

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
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P.O. BOX 98910
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(402) 471-3731

April 29, 1998

L. Jay Bartel
ATTORNEY GENERAL'S OFFICE
2115 State Capitol
Lincoln, NE 68509

IN CASE OF: S-97-0205, Gottsch Feeding Corp. v. Department of Revenue

Submission to Court filed 04/08/98 .

has been reviewed by the court and the following order entered:

Appeal dismissed. Gerrard, Justice. See memorandum opinion.

Respectfully,

CLERK OF THE SUPREME COURT AND COURT OF APPEALS

NOTICES

(1) In order to speed the time for the processing of appeals, requests for a second extension of brief date are not encouraged and will be sparingly granted.

The request for such an extension should be accompanied by a statement of good cause. S. Ct. Rule 6F states: "Neither the stipulation of the parties nor the press of other business constitutes good cause."

(2) S. Ct. Rule 6D was amended on May 29, 1997, and now requires an original and one copy of general motions be filed with the Clerk's Office.

IN THE SUPREME COURT OF NEBRASKA



Gottsch Feeding Corporation,)
 a corporation,)
)
 Appellant,)
)
 v.)
)
 State of Nebraska, Department)
 of Revenue, and M. Berri Balka,)
 State Tax Commissioner,)
)
 Appellees.)

No. S-97-205.

Memorandum Opinion
and
Judgment on Appeal

WHITE, C.J., CAPORALE, WRIGHT, GERRARD, STEPHAN, and MCCORMACK, JJ.
GERRARD, J.

Gottsch Feeding Corporation (GFC) appeals the order of the Lancaster County District Court. That order affirmed the State Tax Commissioner's (Commissioner) order of summary judgment, sustaining deficiency assessments by the Nebraska Department of Revenue (Department) against GFC for unpaid sales and consumer's use taxes and income withholding taxes incurred by RFD-TV, Inc. (RFD). For the reasons that follow, we determine that the district court was without jurisdiction to review the Commissioner's order under the Administrative Procedure Act and, therefore, we dismiss the appeal.

BACKGROUND

GFC is a South Dakota corporation with business locations in Nebraska and South Dakota. GFC is primarily involved in the livestock-feeding business. RFD was a Nebraska corporation, whose primary business was the operation of a 24-hour, 7-day-a-week television network.

On March 10, 1993, the Department issued a deficiency assessment to GFC for the sales and use tax liabilities of RFD in the amount of \$174,195.30. In addition, the Department issued a

deficiency assessment to GFC for the income withholding tax liabilities of RFD in the amount of \$9,415,30. GFC timely protested both assessments before the Commissioner. Following a hearing on cross-motions for summary judgment, the Commissioner granted summary judgment in favor of the Department, thereby sustaining the Department's deficiency assessments against GFC for the unpaid sales and use taxes and income withholding taxes. GFC appealed to the Lancaster County District Court. After the appeal was filed, counsel for GFC and the State entered into a stipulation in district court whereby "questions concerning the propriety of agency disposition of cases . . . on the basis of summary judgment motions, [would] be waived by the parties and eliminated as an issue before the court."

On January 24, 1997, the district court affirmed the order of the Commissioner. In so affirming, the district court concluded that GFC was liable for the unpaid sales and consumer's use taxes incurred by RFD because GFC succeeded to the business and stock of goods of RFD within the meaning of Neb. Rev. Stat. § 77-2707 (Reissue 1996). The district court further concluded that GFC was liable for the unpaid income withholding taxes because GFC was a "successor" to RFD within the meaning of Neb. Rev. Stat. § 77-27,110 (Reissue 1996). GFC appeals.

SCOPE OF REVIEW

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *Big John's Billiards*

v. Balka, 254 Neb. 528, ___ N.W.2d ___ (1998); *Bonge v. County of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998).

ASSIGNMENTS OF ERROR

Restated, GFC assigns that the district court erred (1) in finding that it succeeded to the business and stock of goods of RFD within the meaning of § 77-2707 so as to render it liable for the sales and use taxes owed by RFD and (2) in finding that GFC, pursuant to § 77-27,110, was a "successor" of RFD so as to render it liable for the income withholding taxes owed by RFD.

ANALYSIS

Before addressing GFC's assignments of error, we must first determine whether we have subject matter jurisdiction in this appeal. It is well settled that the absence of subject matter jurisdiction may be raised sua sponte by the court. *In re Interest of Floyd B.*, 254 Neb. 443, ___ N.W.2d ___ (1998); *County of Sherman v. Evans*, 252 Neb. 612, 564 N.W.2d 256 (1997). Furthermore, it is equally well settled that parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996); *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996).

In *Big John's Billiards, supra*, we recently held that, in the absence of a statutory grant, the Commissioner does not have the authority to grant summary judgment in a contested case. Having concluded that neither the Administrative Procedure Act nor chapter 77, covering revenue and taxation, authorizes the Department to grant summary judgment, we determined that the summary judgment

order in *Big John's Billiards, supra*, was void ab initio. Based on the rationale in *Big John's Billiards*, we likewise conclude in the instant case that the Commissioner did not have the authority to issue a summary judgment order. Therefore, the order being void ab initio, there is no final order from which either party could have taken an appeal to the district court or to this court. Even though the parties attempted to stipulate away the issue of the propriety of the Commissioner's disposition of the case on the basis of summary judgment, it has long been the rule that parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Kuhlmann, supra; Fox, supra*. Thus, the district court was without jurisdiction to review the Commissioner's order under the Administrative Procedure Act.

When the district court lacks jurisdiction to hear an appeal, we likewise lack jurisdiction to hear the appeal. *Big John's Billiards, supra*.

CONCLUSION

We therefore conclude that the instant appeal must be dismissed for lack of jurisdiction.

APPEAL DISMISSED.

CONNOLLY, J., not participating.

THE STATE OF NEBRASKA, ss.

I hereby certify that I have compared the foregoing copy of an opinion filed by this Court with the original on file in my office and that the same is a correct copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of this Court, in the City of Lincoln.



Janet S. Amussen
Clerk/Deputy Clerk

SUPREME COURT NO.	S-97-205
TRIAL TRIBUNAL NO.	535-59
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