

State of Nebraska

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

MAJORS, INC., A Nebraska Corporation,

Plaintiff,

vs.

NEBRASKA DEPARTMENT OF REVENUE, DONNA KARRIS, Tax Commissioner,

Defendants.

Docket 412 Page 239

Majors has appealed from an Order of the State Tax Commissioner dated December 2, 1986 denying, in part, a refund of sales tax paid pursuant to a deficiency determination issued against Majors for the tax periods of April 1, 1979 through March 31, 1982. The appeal was submitted on a Stipulation between Majors and the Nebraska Department of Revenue.

Majors, Inc., a Nebraska corporation, is engaged in the business of custom plastic injection manufacturing. The molds are made by tool makers to Majors' specifications and sold to Majors who then sells them to their customers. However, Majors retains possession of the mold in order to use it in producing the plastic part for the customers.

Majors raises three issues in its appeal; the first concerns certain "mold modifications" performed by or contracted

for by Majors on the above described molds. The cost of such modifications is billed to the customer and Majors does not collect sales tax for such charges. The Commissioner determined that a number of these "modifications" were fabrication labor under Section 77-2702(13) and, therefore, subject to sales tax.

Majors also challenges the imposition of sales tax on certain "set up" charges, that is, charges billed to clients when it is required to shut down a machine and install a new mold for a relatively short production run.

Finally, Majors claims that certain sales of custom built molds qualify for the product diversification exemption provided by Section 77-2704(t). This claim was denied by the Commissioner on various grounds including the fact that Majors is the seller, not the purchaser of the molds.

Appeals from a final decision of the Tax Commissioner are reviewable under Section 84-917. Majors alleges that the Order of the Tax Commissioner is:

1. Affected by errors of law.
2. Unsupported by competent, material and substantial evidence in view of the entire record as made.
3. Arbitrary and capricious.
4. In excess of the statutory authority and jurisdiction of the Tax Commissioner.

The Nebrasks Supreme Court has described and defined the "substantial evidence" and "arbitrary and capricious" standards as used in §84-917(6) in the following manner:

"'[S]ubstantial evidence' for purposes of administrative review, must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury, and this is something less than the weight of evidence; and the possibility of drawing two inconsistent conclusions from evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

Wiener v. State ex rel. State Real Estate Comm., 214 Neb. 404, 406, 333 N.W.2d 915, 917 (1983); Wright v. State ex rel. State Real Estate Comm., 208 Neb. 467, 304 N.W.2d 39 (1981).

The substantial evidence standard of review of decisions of administrative agencies requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably find facts as it did.

Simonds v. Board of Examiners, 213 Neb. 259, 263, 329 N.W.2d 92, 95 (1983).

In applying the substantial evidence standard, the reviewing court is not free to substitute its judgment for that of the appeal panel. See, McChesney, supra; Scott v. State ex rel. Board of Nursing, 196 Neb. 681, 244 N.W.2d 683 (1976).

Beatrice Manor v. Department of Health, 219 Neb. 141, 147, 362 N.W.2d 45 (1985).

"Arbitrary and capricious action, in reference to action of an administrative agency, means action taken in disregard of

facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion." Heaffner v. State, 220 Neb. 560, 567, 371 N.W.2d 658 (1985).

From a review of the entire record, this court finds that the Order of the Commissioner was supported by competent, material, and substantial evidence; it was not in excess of the statutory authority or jurisdiction of the agency; it was not affected by errors of law; and it was not arbitrary nor capricious.

IT IS ORDERED that the Order dated December 2, 1986 be affirmed at plaintiff's costs.

DATED December 16, 1987.

BY THE COURT:


District Judge