

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

DIVERSIFIED TELECOM SERVICES, INC., )  
a corporation organized under the laws of the )  
State of Nebraska, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
STATE OF NEBRASKA, NEBRASKA )  
DEPARTMENT OF REVENUE, and TONY )  
FULTON, TAX COMMISSIONER OF THE )  
STATE OF NEBRASKA, )  
 )  
Respondents. )

Case No. CI 19-283

ORDER

LANCASTER COUNTY  
2019 AUG 16 PM 4:33  
CLERK OF THE  
DISTRICT COURT

On May 21, 2019, this case came before the Court on Petition for Review. Andrew C. Pease appeared for the Petitioner Diversified Telecom Services, Inc. (Diversified Telecom). L. Jay Bartel appeared for the Respondents State of Nebraska, Nebraska Department of Revenue (Department), and Tony Fulton, Tax Commissioner of the State of Nebraska (Commissioner). Being fully advised, the Court affirms the Tax Commissioner Order dated January 2, 2019.

I. BACKGROUND

Diversified Telecom builds, maintains, repairs, and removes mobile telecommunication towers and related equipment. T24; 33:10-35:1; Exs. 15 to 56. At some sites it installs back-up generators. 107:15-19. The generators are attached to concrete foundations. 99:22-25. Their sole purpose is allowing a telecommunications tower to function during a power outage. 59:21-23.

At all relevant times, Diversified Telecom has been an "Option 2" contractor, meaning that it pays sales or use tax as a consumer when it buys building materials. See Neb. Rev. Stat.

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§ 77-2701.10. In 2008, the Department and Diversified Telecom exchanged letters about whether Diversified Telecom was subject to a statute defining “gross receipts” for sales tax purposes to include gross income from providing, installing, constructing, servicing, or removing property used in conjunction with a mobile telecommunications service. See Neb. Rev. Stat. § 77-2701.16. The Department informed Diversified Telecom that its gross income from such work was taxable even though Diversified Telecom was an Option 2 contractor. Exs. 10, 12. That is, Diversified Telecom had to collect sales tax for “the total amount charged for the installation, construction, servicing, and removal of cellular towers and lower foundations, antennas and any related wires, cables, and equipment.” Ex. 12. The Department further informed Diversified Telecom that the “taxable base” included “tax paid on building materials used in providing the above services,” without a deduction or credit for the tax already paid. Ex. 12; see Ex. 10.

The Department and Diversified Telecom apparently did reach an understanding. The Department audited Diversified Telecom for the period March 1, 2012 to February 28, 2015. Ex. 2. As a result of the audit, the Department issued a Notice of Deficiency Determination for \$117,969.15 of taxes and \$20,268.34 of interest and penalties. *Id.*

Diversified Telecom petitioned for a redetermination and tried the matter to a hearing officer. Diversified Telecom contended that the Department had estimated its tax liability for the entire three-year audit period using information from only the 2014 calendar year. T40. Amy Grady, a person who worked for a company that oversaw Diversified Telecom’s accounting, testified about the audit. 118:2–6. Grady said that the auditors had access to “sales records for the entire period,” but the “sales records” she referred to were apparently “Excel sheets.” 132:1–133:22.

Grady testified that she gave the auditors the “initial spreadsheets,” answered their questions, and gave them additional records if “they needed certain invoices or anything.” 119:17–22. But she also said that the auditors did not ask for “[o]riginal invoices.” 134:1–2. During Grady’s testimony, she referred to spreadsheets that were apparently physically before her. But Diversified Telecom did not offer those documents as exhibits and, as far as the Court can tell, they are not otherwise in the record.

Grady also testified that Diversified Telecom installed an unusually large number of generators in 2014. 130:3–25. Thus, 2014 was “not an accurate representation of [Diversified Telecom’s] generator install sales for the entire audit period.” 131:1–5.

