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IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

METRO MOVING SERVICES, INC.,)
a corporation doing business)
in Nebraska,)
)
Plaintiff,)
)
v.)
)
M. BERRI BALKA; Tax)
Commissioner of the State of)
Nebraska; and STATE OF NEBRASKA,)
DEPARTMENT OF REVENUE,)
)
Defendants.)

DOCKET 552 PAGE 141

ORDER

DEPT. OF JUSTICE
MAY 21 1998
STATE OF NEBRASKA

INTRODUCTION

This is an appeal pursuant to Neb. Rev. Stat. §§ 77-27,127, 77-27,128 (1996) and 84-917 (Supp. 1997) from an Order of the State Tax Commissioner affirming a deficiency assessment for Nebraska consumers use tax issued to Plaintiff Metro Moving Services, Inc. ["Metro"]. The Department assessed use tax on packaging containers (including boxes, cartons, packing materials, and padding materials) purchased by Metro which were used in performing their service of transporting and protecting the property of customers to locations inside and outside of Nebraska. The Commissioner determined that Metro was liable for tax on packaging containers used and consumed by Metro in providing moving services, and that Metro's use of containers was not exempt pursuant to Neb. Rev. Stat. § 77-2702.23(2) (1996). Pursuant to Neb. Rev. Stat. § 84-917(5) (a) (Supp. 1997), the Court reviews the Tax Commissioner's decision "de novo on the record" created before the Commissioner.

Hearing on the appeal was held before the Court on February 20, 1998. The Court, having reviewed the administrative record, hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The facts in this appeal are not in dispute, and were stipulated by the parties.

Metro is in the business of moving tangible personal property of persons or entities from a location within the State of Nebraska to locations, both within Nebraska (intrastate moves), and to locations outside of Nebraska (interstate moves). Metro is an agent for North American Van Lines ("North American"), and conducts all interstate moves according to contracts held with North American.

Metro, either in its individual capacity, or as agent for North American, enters into written contracts with customers located in Nebraska to provide any or all of the moving services listed above. Eighty-six percent (86%) of all moving services provided by Metro are for interstate moves, and fourteen percent (14%) of all moving services provided are for intrastate moves. Metro does not dispute that use tax is due on the containers that are used in the intrastate moves, and those containers are not at issue.

The most common moving services requested by a customer are to provide containers, pack the containers, transport all tangible personal property of the customer from a location in Nebraska to a destination outside Nebraska, unload and unpack the containers, and dispose of the containers.

Metro purchases boxes that are flat and in bundles of like-size. In order for Metro to use the boxes, the bundles must be

broken and the boxes must be opened up, assembled, and shaped, requiring the use of tape. The boxes and other containers are used by Metro to facilitate the movement of a customer's personal property. Padding materials are used to help insure that the property of the customers arrives at the destination undamaged. Once the boxes are taped into shape, tangible personal property of the customers is packed inside, with other packing material put inside to protect the property from damage. The containers are marked with a sticker to assist in identifying the contents of the containers, which aids in their room placement at the new destination.

The containers, once packed with customer's belongings and marked, are loaded onto a moving van along with other items of personal property for transportation to the new destination. Upon arriving at the destination, the containers are unloaded and taken into the destination location. Depending on the customer's wishes, the containers may be opened up and the property and packing materials inside taken out, or the containers may be left for storage and/or unpacking by the customer. If unpacked, both the containers and the packing materials may be left for the customer to dispose of, or the containers may be removed and disposed of by Metro.

Metro does not reuse the containers it removes from a customer's destination, but disposes of them as waste. Metro does not return any of the containers to the State of Nebraska; they are either left with the customer out of state, or are disposed of out

of state. The containers are not sold separately from packing and moving services.

Metro purchased the containers from vendors located outside of the State of Nebraska, and the containers were shipped to Metro's premises located in Nebraska by common carrier. Metro did not pay any sales or use tax on the purchase of the containers to any state at any time.

The Department conducted an audit of Metro for the period of December 1, 1986 through July 31, 1992, and a deficiency assessment was subsequently issued. The amount of tax that relates to containers used by Metro to provide moving services originating in Nebraska to destinations outside Nebraska is \$20,914.00.

