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IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

NORMAN BOSSALLER,)
)
 Petitioner,)
)
 vs.)
)
 NEBRASKA DEPARTMENT OF REVENUE)
 and M. BERRI BALKKA, State Tax)
 Commissioner for the State of)
 Nebraska,)
)
 Respondents.)

Docket 533, Page 192.

ORDER

DEPT. OF JUSTICE

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DEPT. OF JUSTICE

This appeal came on for oral argument on February 8, 1996. Briefs were submitted and the Court being fully advised finds and orders as follows:

STATEMENT OF THE CASE

This is an appeal pursuant to Neb. Rev. Stat. § 77-2708(2)(f), 77-27,127 and 84-917 (Cum. Supp. 1994 and Reissue 1994) from a final decision by the State Tax Commissioner dismissing the Petitioner's petition for redetermination of a deficiency assessment for consumer's use tax on the purchase of a motor vehicle. The Court's review is conducted "without a jury de novo on the record of the agency." Neb. Rev. Stat. § 84-917(5)(a).

STATEMENT OF FACTS

The facts in this case are uncontroverted and are the subject of a jointly executed stipulation agreement by the parties.

On or about June 10, 1994, the Petitioner applied for a permit authorizing operations as a common or contract carrier by motor vehicle from the Interstate Commerce Commission. Petitioner's

permit was subsequently granted on September 6, 1994.

On or about August 11, 1994, the Petitioner purchased a 1995 Freightliner truck (hereinafter "Truck") for \$57,330.00. On August 22, 1994, Petitioner submitted to the Nebraska Department of Revenue (hereinafter "Department") a Form 5 Nebraska Exemption Application, seeking a Contract Carrier Certificate of Exemption from Nebraska sales and use tax pursuant to Neb. Rev. Stat. § 77-2702.13(2)(f), (Cum. Supp. 1994).

At that time, Petitioner was in the business of hauling used petroleum which was picked up from several different generators of such fuel primarily within Nebraska, Iowa, Kansas and Missouri. Petitioner transported the used petroleum to recyclers and consumers of used petroleum. Petitioner was paid from 15 cents to 19 cents per gallon for the used petroleum. The generators of the used petroleum, however, did not direct the Petitioner to deliver said petroleum to specific receivers, nor did the receivers of said petroleum request the Petitioner to obtain the used petroleum from specific generators.

Based on the above described method of operation, the Department, on September 21, 1995, denied Petitioner's Form 5 Application because the Petitioner owned the used petroleum being transported and his Truck, therefore, was not used to transport the property of others for compensation. The Petitioner has not paid any sales or use tax on his purchase of the Truck.

On or about January 24, 1995, the Petitioner changed his method of operation. Bossaller Oil Service, Inc. (hereinafter

"BOSI") was incorporated on January 23, 1995, and since its incorporation BOSI takes title to, and becomes the owner of, the used petroleum obtained from the supplying generators. BOSI contracts with the Petitioner to provide transportation services for the used petroleum from origins and destinations specified by BOSI pursuant to a written Motor Transportation Contract. Under the terms of said contract, Petitioner is paid by BOSI at the rate of \$1.20 per running mile.

It is undisputed that since January 24, 1995, all transportation services by the Petitioner have been performed in accordance with the Motor Transportation Contract with BOSI. The Department concedes that this arrangement satisfies the applicable statutory exemption requirements. Accordingly, Petitioner was issued a Common or Contract Carrier Exemption, effective from January 23, 1995.

From August 11, 1994 to January 23, 1995, the Petitioner operated his Truck a total of 11,447 miles in the conduct of his business. From January 24, 1995 to August 10, 1995 the Petitioner operated his truck not less than a total of 33,000 miles.

On February 21, 1995, the Department issued a Notice of Deficiency Determination and Assessment to the Petitioner in the total amount of \$4,256.33, which amount represents use tax, interest, and a penalty due on the Truck purchase. Thereafter, on March 7, 1995, the Petitioner timely filed a petition for redetermination of the deficiency assessment.