In January 2019, the Commissioner denied Diversified Telecom’s petition for redetermination, except for certain items stipulated to by the parties. T67–82. The Commissioner concluded that, despite Diversified Telecom’s status as an Option 2 contractor, it had to pay taxes under § 77-2701.16(2) on gross income from providing, installing, constructing, servicing, or removing property used in conjunction with mobile telecommunications services. The Commissioner further disagreed with Diversified Telecom that certain things (e.g., back-up generators) were not used in conjunction with providing mobile telecommunications services.

As for Diversified Telecom’s argument that the Department was taxing it twice, the Commissioner noted that Diversified Telecom’s clients were liable for the tax in the first instance. Further, the Commissioner identified a “difference between paying a sales tax when buying building materials[,] including that amount in taxpayer’s total costs of materials, and then charging sales tax to the customer for that total cost as well as for services.” Also, the Commissioner stated that the tax was not discriminatory because it had a rational basis and Diversified Telecom itself chose to be an Option 2 contractor.

Finally, the Commissioner concluded that Diversified Telecom had not carried its burden of showing that the Department's calculations were inaccurate. The Commissioner stated that the Department had used a "projection of income subject to sales tax, which was based on transactions during the entire 2014 calendar year and documents produced by [Diversified Telecom]." The Commissioner emphasized that Diversified Telecom had not produced invoices for the audit period outside of 2014. Nor had Diversified Telecom offered the spreadsheets referred to by Grady. Further, the Commissioner found that Grady was not a credible witness.

Diversified Telecom timely petitioned this Court for review. In the Petition for Review, it asserts that the Commissioner made five incorrect conclusions (renumbered):

1. "Amounts collected by Diversified for the sale of building materials annexed to real estate or fixtures are subject to sales tax both: (a) when Diversified purchases said building materials; and (b) when Diversified bills its customers for construction of fixtures and buildings at a cellular tower site as an Option 2 Contractor."
2. "Requiring Diversified, as an Option 2 Contractor, to both pay sales tax when purchasing building materials used in construction of fixtures and buildings at cellular tower sites, and collect and remit sales tax when billing its customers for the construction of fixtures and buildings at a cellular tower is NOT impermissible double taxation."
3. "The Department's assessment of sales tax both: (a) when Diversified purchases said building materials; and (b) when Diversified bills its customers for construction of fixtures and buildings at a cellular tower site as an Option 2 Contractor, even though Option 1 contractors are only required to collect sales tax upon sale of the same construction work to a customer, is not a violation of the Equal Protection provision in the Nebraska Constitution or the United States Constitution."
4. "Electrical services, gas lines, concrete pads, back-up power generators and other fixtures at the tower site are used directly in conjunction with the furnishing, installing, or connecting mobile telecommunication services and, therefore, are subject to sales tax both: (a) when Diversified purchases said building materials; and (b) when Diversified bills its customers for construction of fixtures and buildings at a cellular tower site as an Option 2 Contractor."
5. "The Department's audit and use of a projection was done in accordance with the Nebraska Revenue Act of 1967, despite the fact that Diversified did not sign a Sampling Agreement and provided the Department (at the time of audit) with clear evidence that the projection period did not accurately represent the entire audit period."

## II. STANDARDS

Any final action of the Tax Commissioner may be appealed under the Administrative Procedure Act (APA). Neb. Rev. Stat. § 77-27,127. Under the APA, a court shall review the agency's action without a jury de novo on the agency's record. Neb. Rev. Stat. § 84-917(5). A court may affirm, reverse, or modify the agency's decision, or remand for further proceedings. § 84-917(6)(b).

The APA requires that a "petition for review shall set forth . . . identification of the final decision at issue together with a duplicate copy of the final decision." Neb. Rev. Stat. § 84-917(2)(b)(iii). Here, Diversified Telecom's petition identified the final decision but did not attach a duplicate copy. Nebraska's appellate courts have not yet decided whether failing to attach a duplicate copy of the final decision deprives the court of subject matter jurisdiction or changes the standard of review. The Court concludes that where, as here, the transcript includes the agency's final decision, a court still has jurisdiction and its review remains de novo on the agency's record.

