

Bartel

DEPT. OF JUSTICE

MAY 22 1995

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA

UMTHUN TRUCKING, WISCONSIN)
EXPRESS LINES, and SOUTHWEST)
MOTOR FREIGHT,)

Petitioners,)

vs.)

M. BERRI BALKA, TAX COMMISSIONER)
OF THE NEBRASKA DEPARTMENT OF)
REVENUE and STATE OF NEBRASKA,)

Respondents.)

Docket 513, Page 274.

ORDER

This appeal came on for hearing on January 4, 1995. L. Jay Bartel was present for the Respondents. Margaret E. Stine was present for the Petitioner. The Court finds and orders as follows:

This is an appeal from a decision of the Nebraska Department of Revenue [the Department] rendered on April 20, 1994, denying the Petitioners' claim for a tax refund for fuel consumed for non-highway use for various tax periods from 1989 through 1991. The tax at issue is imposed pursuant to Neb. Rev. Stat. § 66-401 et. seq. (Reissue 1990) (Currently found at Neb. Rev. Stat. § 66-482 et. seq. (Cum. Supp. 1994)). The court's review is conducted "without a jury de novo on the record of the agency." Neb. Rev. Stat. § 84-917(5)(a).

On November 16, 1992, the Department, without a hearing, issued Denials of Refund Claims of: (1) Wisconsin Express Lines, Inc. for the first quarter of 1989 through the third quarter of 1991; (2) Southwest Motor Freight, Inc. for the first quarter of

1989 through the fourth quarter of 1991; and (3) Umthun Trucking for the third and fourth quarters of 1989 [hereinafter Petitioners]. On October 12, 1993, the Honorable Paul D. Merritt, Jr., remanded the appeal of these claims to the Department for the purpose of conducting a hearing on the claims. The Petitioners' claims were consolidated by Order of the Hearing Officer on December 7, 1993. All parties agreed to bifurcate the issues, with the legal issue being decided prior to the factual issue.

Petitioners are interstate trucking companies who travel in Nebraska, and are therefore subject to Nebraska's motor fuel tax laws. Petitioners seek a refund/credit of taxes paid on fuel which was not used to propel vehicles on the highway, but rather was consumed during idle time (the engine is left running while the truck is off-duty, out of service, parked on private property for loading or unloading and rest or meal breaks) and for climatic control purposes. All claims were denied by the Department after it determined that the taxable event for fuel tax liability is the consumption of motor fuels by qualified motor vehicles operating in the state of Nebraska computed based on the total number of gallons of each kind of fuel consumed.

DISCUSSION

The Nebraska motor vehicle fuel tax is imposed upon the receiving, importing, producing, refining, manufacturing, compounding, or blending of motor vehicle fuels in the state of Nebraska for use, distribution, sale, or delivery in this state.

Motor vehicle fuel is defined, in part, as

. . .all products and fuel commonly or commercially known as gasoline, including casing head or natural gasoline, benzol, naphtha, and benzine with an initial boiling point under two hundred degrees Fahrenheit, . . . and shall include any other liquid and such other volatile and inflammable liquids as may be produced, compounded, or used for the purpose of or as may be used for operating or propelling motor vehicles, . . .

Neb. Rev. Stat. § 66-401(2) (Reissue 1990).

The tax on motor vehicle fuel is imposed upon among others, users of motor vehicle fuel pursuant to Neb. Rev. Stat. § 66-428 (Reissue 1990) and motor vehicle fuel brought into this state in the fuel supply tanks of a vehicle with more than two axles, except one registered as a farm truck, to be used in the operation of the vehicle in this state. Neb. Rev. Stat. § 66-410.01 (Reissue 1990).