The State Tax Commissioner (hereinafter "Commissioner") based

on the joint stipulation of facts and briefs submitted by the parties entered an Order on September 8, 1995, upholding the use tax deficiency assessment issued to Petitioner on the basis that Petitioner's vehicle was not operated predominately as a contract carrier. From the order of the Commissioner, Petitioner appeals.

DISCUSSION

Neb. Rev. Stat. § 77-2703(1) (Cum. Supp. 1994) provides in part: "[t]here is hereby imposed a tax...upon the gross receipts from all sales of tangible personal property sold at retail in this state..."

Additionally, Neb. Rev. Stat. § 77-2703(2) (Cum. Supp. 1994) provides: "[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 subject to tax under subsection (1) of this section..."

Furthermore, in Nebraska, "to prevent evasion of the retail sales tax, it shall be presumed that all gross receipts are subject to the tax until the contrary is established." Neb. Rev. Stat. § 77-2703(1)(f) (Cum. Supp. 1994). (Emphasis added).

Moreover, Neb. Rev. Stat. § 77-2703(1)(i) provides in part: "[t]he tax imposed by this section on the sale of motor vehicles...shall be collected by the county treasurer...at the time the purchaser makes application for the registration of the motor vehicle, trailer, or semitrailer for operation upon the highways of this state..." (Emphasis added).

Neb. Rev. Stat. § 77-2702.13(2)(f) (Cum. Supp. 1994) excludes

from the definition of retail sale or sale at retail:

"The purchase...of materials and replacement parts used as or used directly in the repair and maintenance or manufacture of railroad rolling stock, whether owned by a railroad or by any person, whether a common or contract carrier or otherwise, motor vehicles, watercraft, or aircraft engaged as common or contract carriers or the purchase in such manner of motor vehicles...to be used as common or contract carriers. All purchasers seeking to take advantage of the exemption shall apply to the Tax Commissioner for a common or contract carrier exemption..."

(Emphasis added).

Finally, Nebraska Sales and Use Tax Regulation 1-069.02A(2) (1993) provides:

"Only those motor vehicles, watercraft, or aircraft that are predominantly used for transporting persons or property for hire may qualify for common or contract carrier status.

069.02A(1) A common carrier is any motor vehicle...which is predominantly used by its owner to offer to transport specific persons and the goods of specific persons, on a contractual basis with such persons, from place to place of compensation.

Predominantly used means :

"the total measure of the use of any motor vehicle... used to haul property as a common or contract carrier, divided by the total measure of use of the motor vehicle...for all purposes, is greater than 50%. For purposes of determining this percentage, a one (1) year period of operation should be used..." Regulation 069.02A(3) (1993).

In Nebraska, statutes providing for tax exemptions are to be strictly construed and the burden of proving the right to an exemption is on the claimant. Vulcraft v. Karnes, 229 Neb. 676,678, 428 N. W.2d 505,507 (1990). There is a general rule that interpretation of a statute given by an administrative agency to which the statute is directed is entitled to weight. Id.

The record clearly reflects that at the time Petitioner registered his newly purchased Truck in August of 1994 and applied for the appropriate tax exemption, his method of business operation did not qualify for a "common or contract carrier" exemption because Petitioner used said Truck as a private carrier.

Under Neb. Rev. Stat. § 77-2703(1)(i) it is clear that the proper sales and use tax imposed must be paid at the time the purchaser registers his or her vehicle for operation upon the highways of Nebraska. When the words of a statute are plain, direct and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. No Frills Supermarket, Inc. of Omaha v. Nebraska Liquor Control Comm'n, 246 Neb. 822, 523 N.W.2d 528 (1994).

However, the Petitioner contends that his subsequent change of business operation under the Motor Transportation Contract with BOSI since January 24, 1995, entitles Petitioner to the "common or contract carrier" exemption under Reg. 069.02A because he predominantly used said Truck to haul property (used petroleum) as a contract carrier for a one year period of operation.