The burden of proof is important in this case. Under Neb. Rev. Stat. § 77-2781, the taxpayer has the burden of proof in any proceeding before the Commissioner (subject to a few exceptions that do not apply here). See also Neb. Admin. Code tit. 316, ch. 33, § 013.01 (similar). The taxpayer thus has the burden of proving factual matters. *Kellogg Co. v. Herrington*, 216 Neb. 138, 343 N.W.2d 326 (1984). This rule means that the taxpayer "bear[s] the burden of producing evidence sufficient to establish that a determination made by the Tax Commissioner is not in accordance with law, if it disagrees with [the Commissioner's] determination." *Id.* at 150, 343 N.W.2d at 333.

## III. ANALYSIS

**A. Diversified Telecom must pay taxes on gross income from providing, installing, constructing, servicing, or removing property used in conjunction with the furnishing, installing, or connecting of mobile telecommunications services.**

The Legislature has established a sales and use tax on, among other things, gross receipts from all sales of tangible personal property sold at retail and the gross receipts of any person involved in connecting and installing mobile telecommunications services. See Neb. Rev. Stat. § 77-2703(1). Generally, sales tax is part of the purchase price and, until collected, is a debt from the consumer to the retailer. *Id.* The tax is also a debt owed by the retailer to the state. *Id.*

Persons who annex building materials to real estate, i.e., “contractors,” can choose to be taxed as a retailer or consumer of the building materials. *Bridgeport Ethanol, LLC v. Neb. Dept. of Revenue*, 284 Neb. 291, 818 N.W.2d 600 (2012). Under Neb. Rev. Stat. § 77-2701.10, contractors have three “options.” An “Option 1” contractor is taxed as a retailer and is not considered the final consumer of the building materials it purchases. *Bridgeport Ethanol, supra.* On the other hand, “Option 2” and “Option 3” contractors are taxed as consumers, meaning that they pay taxes when they purchase building materials. *Id.* The Department of Revenue cannot “prescribe any requirements . . . restricting any person’s election.” § 77-2701.10. Taxpayers can change their election with the Commissioner’s approval. *Id.*

In addition to building materials, gross income from installing or connecting a mobile telecommunications service is also taxable. Subsection (2) of Neb. Rev. Stat. § 77-2701.16, the statute defining “gross receipts” subject to the sales or use tax, provides in part:

**Gross receipts** of . . . any person involved in connecting and installing services defined in subdivision (2)(a), (b), or (d) of this section **means**:

(a)

(i) . . .

(ii) In the furnishing of mobile telecommunications service as described in section 77-2703.04, the gross income received from furnishing mobile

telecommunications service that originates and terminates in the same state to a customer with a place of primary use in Nebraska;

(b) . . .

(c) . . .

(d) . . .

(e) ***The gross income received from the provision, installation, construction, servicing, or removal of property used in conjunction with the furnishing, installing, or connecting of any public utility services specified in subdivision (2)(a) or (b) of this section . . . , except when acting as a subcontractor for a public utility, this subdivision does not apply to the gross income received by a contractor electing to be treated as a consumer of building materials under subdivision (2) or (3) of section 77-2701.10 for any such services performed on the customer's side of the utility demarcation point.***

Diversified Telecom initially argued that it received at least some of its gross revenue from work on the customer's side of the utility demarcation point. T43. But Diversified Telecom is not pressing that argument anymore.

Diversified Telecom elected to be an Option 2 contractor and pay sales and use taxes on building materials as a consumer. Because Diversified Telecom already paid sales and use taxes on building materials, it argues that its taxable gross income from connecting or installing mobile telecommunications services under § 77-2701.16(2) should not include income related to such building materials.

The Department argues that persons who chose to be Option 2 contractors must pay taxes under § 77-2701.16(2) like any other person. The Department's regulations provide that "Option 2 contractors must collect sales tax on the total amount charged when working on the service provider's side of the demarcation point (i.e., the general distribution system) whether the

property is annexed or remains tangible personal property.” 316 Neb. Admin. Code, ch. 1, § 017.06E(1)(a).

