

Bartel

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

LYMAN-RICHEY CORPORATION, ) Docket 561 Page 120  
a Nebraska Corporation, )

Plaintiff, )  
(CLERK)

vs.

NEBRASKA DEPARTMENT OF )  
REVENUE, M. BERRI BALKA, )  
Nebraska Tax Commissioner, and )  
STATE OF NEBRASKA, )

Defendants. )

ORDER

DEPT. OF JUSTICE  
AUG 19 1998  
STATE OF NEBRASKA

STATEMENT OF THE CASE

Under the Nebraska Employment and Investment Growth Act (the Act), taxpayers who agree to undertake a project resulting in a minimum investment in "qualified property" of \$3 million and the creation of 30 new jobs in Nebraska are rewarded with tax benefits. Neb. Rev. Stat. §§ 77-4101 to 77-4112 (1990 and Supp. 1994). Plaintiff, a manufacturer of ready-mix concrete products, entered into an agreement pursuant to the Act and attained the required thresholds so as to entitle it to the tax benefits set out therein. As part of the project, Plaintiff purchased 16 concrete mixers from a mixer manufacturer. Plaintiff also purchased a like number of trucks from a truck manufacturer. The mixer manufacturer delivered the mixers to the truck manufacturer, who affixed them to the trucks. The truck manufacturer then delivered the units to Plaintiff. Plaintiff paid sales and use taxes on the trucks and on the mixers.

Plaintiff filed a claim for a refund of the sales and use taxes paid on the concrete mixers it had purchased and used at the project. The Department of Revenue denied the claim, finding that the concrete mixers were not “qualified property”, but were instead “motor vehicles” and not eligible for a tax refund. The Department found that the concrete mixers must be affixed to a motor vehicle when operating, and therefore were excluded from the definition of “qualified property”, because they constituted a “motor vehicle.” It is from this decision that the Plaintiff appeals to this court.

#### THE ACT

The Act provides sales and use tax benefits to “qualified property” used as part of a project approved by the state. See Neb. Rev. Stat. § 77-4105(3)(a) and (b). “Qualified property” is defined under under the Act as:

“any tangible property of a type subject to depreciation, amortization, or other recovery under the Internal Revenue Code of 1986, or the components of such property, that will be located and used at the project. Qualified property shall not include (a) aircraft, barges, *motor vehicles*, railroad rolling stock, or watercraft or (b) property that is rented by the taxpayer qualifying under the Employment and Investment Growth Act to another person;” Neb. Rev. Stat. § 77-4103(12) [emphasis added].

The Act defines a motor vehicle as:

“any motor vehicle, trailer, or semitrailer as defined in section 60-301 and subject to licensing for operation on the highways;” Neb. Rev. Stat. § 77-4103(8).

Neb. Rev. Stat. § 60-301 defines “motor vehicle” as follows:

“any vehicle *propelled by any power* other than muscular power, *except* (a) mopeds, (b) farm tractors, (c) self-propelled equipment designed and used exclusively to carry and apply fertilizer, chemicals, or related products to agricultural soil and crops and other implements of husbandry designed for and used primarily for tilling the soil and harvesting crops or feeding livestock, (d) power unit hay grinders or a combination which includes a power unit and a hay grinder when operated without cargo, (e) vehicles which run only on rails or tracks, (f) off-road designed vehicles, including, but not limited to, golf carts, go-carts, riding lawnmowers, garden tractors, all-terrain vehicles as defined in section 60-2801, snowmobiles, and minibikes, and (g) road and general-purpose construction and maintenance machinery not designed or used primarily for the transportation of persons or property, including, but not limited to, ditch digging apparatus, asphalt spreaders, bucket loaders, earthmoving equipment, crawler tractors, and self-propelled invalid chairs.”

“Vehicle shall mean any device in, upon, or by which any person or property is or may be transported or drawn upon a public highway except devices moved solely by human power or used exclusively upon stationary rails or tracks.”

The purpose of the Act is to provide incentives for businesses to invest in projects in Nebraska that would lead to jobs and economic revitalization. Among the means the Legislature used to accomplish this task was to provide refunds of taxes paid on “qualified property” that businesses bought and “incorporated into or used at the project.” Neb. Rev. Stat. 77-4103(7). No refund is available for “aircraft, barges, motor vehicles,

railroad rolling stock, or watercraft”, however. While this exception is not explained in the statute itself, it is not a difficult leap to assume it is the transitory nature of this property, and the ease with which it could be transported out of the state, that motivated the Legislature to exclude it from the incentive program.

## ANALYSIS

The Nebraska Supreme Court has stated, in reviewing a challenge to similar legislation, the Employer Expansion & Investment Incentive Act, Neb. Rev. Stat. §77-27,187 *et. seq.*, that tax exemption provisions are strictly construed, and their operation will not be extended by construction. *Omaha Public Power District v. Nebraska Department of Revenue*, 248 Neb. 518, 519, 537 N.W.2d 312, 314 (1995). Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation. *Id.* at 519-520, 537 N.W.2d at 314. Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to the exemption. *Id.* at 520, 537 N.W.2d at 314.