Additionally, a special fuel tax exists pursuant to Chapter 66, Article 6 of the Nebraska Revised Statutes. This Article is intended to supplement the provisions of Chapter 66, Article 4, by imposing a tax upon any fuel not taxed pursuant to Article 4 which is received, delivered, or placed into the fuel tanks of motor vehicles in the State of Nebraska. Special fuels include diesel, propane, butane, and other combustible products used by motor vehicles, however, it does not include motor vehicle fuel as that term is defined in Neb. Rev. Stat. § 66-401(2).

Neb. Rev. Stat. § 66-410.01 to § 66-410.05 and § 66-418.01 provides an additional method of collecting motor vehicle fuel taxes by imposing a tax upon motor vehicle operators commensurate with their operations on Nebraska highways. Neb. Rev. Stat. § 66-

410.01 (Reissue 1990). § 66-410.02 requires a person to obtain a permit or arrange for payment of Nebraska motor vehicle fuel taxes on fuel consumed in Nebraska any fuel used in the supply tanks of buses, truck-tractors, or trucks with more than two axles. Farm trucks are exempt from this provision. Tax liability is assessed under these sections based on the total number of gallons of fuel consumed in Nebraska. Neb. Rev. Stat. § 66-410.04.

Further, Nebraska has been a member of the International Fuel Tax Agreement [IFTA] since January 1, 1990. Pursuant to IFTA, the Tax Commissioner is authorized to participate in fuel tax agreements with other participating states in order “. . .to permit the administration, collection, and enforcement of each state's motor fuel taxes by the base state.” Neb. Rev. Stat. § 66-1401 et. seq. (Reissue 1990).

Petitioners first claim that fuel consumed for non-highway use purposes is excluded from taxation pursuant to Neb. Rev. Stat. § 66-410.01 which defines the purpose of § 66-410.01 to § 66-410.05 and § 66-418.01 as being to collect fuel taxes commensurate with a motor vehicle operator's operations on Nebraska highways.

When construing a statute, “all parts of an act relating to the same subject shall be considered together, and not each by itself.” State v. Jennings, 195 Neb. 434, 439, 238 N.W.2d 477, 481 (1976). With this in mind, the court considers the provisions relating to motor vehicle fuel as a whole and finds

that there is no exclusion for fuel consumed in Nebraska for non-highway use. First, § 66-410.02 provides:

No person shall bring into this state in the fuel supply tanks. . .any motor vehicle fuel or special fuel to be used in the operation of the vehicle in this state unless he or she has purchased a trip permit. . .or paid or made arrangements in advance with the Tax Commissioner for payment of Nebraska motor vehicle fuel taxes or special fuel taxes on the gallonage consumed in operating the vehicle in this state. [Emphasis added].

Neb. Rev. Stat. § 66-410.03(2) further provides in relevant part:

The holder of a permit under this section shall have the privilege of bringing into this state in the fuel supply tanks of motor vehicles any amount of motor vehicle fuel or special fuel to be used in the operation of the vehicles and for that privilege shall pay Nebraska motor vehicle fuel or special fuel taxes. [Emphasis added].

Neb. Rev. Stat. § 66-410.04 sets forth the method of computation of tax liability as follows:

Tax liability under sections 66-410.01 to 66-410.05 and 66-418.01 shall be computed on the total number of gallons of each kind of motor vehicle fuel and special fuel consumed in the operation in Nebraska of motor vehicles. . . . [Emphasis added].

§ 66-410.04 further provides that reports and tax payment may be required covering "actual operation and fuel consumption in Nebraska" or "on a basis of their average consumption of fuel in Nebraska determined by taking that proportion of the total gallons consumed everywhere in these vehicles that their mileage in Nebraska is to their total mileage everywhere."

When the provisions are read as a whole, there is nothing to support Petitioners' claim that the Legislature intended to exclude from tax liability fuel used when a vehicle is idle. On

the contrary, statutory language makes it clear that a tax is to be assessed upon any motor vehicle fuel used to operate a vehicle in this state based on the total number of gallons consumed. The very basis of computation provided by the Legislature omits any consideration of idle time as it requires tax liability to be determined based on an operator's actual operation and fuel consumption in Nebraska or on the basis of average consumption of fuel in Nebraska.