This case requires the Court to determine the meaning of statutes. Courts give statutory language its plain and ordinary meaning. *Stewart v. Neb. Dept. of Revenue*, 294 Neb. 1010, 885 N.W.2d 723 (2016). A statute is not open to construction if its language is plain, direct, and unambiguous. *Id.* Courts cannot read into a statute a meaning that is not there or read anything direct and plain out of the statute. *Id.* If the statute is clear, its words are the end of any judicial inquiry about its meaning. *Id.*

The Court concludes that, under the plain and ordinary meaning of the statutes, Option 2 contractors are among the persons who must pay taxes on gross income from installing, constructing, servicing, or removing property used in conjunction with mobile telecommunications services. In other words, there is no exception for Option 2 contractors under § 77-2701.16(2) because they already paid sales or use taxes on building materials.

The Legislature’s intent to tax the gross income of Option 2 contractors is clear on the face of the statute. Section 77-2701.16(2) applies to “*any person* involved in connecting and installing” mobile telecommunications services. Section 77-2701.16(2)(e) creates an exception for “gross income received by a contractor electing to be treated as a consumer of building materials under subdivision (2) or (3) of section 77-2701.10 for any such services performed on the customer’s side of the utility demarcation point.” That is, the Legislature made a partial exemption for Option 2 contractors under § 77-2701.16(2)(e). That exemption that would be meaningless if Option 2 contractors were not taxed in the first place.

So it is clear that the Legislature intended “any person” in § 77-2701.16(2) to include Option 2 contractors. The Legislature chose to exempt gross income received by Option 2



contractors when they provide, install, construct, service, or remove property on the customer's side of the utility demarcation point. But the Legislature declined to exempt an Option 2 contractor's gross income more generally. The Court cannot add an exemption to the statute.

The Department's regulations are consistent with the statutes. The Department is not, as Diversified Telecom argues, prescribing requirements that restrict a contractor's election between Options 1, 2, and 3. Contractors are free to choose between the options, although the wisdom of their choice will obviously depend on the nature of their business (such as whether a significant part of their revenue is related to connecting or installing mobile telecommunications services).

**B. The statutes do not unlawfully double tax Diversified Telecom.**

Diversified Telecom argues that the statutes result in double taxation. "Double taxation" does not occur unless both taxes are of the same kind and have been imposed by the same taxing entity, for the same taxing period, for the same taxing purpose, and upon the same property or the same activity, incident, or subject matter. *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012) (citing other jurisdictions).

The Department argues that no "double taxation" occurred here because there are two different transactions: one transaction when Diversified Telecom bought building materials, and another transaction when Diversified Telecom's clients paid it for providing, installing, constructing, servicing, or removing property used in conjunction with mobile telecommunications services. See *Black Hills Truck & Trailer, Inc. v. S.D. Dept. of Revenue*, 881 N.W.2d 669 (S.D. 2016) (no double taxation when automotive dealerships are required to both pay sales tax when they purchase shop supplies and collect sales tax on receipts from repair services).

At any rate, double taxation itself is not unlawful. Although courts have a policy of guarding against double taxation, it is not prohibited unless unreasonable, confiscatory, or discriminatory. *Anthony, supra*. Put simply, “the Legislature may enact laws that result in double taxation and if it does it is a valid exercise of the taxing power.” *Stephenson Sch. Supply Co. v. County of Lancaster*, 172 Neb. 453, 463, 110 N.W.2d 41, 47 (1961).

