IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

PSI GROUP, INC.,	)	**Case No. CI 07-691**
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER**
	)	
NEBRASKA DEPARTMENT OF REVENUE and DOUGLAS A. EWALD, Nebraska State Tax Commissioner,	)	
	)	
Defendants.	)	

This matter came before the court for hearing on August 16, 2007, on plaintiff's appeal from the decision of the Nebraska State Tax Commissioner. Plaintiff was represented by John M. Boehm. Defendant was represented by L. Jay Bartel, Assistant Attorney General. Exhibit 1 was received into evidence and the matter was argued and submitted on briefs. The court, having fully considered the evidence, finds as follows:

This is an appeal from a decision of the Nebraska State Tax Commissioner denying a claim for refund of Nebraska sales and use tax filed by plaintiff, PSI Group, Inc. (PSI). The claim requested a refund of $52,000 for the period beginning May 1, 2003 and ending December 31, 2005. The refund was sought under Neb. Rev. Stat. § 77-27,187 to 77-27,195 (2003). The Nebraska State Tax Commissioner denied the refund claim and notified PSI of such decision in a letter dated January 25, 2007. PSI did not request an administrative hearing. This matter was

DEPARTMENT OF JUSTICE

DEC 0 6 2007

STATE OF NEBRASKA

then filed seeking review of the denial of the refund claim as provided in Neb. Rev. Stat. §§ 77-2708(f) and 77-27,127.

Neb. Rev. Stat. § 77-27,127 (Cum. Supp. 2006) provides that, "any final action of the Tax Commissioner may be appealed, and the appeal shall be in accordance with the Administrative Procedure Act." Pursuant to the Administrative Procedure Act (APA), Neb. Rev. Stat. Section 84-917(5)(a), this court's review is de novo on the record.

The denial of PSI's refund claim was based upon a finding that PSI was not engaged in a qualifying business as defined by Neb. Rev. Stat. § 77-27,189 and therefore, was not entitled to the refund requested. The ultimate question to be determined by this appeal is whether PSI is a qualifying business as defined in Neb. Rev. Stat. § 77-27,189. The burden of proof is on PSI. *Dillard Department Stores, Inc. v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995).

At the outset, the court must make clear that the record being considered in this de novo review is that contained exclusively in Exhibit 1. In both plaintiff's and defendants' briefs the court is cited to a Government Accounting Office study entitled "A Primer on Postal Worksharing." Plaintiff goes so far as to quote extensively from this publication and appends some, if not all of the study to the reply brief. In referencing this study, plaintiff states, "Any understanding of the business of mail presorting, must begin with an understanding of the requirements of the US Postal Service, because the presorting company is essentially providing services that the USPS would otherwise perform." Plaintiff goes on to say that this study, "... contains a good description of the actual activities engaged in by companies such as [PSI]." The court is mindful of the standard of review in this case and finds that any consideration of materials outside the record, Exhibit 1, would be improper. The court has neither read, nor

considered any of this material in arriving at the decision in this case. If, as plaintiff claims, this information is helpful in determining with more clarity what PSI's business activities consist of, then plaintiff should have provided such information to defendants so they could have considered it in determining plaintiff's refund request. Instead, the information from which defendants made their decision, and from which this court must make it's decision, is limited to that contained in Exhibit 1.

Exhibit 1 reveals that after PSI filed the tax refund claim at issue, the Nebraska Department of Revenue asked PSI to provide additional information as to the nature of PSI's business activity in order to determine whether PSI was a "qualifying business" as defined in Neb. Rev. Stat. § 77-27,189. After several months, and the exchange of many e-mails, PSI submitted a letter dated October 26, 2006 explaining the nature of the business it performs.

Plaintiff had originally asserted in the Nebraska Employment and Investment Credit Computation Form 3800Ns filed with the amended corporate tax returns that it was a "qualifying business" under Neb. Rev. Stat. § 77-27,189 based upon it being a "mail processing organization". PSI went on to indicate, "The company converts the mail to an automated mail piece and packages in its business relationship with the United States Postal Service. For the majority of the mail pieces, the physical envelope is changed by the spraying activity when the recognition software deduces its destination." Plaintiff now concedes that in determining whether PSI is a qualifying business and entitled to receive the tax refund claimed, the focus should exclusively be on the activities of the business which constitute "distribution", "transportation", and "storage" of tangible personal property. There is no dispute that the mail that is presorted by PSI is tangible personal property.

What the court must determine in this case is what business PSI is engaged in. Put another way, what the essence is of PSI's business. From the information contained in Exhibit 1 the court finds that PSI is a mail presort company. By it's own description, PSI indicates that it presorts mail for customers. In doing so, PSI can obtain reduced postage rates for it's customers. PSI claims that this is part of the mail distribution process of the United States Postal Service and therefore, they are engaged in the business of distribution. Under a plain, ordinary, and common sense application of the word distribution, this court does not find that the work PSI does, as related in Exhibit 1, is distribution of tangible personal property. PSI sorts mail before it is taken to the USPS. It is the USPS that distributes the mail to the recipient, not PSI. Sorting is not the same as distributing. PSI attempts to argue that because they ultimately take the mail to the USPS for distribution that they are, thus, a distributor themselves. This court disagrees.

PSI further attempts to claim they are a qualifying business based upon their transportation and/or storage of mail before and after the sorting is done. In terms of "storage", PSI indicates in the October 26, 2006 letter that mail awaits presorting anywhere from eight hours to four days depending upon what type of mail it is. This court does not believe this activity constitutes "storage" of tangible personal property under § 77-27,189. Additionally, the only information PSI provides to support a finding that their business activity includes "transportation" is in their October 26, 2006 letter which states, "PSI picks up and directly transports approximately 50% of its Nebraska customers' letters to its facility for presort, while the other 50% of the letters are transported via a third party carrier." The same letter also states, "Upon completion of these functions and contingent upon the level of sortation, approximately 50% of the mail distributed to the USPS is transported by USPS, 35% is transported by common

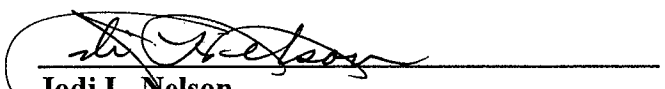
carrier, and 15% by PSI." There is no mention within the letter that there is any charge for storage or transportation to PSI's customers. The court finds that storage and transportation are ancillary and minimal portions of the business activities of PSI and not the essence of the work performed for their customers.

The court finds that PSI is a mail-presort company. Sorting mail is not synonymous with distribution of mail. Therefore, the court finds that PSI is not a qualifying business as defined by Neb. Rev. Stat. § 77,27,189.

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED that the decision of the Nebraska Tax Commissioner, denying PSI's tax refund claim, is the correct decision and is affirmed. Costs of this action are taxed to plaintiff.

DATED this 30 day of November, 2007.

BY THE COURT:



Jodi L. Nelson
District Judge

cc *John M. Boehm, Attorney for Plaintiff*
Assistant Attorney General L. Jay Bartel, Attorney for Defendants