QUESTION PRESENTED

The sole issue before the Court is whether Metro's use of packaging containers purchased by Metro from out-of-state vendors (including boxes, cartons, packaging materials, and padding materials) in performing their moving services constitutes a "use" of tangible personal property subject to Nebraska use tax.

CONCLUSIONS OF LAW

The Nebraska sales and use tax applies to most sales or uses of tangible personal property in this state, unless the sale or use has been specifically exempted or excluded from taxation. Generally, the use tax is designed to complement the sales tax to protect a state's revenue by taking away the advantages of residents to obtain tax free goods and services out of state, and

to protect local merchants from this type of out of state competition.

Neb. Rev. Stat. § 77-2703 (Supp. 1997) provides in relevant part:

(1) There is hereby imposed a tax at the rate provided in section 77-2701.02 upon the gross receipts of all sales of tangible personal property sold at retail in this state. . . (2) A use tax is hereby imposed on the storage, use, or other consumption in this state of property purchased, leased, or rented from any retailer and on any transaction the gross receipts of which are subject to tax under subsection (1) of this section....

"Use" is defined in Neb. Rev. Stat. § 77-2702.23(1) (1996) as:

...the exercise of any right or power over property incident to the ownership or possession of that property, except that use shall not include the sale of that property in the regular course of business or the exercise of any right or power over property which will enter into or become an ingredient or component part of property manufactured, processed, or fabricated for ultimate sale at retail....

It has long been the position of the Department (at least since 1978) that containers and packing materials used by a moving company constitute a taxable sale or use. Revenue Ruling 1-78-9 provides:

Sales and Use Tax -- Moving Companies. A MOVING COMPANY IS THE ULTIMATE CONSUMER OF ALL BOXES, CONTAINERS, WRAPPING PAPER, TAPE, AND OTHER PACKING MATERIALS USED IN PERFORMANCE OF ITS NONTAXABLE SERVICES.

Advice has been requested as to whether charges for boxes, containers, wrapping paper, tape and other packing materials purchased and used by a moving company to pack tangible personal property of others for shipment or storage are subject to sales and use tax.

A moving company provides a nontaxable service when packing and moving property of its customers and its total charge is not subject to Nebraska sales tax. As part of this service, the moving company provides boxes, containers, wrapping paper, tape and other packing

materials to protect the goods in shipment. The packing materials are used and consumed by the mover in the performances of the service and are subject to sales or use tax when purchased by the mover.

While the Department's Revenue Ruling was not promulgated as a regulation pursuant to the Administrative Procedure Act, it is nevertheless entitled to weight. Nebraska courts have granted deference to the construction and interpretation of a statute by the agency or officers charged with enforcing the statute. In *McCaul v. American Savings Co.*, 213 Neb. 841, 846, 331 N.W.2d 795 (1983), the Supreme Court stated:

...although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has failed to take any action to change such interpretation.

Accord Metropolitan Utilities Dist. v. Balka, 252 Neb. 172, 560 N.W.2d 795 (1997).

Similarly, in *Monahan v. School Dist. No. 1*, 229 Neb. 139, 195, 425 N.W.2d 624 (1988), the Court stated:

If there be any doubt, we are guided by the familiar rule that the construction of a statute by those whose duty it is to enforce the statute, in which construction the Legislature has, by its continued noninterference for a number of years, acquiesced, will be approved unless, as thus construed, it contravenes some provision of the Constitution or is clearly wrong. . . .

Metro does not deny that the containers are "used" in Nebraska, in that they are delivered into this state, assembled, packed with customer's belongings, and loaded onto a moving van for subsequent travel to an out of state destination. Metro, however, maintains that such "use" of its containers is excluded from

taxation pursuant to Neb. Rev. Stat. § 77-2702.23(2) (1995), which provides:

Except for a transaction that is subject to sales tax under the Nebraska Revenue Act of 1967, use shall not include the keeping, retaining, or exercising of any right or power over property for the purpose of subsequently transporting it outside the state or for the purpose of being processed, fabricated, or manufactured into, attached to or annexed to other property to be transported outside the state and thereafter used solely outside the state.