When a statute is open to construction, the policy against double taxation may help courts discern the Legislature’s intent. See *Peter Kiewit Sons’ Co. v. Douglas County*, 161 Neb. 93, 72 N.W.2d 415 (1955); 67B Am. Jur. 2d *Sales and Use Taxes* § 12; 67B Am. Jur. 2d *Sales and Use Taxes* § 163. But if the plain meaning of the statutes results in double taxation, courts will enforce the Legislature’s intent. See, e.g., *Kaapa Ethanol, L.L.C. v. Bd. of Supervisors*, 285 Neb. 112, 825 N.W.2d 761 (2013) (acknowledging that the plain meaning of the statute “leads to the harsh result of double taxation in this case,” but “we can only interpret the existing statute under our established principles”).

Here, as explained above, the Department applied the statutes consistently with their plain meaning. It is not a court’s job to rewrite a law for policy reasons. That is the Legislature’s role: “If the Legislature wishes to provide broader relief to taxpayers under similar circumstances in the future, it has the power to enact a statute or statutes specifically providing such relief.” *Kappa Ethanol, supra*, 285 Neb. at 120, 825 N.W.2d at 767.

Courts will not allow double taxation if it is unreasonable or confiscatory, but Diversified Telecom has not shown that this is the case. Taxes are unreasonable if they are so high as to effectively prohibit a taxpayer from engaging in a particular business. *Waste Connections of Neb. v. City of Lincoln*, 269 Neb. 855, 697 N.W.2d 256 (2005); *Speier’s Laundry Co. v. City of*

*Wilber*, 131 Neb. 606, 269 N.W. 119 (1936). Diversified Telecom did not offer any evidence that the amount of taxes effectively prohibits it from engaging in a particular business.

Finally, the statutes are not discriminatory. Diversified Telecom argues that the Department violated its right to equal protection under the federal and state constitutions. The standard for an equal protection claim not involving a fundamental right or suspect classification is whether the law is rationally related to a legitimate governmental purpose. *Waste Connections, supra*. Section 77-2701.16 is rationally related to the government's interest in raising revenue. To the extent Option 2 or 3 contractors may ultimately pay more taxes than Option 1 contractors when working on telecommunications projects, the difference results from a business's own decision about how it will collect sales and use taxes.

**C. Diversified Telecom did not show that the Department taxed it for property not “used in conjunction with” telecommunications services.**

Next, Diversified Telecom argues that gross income from certain property was not taxable because the property was not “used in conjunction with” mobile telecommunications services. Section 77-2701.16(2)(e) states, in relevant part, that taxable gross receipts include “gross income received from the provision, installation, construction, servicing, or removal of property *used in conjunction with* the furnishing, installing, or connecting” mobile telecommunications services. The phrase “in conjunction with” is not defined by statute, but generally refers to the joining, association, or combination of one thing with another. See *Interstate Fire & Cas. Co. v. Dimensions Assur. Ltd.*, 843 F.3d 133 (4th Cir. 2016); *Dartmouth Corporation of Alpha Delta v. Town of Hanover*, 159 A.3d 359 (N.H. 2017); *LensCrafters, Inc. v. Sundquist*, 33 S.W.3d 772 (Tenn. 2000); *The American Heritage Dictionary of the English Language* 389 (5th ed. 2018).

Initially, Diversified Telecom argued that no part of a tower is “used in conjunction with” mobile telecommunications services “until antennas and any related cables and equipment are attached to the tower.” Ex. 13. A tower, in Diversified Telecom’s eyes, was no different than a multi-story building which is not used in conjunction with communication services unless and until an antenna is attached to the roof. *Id.* Thus, Diversified Telecom asked the Department to “classify construction services associated with the erection of towers, including foundations, as tax-free services.” *Id.*

Now, Diversified Telecom’s position is less ambitious. It argues that the Commissioner wrongly taxed “[e]lectrical services, gas lines, concrete pads, back-up power generators and other fixtures at the tower site.” Diversified Telecom most strongly complains about taxes related to installing generators. But, so far as the evidence shows, the sole purpose of these generators was to power to the mobile telecommunications equipment during power outages. This use was “in conjunction with” furnishing mobile telecommunications services. The Court concludes that the other property identified by Diversified Telecom was also used in conjunction with furnishing telecommunications services.