Petitioners further assert that even if fuel used for non-highway purposes is not excluded from motor vehicle taxation, that it is exempt pursuant to Neb. Rev. Stat. § 66-452 which states in relevant part:

Every recipient of a permit, as described in section 66-449, shall be regarded as purchaser and claimant if he or she has paid for any one purchase the excise tax to a distributor upon forty or more gallons of gasoline or motor vehicle fuel, which gasoline or motor vehicle fuel was or is to be used solely and exclusively by such person for propelling or operating a stationary gas engine, tractor, combine, or machinery used solely for agricultural, quarrying, or industrial purposes in the state or for some purpose not involving the use of any highways in this state.

It is well settled that tax exemptions are to be strictly construed and not extended by construction. Nebraska State Bar Foundation v. Lancaster County Bd. of Equalization, 237 Neb. 1, 4, 465 N.W.2d 111, 114 (1991). Strictly construing the language in § 66-452, this court finds that the phrase "or for some purpose not involving the use of any highways in this state" applies only to those items listed: A stationary gas engine, tractor, combine or machinery. As the statutory language points

out, all of these items are typically used for agricultural, quarrying, or industrial purposes. The additional non-highway use clause appears intended to provide a catchall for these types of equipment in the event that they are not used solely for agricultural, quarrying, or industrial purposes. Therefore, this court finds that non-highway fuel consumed by trucking companies is neither excluded from coverage of the motor vehicle use tax nor exempt.

Although the Department argues that Petitioners are users of special fuel by virtue of their use of diesel fuel and proceeds to state why the exemption provided in Neb. Rev. Stat. § 66-605.06 (Cum. Supp. 1992) does not apply to Petitioners, this argument is irrelevant because § 66-605.06 has an effective date of January 1, 1992. Prior to this effective date, no similar provision exists which could provide an exemption for Petitioners. Therefore, regardless of whether Petitioners come within Article 4 or Article 6 of Chapter 66, they come within no provision exempting them from motor vehicle fuel taxes imposed upon fuel consumed for non-highway purposes.

Last, Petitioners argue that Article III(A) of IFTA supports their argument in that it states: "For purposes of this Agreement, the taxable event is the consumption of motor fuels used in the propulsion of qualified motor vehicles, except fuel consumed which is exempt from taxation by a jurisdiction." Based on this language, Petitioners argue that fuel which is consumed when a vehicle is idle is not subject to tax since it is not

consumed to propel a vehicle. Petitioners' claim, however, is without merit because it ignores the statutory purpose of IFTA set forth at Neb. Rev. Stat. § 66-1402 (Reissue 1990):

It is the purpose of the Interstate Motor Carriers Base State Fuel Tax Compact Act to simplify the motor fuel tax licensing, bonding, reporting, and remittance requirements imposed on motor carriers involved in interstate commerce by authorizing the Tax Commissioner to participate in cooperative fuel tax agreements with another state or states to permit the administration, collection, and enforcement of each state's motor fuel taxes by the base state.

IFTA does not change the amount of tax imposed nor the method of computation for said tax. In contrast, the amount of tax imposed pursuant to any agreement continues to be determined by Chapter 66, articles 4 and 6. See Neb. Rev. Stat. § 66-1405 (Reissue 1990). As pointed out by the Department, clearly, the legislative authorization to participate in fuel agreements with other jurisdictions is limited to the administration, reporting, and collection of the fuel tax. Such authority does not extend to assessing a tax which is inconsistent with motor fuel tax laws promulgated by the Legislature.

THEREFORE, the decision of the Department is affirmed.

ENTERED this 18 day of May, 1995.

BY THIS COURT:



District Court Judge

cc: Margaret E. Stine, attorney for Petitioners
L. Jay Bartel, attorney for Respondents