“[I]n construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary and popular sense.” *Van Ackeren v. Nebraska Bd. Of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997); *Rauert v. School District 1-R of Hall County*, 251 Neb. 135, 555 Neb. N.W.2d 763 (1996). Statutory language is to be

given its plain and ordinary meaning; in addition, the courts will, if possible, try to avoid a statutory construction which would lead to absurd, unconscionable, or unjust results.

*Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). When a challenged statute is susceptible to more than one reasonable construction, a court uses the construction that will achieve the purposes of the statute and preserve the statute's validity. *Callan v. Balka*, 248 Neb. 469, 536 N.W.2d 47 (1995); *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993).

There is no question that a cement mixer, by itself and not attached to a truck, is not a motor vehicle. Nor is there any doubt that the truck to which the cement mixer is attached is a motor vehicle. The question before me is whether once a cement mixer plaintiff bought is bolted to a truck plaintiff bought, a unit is created which is a motor vehicle.

The Plaintiff argues that the cement mixers are not motor vehicles because:

1) the concrete mixers have a functional purpose separate from motor vehicle functions, specifically mixing or completing the mixing of concrete ;

2) both Congress and the Internal Revenue Service treat the concrete mixers and trucks as separate pieces of machinery for tax purposes under the excise tax imposed on heavy trucks and trailers sold at retail. There, the truck chassis is taxable and the mixer is exempt;

3) case law in other states which, in other circumstances and under other statutes, has treated concrete mixers and truck chassis as separate pieces of machinery;

4) concrete mixers and the trucks they are mounted on are valued as separate pieces of equipment for the purposes of the Nebraska property tax;

5) the concrete mixers and trucks are purchased as separate pieces of equipment from separate manufacturers, then assembled before being delivered to the plaintiff;

6) for purposes of Nebraska sales and use tax, (a) the concrete mixers and trucks are valued as separate pieces of equipment, and (b) the sales tax on the mixers is paid to the concrete mixer manufacturer and the tax on the trucks is paid to the county treasurer or the department of motor vehicles; and

7) the concrete mixers and trucks they are mounted on are treated as separate pieces of machinery for warranty purposes.

The plaintiff further argues that the cement mixers do not fit within the definition of motor vehicles because they are not themselves “propelled” by any type of power under the definition of “motor vehicle” in § 60-301(16) and because they are not “licensed on Nebraska’s highways” as required by § 77-4103(8). The plaintiff also claims that the concrete mixers aren’t part of the truck at all, but rather cargo or “property” that is merely transported on the trucks.

The Defendant counters the plaintiff’s argument with seven principal points:

1) the cement mixer is delivered to the plaintiff as a single unit ;

2) the cement mixer is powered by the truck chassis;

3) the cement mixer and truck chassis are subject to registration as a unit to

authorize their operation on Nebraska's highways ;

4) case law from other states recognizes the integrated nature of mixer units and trucks for sales and use tax purposes;

5) Nebraska property tax is based on the value of the truck and mixer unit;

6) the Department of Revenue's interpretation is consistent with other provisions of the Nebraska Revenue Act; and

7) the plaintiff treats the concrete mixer and truck as one unit for internal accounting and reporting purposes .

The defendant also notes that 1) when the truck and cement mixer are registered for use on Nebraska's highways, the weight of the cement mixer is included in determining the amount of the fee; 2) the Nebraska motor vehicle tax is based on both the value of the mixer unit and the truck chassis, and that they are merely separately denominated; 3) the plaintiff's decision to buy cement mixers and their truck chassis from separate manufacturers is a decision made by the plaintiff; and 4) and that the plaintiff treats the concrete mixers and trucks as single units for depreciation purposes.

I am persuaded by the evidence before me that the mixers plaintiff bought must be attached to the trucks to work. They are specifically designed this way. The mixers are of no use to the plaintiff without the trucks and the trucks are of no use to plaintiff without the mixers. Plaintiff bought the trucks and the mixers to function as a unit and that is what they do. The fact that plaintiff chose to buy them from separate manufacturers is of no consequence to this fact and has no bearing on whether what plaintiff got from its

purchases was a motor vehicle as defined by the Act.

In essence the plaintiff asks that I define motor vehicles to exclude mobile machinery and equipment. I cannot help but note, however, that the Act provides a specific definition of motor vehicles and I cannot rewrite that definition. If the Legislature had wanted to provide a tax break on mobile machinery and equipment such as cement mixers, it could have done so. It didn't and I can't.

For the forgoing reasons the decision of the Department of Revenue denying the requested refund is affirmed. Costs are taxed to plaintiff. A copy of this order is to be mailed to counsel of record.

DATED: August 14, 1998.

BY THE COURT:

  
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Karen B. Flowers, District Judge