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**IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA**

TRAVEL & TRANSPORT, INC., )  
 )  
 Petitioner, )  
 )  
 )  
 )  
 v. )  
 )  
 NEBRASKA DEPARTMENT OF )  
 REVENUE, )  
 )  
 Respondent. )  
 )

**CASE NO. CI 06-579**

**ORDER**

THIS MATTER came before the court on May 18, 2006, for hearing on plaintiff's appeal pursuant to Neb. Rev. Stat. §§ 77-27, 127 and 84-917. Attorneys Andrew D. Strotman and Douglas R. Aberle were present on behalf of the plaintiff and Assistant Attorney General Jay Bartel was present on behalf of the defendant. The matter was argued and submitted. The court, being fully informed, now finds and orders as follows:

**FACTS**

On February 25, 1992, Petitioner applied to the Department of Revenue, seeking to enter into an agreement with the Nebraska Tax Commissioner under the Employment and Investment Growth Act ("LB775") (Neb. Rev. Stat. §§ 77-4101 to 77-4113 (2005)). The Tax Commissioner reviewed the application and determined that it met the requirements as defined by LB775. On September 8, 1993, the Tax Commissioner entered into an Employment and Investment Growth Act Project Agreement with Travel & Transport, Inc. Pursuant to the agreement, Petitioner

invested more than \$3,000,000 in qualified Nebraska property and hired at least 30 new full-time equivalent employees as of the tax year end December 31, 1994. As of December 31, 2000, Petitioner had earned but not used LB775 carryover credits exceeding \$1,900,000 which could be utilized through approximately December 31, 2008 to obtain refunds of Nebraska and city sales and use taxes. Between December 28, 2001 and September 6, 2002, Petitioner filed ten Claims for Overpayment of Sales and Use Tax ("Claims 1-10") with the Respondent for refunds against the Petitioner's LB775 carryover credit balance. Respondent approved each claim and issued refunds to Petitioner.

In 2004, the Respondent audited Petitioner's refund claims, and on January 23, 2004, issued a Notice of Deficiency determination to the Petitioner disallowing the refunds on claims 1 through 3 (relating to the period between December 1, 2000 and December 31, 2000) and Claims 4 through 10 (involving years 2001 and 2002, in their entirety). The Respondent's assessment was based on the Department of Revenue's determination that Petitioner was not entitled to use credit earned pursuant to the Agreement because Petitioner had made an S corporation election effective January 1, 2001, while it had an Employee Stock Ownership Plan and Trust (ESOT) as a shareholder. The Commissioner determined that this election disqualified Petitioner from being defined as a "taxpayer" under LB775, and therefore could not utilize credits during the carryover period. Respondent then issued a Notice of Deficiency Determination to the Petitioner seeking the repayment of taxes and interest totaling \$157,855.

Petitioner filed a timely Petition for Redetermination of the Notice of Deficiency on February 20, 2004, contesting the Notice in its entirety and requesting a formal hearing with the Respondent. The hearing was held on March 17, 2005 before the Respondent at its office in Lincoln, Nebraska. The parties submitted briefs and reply briefs in accord with the time schedule

established by the State Tax Commissioner. The State Tax Commissioner issued an Order in favor of the Petitioner with respect to Claims 1 through 3, finding that the claims relating to the 2000 tax year should be allowed. The Order ruled in favor of the Respondent with respect to Claims 4 through 10, because it was determined that the Petitioner did not satisfy the definition of the word "taxpayer" as defined in The Nebraska Employment and Investment Growth Act during the 2001 and 2002 tax years.

Petitioner filed this administrative appeal from a final decision of the Nebraska State Tax Commissioner, claiming: First, that Petitioner should be declared to be a "taxpayer" as defined in the LB775 statutes for the 2001 and 2002 tax years; Second, that Petitioner should have the right to utilize its LB775 carryover credits for the 2001 and 2002 tax years; Third, that the Commissioner's Order should be reversed with respect to Claims 4 through 10; Fourth, that the Notice of Deficiency Determination should be declared erroneous and abated in its entirety; and Fifth, that Petitioner should be awarded attorneys fees in accord with Nebraska Law.