**D. Diversified Telecom did not show that the Department incorrectly calculated its tax liability.**

The Commissioner stated that the Department calculated the amount of taxes that Diversified Telecom owed based on invoices from the 2014 calendar year. T80. This finding is consistent with audit documents referring to 2014 as the “Test Period.” See Ex. 3 at 5. The entire audit period was March 1, 2012 to February 28, 2015.

Diversified Telecom assigns that the Commissioner erred by allowing the Department to estimate its tax liability “despite the fact that Diversified did not sign a Sampling Agreement and provided the Department (at the time of audit) with clear evidence that the projection period did

not accurately represent the entire audit period.” The Court understands this assignment as raising two issues: (1) Could the Department estimate Diversified Telecom’s tax liability without its consent? (2) Did the Department accurately estimate Diversified Telecom’s tax liability?

If the Commissioner is not satisfied with a taxpayer’s return, he or she has the statutory discretion to calculate the taxpayer’s liability under the facts stated in the return or “upon the basis of any information within his or her possession or which may come into his or her possession.” Neb. Rev. Stat. § 77-2709(1). If the taxpayer does not file a return at all, the Commissioner must estimate the taxpayer’s liability. § 77-2709(2).

Under the Department’s regulations, it can estimate a taxpayer’s liability if the taxpayer did not keep adequate records:

When records are missing, all gross receipts are presumed to be taxable, or the Department may estimate a person’s liability for tax based on the best available records. The person required to keep the records has the burden to show that the gross receipts are not taxable or that the estimate is incorrect.  
316 Neb. Admin. Code, ch. 1, § 008.08.

An agency’s regulations have the effect of statutory law. *Melanie M. v. Winterer*, 290 Neb. 764, 862 N.W.2d 76 (2015). They bind the agency just as as they bind individual citizens. *Id.*

The first question is whether the Department could estimate Diversified Telecom’s tax liability without Diversified Telecom’s consent. Under the Department’s regulations, it can estimate a taxpayer’s liability “[w]hen records are missing.” Diversified Telecom had the duty to maintain records, receipts, and invoices necessary to determine the amount of tax due. See Neb. Rev. Stat. § 77-2711(3)(a); 316 Neb. Admin. Code, ch. 1, § 008.01.

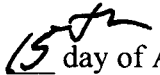
Whether records were missing is a factual issue for which Diversified Telecom had the burden of proof. See *Kellogg Co.*, *supra*. The Court concludes that Diversified Telecom failed to


carry that burden. Grady's testimony that she gave the auditors "whatever they asked for" does not show that Diversified Telecom kept adequate records. She referred to spreadsheets during her testimony, but those documents are not in the record. Further, Diversified Telecom would not have satisfied its duty to keep records by summarizing its sales in an Excel file. Had Diversified Telecom produced invoices for the entire audit period it could have shown whether it kept adequate records, but it did not do so.

The second question is whether Diversified Telecom showed that the Department's estimate was inaccurate. The 2014 invoices offered by Diversified Telecom show that some (but by no means all) of its revenue came from installing generators. See Exs. 15 to 56. Grady testified that 2014 was an especially busy year for installing generators. Diversified Telecom produced no evidence showing whether its revenue in 2014 was representative in other respects.

Based on Grady's testimony about generators, Diversified Telecom argues that its gross receipts in 2014 exceeded its gross receipts during the remaining audit period, causing the Department to overstate its tax liability. But documents related to the audit suggest that the Department did, in fact, calculate more tax liability in 2014 relative to the remaining period. See Ex. 3 at 3. Again, Diversified Telecom did not offer the actual invoices for the remainder of the audit period, which would have showed whether the Department's estimate was accurate. In sum, Diversified Telecom did not show that the Department's calculation was inaccurate.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Tax Commissioner Order dated January 2, 2019 is **AFFIRMED**.

DATED this  day of August, 2019.

  
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Kevin R. McManaman  
District Court Judge