Essentially, Petitioner claims that pursuant to Reg. 069.02A he has a one year time frame from the purchase of his Truck in which to establish his qualification for the "common or contract carrier" exemption. According to the Petitioner, based on the one year percentage test, he is entitled to the sales tax exemption because the Truck was used as a contract carrier for BOSI for over

74% of the total miles said Truck was operated.¹

Petitioner's interpretation of Reg. 069.02A, however, is incorrect. The evidence in the record establishes that qualification for the "common or contract carrier" exemption requires that: (1) the exemption be applied for to the Tax Commissioner; (2) the tax be paid at the time the vehicle is registered unless the applicant is entitled to the exemption and (3) the decision on whether or not an applicant qualifies for the exemption is based on information provided in the application. See Neb. Rev. Stat. § 77-2702.13(2)(f), § 77-2703(1)(i) and Reg. 069.03.

It is abundantly clear and the record reflects that on August 22, 1994 Petitioner filed for the contract carrier exemption. However, at that time, Petitioner's method of business operation did not qualify for the tax exemption. Petitioner's method of business operation was that of a private carrier. Based on the information provided in the application, the Department properly denied Petitioner's application for the contract carrier exemption.

The fact that Petitioner subsequently changed his method of operation under the BOSI contract on January 24, 1995 thereby qualifying him for future exemption does not make said exemption retroactive to the date Petitioner originally applied for the tax exemption.

¹ From August 11, 1994 to January 23, 1995 Petitioner operated said Truck a total of 11,447 miles. From January 24, 1995, to August 10, 1995 Petitioner operated said Truck 33,000 total miles. $33,000 \text{ BOSI miles} \div 44,447 \text{ total miles} = 74.25\%$

Clearly, the relevant time period to establish entitlement to the contract carrier exemption is when the claimant makes application for the registration of the motor vehicle. In the case at bar, at the time the sales tax became due in August of 1994, the Petitioner' Truck was nonexempt because it was used as a private carrier.

According to the Department's interpretation of Reg. 069.02A(3), the one year percentage test merely provides a method of computing predominant usage when the subject vehicle is used in both a private and common or contract carrier capacity. Interpretation of a statute given by an administrative agency to which the statute is directed is entitled to weight. Vulcraft v. Karnes, 229 Neb. 676, 678, 428 N. W.2d 505, 507 (1990). See also, Slack v. Nursing Home Inc. v. Dept. of Social Serv., 247 Neb. 452, 467, 528 N.W.2d 285, 296 (1995) (ordinarily, deference is accorded to an administrative agency's interpretation of its own regulations unless plainly erroneous or inconsistent).

In the present case, the Department's interpretation of Reg. 069.02A(3) is neither plainly erroneous nor inconsistent. The record establishes that in August of 1994, Petitioner was not operating his hauling business in both a private and contract carrier capacity. Consequently, there was no need to apply the one year percentage test.

Moreover, the Department's interpretation of said Regulation is consistent with Neb. Rev. Stat. § 77-2703(1)(i) which requires payment of sales tax at the time the vehicle is registered. As the

Commissioner correctly stated, "[t]he Petitioner's interpretation of Reg. 069.02A(3)...would effectively delay payment of the sales tax on motor vehicles for one year, in order to establish a 'track record' of business operations, which eventually may or may not qualify for an exemption."

Obviously, such an interpretation, if followed by the Department, would be inconsistent and conflict with § 77-2703(1)(i) by extending the scope of the "common or contract carrier" exemption. An administrative agency may not modify, alter, or enlarge provisions of a statute which it is charged with administering. State. ex rel. Spire v. Stodola, 228 Neb. 107, 421 N.W.2d 436 (1988). A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. Grady v. Visiting Nurse Ass'n, 246 Neb. 1013, 524 N.W.2d 559 (1994).

Accordingly, since the Petitioner's method of business operation did not qualify for the contract carrier exemption at the time the Truck was purchased, Petitioner has failed to clearly establish his entitlement to said exemption. See Nucor Steel v. Leuenberger, 233 Neb. 863, 448 N.W.2d 909 (1989) (statutes conferring exemptions from taxation are strictly construed, and claimants seeking an exemption must clearly establish their entitlement).

THEREFORE, the decision of the Tax Commissioner is affirmed and costs of this action are taxed to the Petitioner.

ENTERED this 20 day of March, 1996.

BY THIS COURT:



District Court Judge

cc: Bradford E. Kistler, attorney for Petitioner
L. Jay Bartel, attorney for Respondents