. When a golfer purchases a bag of yellow balls, he is renting the balls to practice long range shots, not purchasing the

right to use a particular practicing area.

Accordingly, IT IS ORDERED that the order of the Tax Commissioner, and the deficiency determination against Miracle Hills, be reversed. Costs taxed against Respondents.

Dated the 28 day of May, 1997.

BY THE COURT,


Earl J. Witthoff
District Court Judge

cc: Tyler B. Gaines & Matthew T. Payne, attorneys for Petitioner
L. Jay Bartel, attorney for Respondents