Metro argues its use of the containers in Nebraska falls under the exclusion in § 77-2703.23(2) because the "purpose" of the use is to transport the property (i.e. the containers) out of the state. The Court concludes that Metro's construction is inconsistent with both the language of the statute and the purpose of the exclusion provided in § 77-2703.23(2).

Section 77-2703.23(2) provides that "use" shall not include "the keeping, retaining or exercising of any right or power over property for the purpose of subsequently transporting it outside the state. . . ." (emphasis added). Metro is not merely "keeping, retaining or exercising any right or power" over the containers to transport the containers out of state. Metro purchases the containers for the purpose of using them in the provision of packing and moving services. The containers are purchased out of state, delivered to Nebraska, and are stored in the state until Metro uses them to provide packing services to a customer. The containers are used in Nebraska to pack the property of Metro's customers. The destination of the property in the container, be it

Nebraska or outside the state, is irrelevant to the use made of the containers by Metro.

To illustrate, the exclusion in § 77-2702.23(2) could be applicable if, instead of using the containers to pack property in Nebraska, Metro would ship the containers, still flat and unused, to another state to pack a customer's property. In that circumstance, although Metro would keep, retain, and exercise rights over the containers while in Nebraska, since the containers were ultimately shipped out of state to be used for the purpose for which they were purchased, the containers would not be subject to Nebraska use tax.

Thus, the difference between a taxable use and a non-taxable use is the purpose of the use of the containers. In the example above, the use was temporary storage before transportation to the out of state location of the ultimate consuming use. In Metro's case, the use of the containers is the ultimate consuming use, and, since it occurs in Nebraska, it is subject to Nebraska use tax.

At least one Nebraska court decision supports the Commissioner's interpretation of § 77-2702.23(2). *Sullivan Transfer and Storage Co. v. State of Nebraska and William E. Peters*, District Court of Lancaster County, Nebraska, Docket 320, Page 228 (T60-61). As in this case, Sullivan contended that its containers and packing materials were not subject to use tax in Nebraska because of Neb. Rev. Stat. § 77-2702(17) (1975), which is substantially the same law that is presently set forth in Neb. Rev.

Stat. § 77-2702.23(2). In addressing Sullivan's argument, Judge Blue stated:

Appellant further contends that its actions do not constitute a "storage" or "use" for tax purposes due to Neb. Rev. Stat. § 77-2702(17) (Reissue 1976). Appellant considers the language, "Neither storage nor use as defined in the subdivision shall include the keeping, retaining, or exercising of any right or power over tangible personal property for the purpose of subsequently transporting it outside the state. . ." to apply to its activities because the packing materials and containers are moved outside the state. However, this language cited by appellant clearly cannot apply when the appellant has used the property prior to shipment outside the state. Appellant is no longer "keeping, retaining, or exercising a right over the property", appellant is actually using the packing materials and containers in Nebraska in order to efficiently and safely ship its customers' goods. Therefore, it is the opinion of this court that the appellant's use of the packing materials and containers in Nebraska mandate that the court affirm the Findings and Order of the State Tax Commissioner. (T61).

While not binding, the Court finds Judge Blue's decision in the *Sullivan Transfer and Storage Co.* persuasive, and will, therefore, reach the same result in this case. The Court thus finds that Metro's containers and packing materials are used and consumed in the State of Nebraska, and are therefore taxable in Nebraska. Section 77-2702.23(2) is not applicable because Metro uses and consumes the containers and packing materials in Nebraska prior to transporting them to an out of state destination.

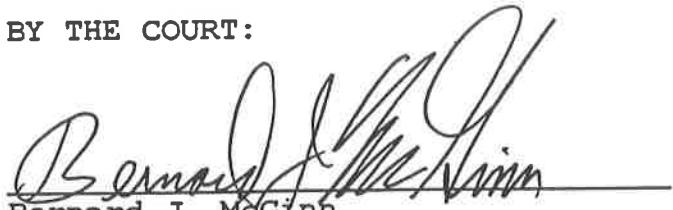
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The Order of the Tax Commissioner is affirmed; and

2. Petitioner is to pay the costs of this action.

DATED AND SIGNED this 20th day of May, 1998.

BY THE COURT:


Bernard J. McGinn
District Judge

cc *Kevin C. Siebert*, Attorney for Plaintiff
L. Jay Bartel, Attorney for Defendants