#### **STANDARD OF REVIEW**

In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals. *Wolgamott v. Abramson*, 253 Neb. 350, 353, 570 N.W.2d 818, 822 (1997). Accordingly, review is conducted by the court, without a jury, de novo, on the record of the agency. Neb. Rev. Stat. § 84-917 (Reissue 1999). In a de novo review on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Harris v. Harris*, 261 Neb. 75, 80, 621 N.W.2d 491, 497 (2001). The de novo standard of review supports the proposition that a rebuttable presumption of validity attaches to the actions of administrative agencies including the Department of Revenue, and the burden of proof

rests with the party challenging the agency's action. *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637, 641 (1995).

Upon review, the court may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings. Neb. Rev. Stat. § 84-917(6)(b)(2005).

## DISCUSSION

The Legislature adopted the Nebraska Employment and Investment Growth Act in 1987 to revitalize the economic sufficiency of Nebraska and encourage new businesses to relocate to the State. The Act provides that qualifying businesses—those which create the equivalent of at least 30 new, full-time jobs and invest at least \$3 million within the State—are eligible to enter into an Agreement with the state under which they can receive various tax incentives. The incentives in question in the case at hand include tax refunds and credits described in Neb. Rev. Stat 77-4105(1), (3) and (4) (2005).

In order to qualify for the tax incentives provided for under the act, a corporation must meet the statutory definition of “taxpayer” during both the entitlement period and the carry over period. As defined in Neb. Rev. Stat. § 77-4103 (15) (2003):

Taxpayer shall mean any person subject to the sales and use taxes and either an income tax imposed by the Nebraska Revenue Act of 1967 or a franchise tax under sections 77-3801 to 77-3807, any corporation, partnership, limited liability company, or joint venture that is or would otherwise be a member of the same unitary group, if incorporated, which is, or whose partners, members, or owners, are subject to such taxes, and any other partnership, limited liability company, S corporation, or joint venture when the partners,

shareholders, or members are subject to such taxes.<sup>1</sup>

Petitioner claims that it should be allowed to use the tax credits it earned but did not use for tax years 2001 and 2002, based on the fact that it did meet the § 77-4103(15) definition of “taxpayer” because the ESOT was “exposed to” both Nebraska sales and use tax and Nebraska income tax. Petitioner argues that LB775 credits can be used during the carryover period even if the taxpayer no longer maintains the levels of employment or investment required during the entitlement period, because Petitioner interprets LB775's repeated use of the word “taxpayer” as an “identification term.” (Petr.’s Br. 10). It argues that the “more consistent and logical interpretation of LB775 is that there is no requirement that a participant meet the technical definition of “taxpayer” during the carry over period.” (Petr.’s Br. 10). Additionally, Petitioner argues that regardless of whether or not the court agrees with Petitioner’s interpretation of the term “taxpayer” as simply an identification term, Petitioner does satisfy the definition of “taxpayer” because its sole shareholder, the ESOT is “subject to” both Nebraska sales tax and use tax and “exposed to” Nebraska income tax.<sup>2</sup> (Petr.’s Br. 10).

With regard to statutes, “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.” *First Data Corp. v. State*, 263 Neb. 344, 352, 640 N.W.2d 24 (2002). “Although construction of a statute by a department charged with enforcing it is not

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<sup>1</sup>The definition of the term “taxpayer” was amended by 2004 Neb. Laws, LB 1065, § 10. However, neither Petitioner nor Respondent alleges that the amendment applies in the case at hand, since the Legislature did not include language in the revision that would imply that the revised definition should be applied retroactively.

<sup>2</sup>Petitioner states that the Department of revenue has agreed that the ESOT is subject to Nebraska sales and use taxes and that it is “exposed to” Nebraska income tax on unrelated business income attributable to Nebraska sources. Petitioner implies that “exposed to” and “subject to” are synonymous.

controlling, considerable weight will be given to such a construction. This is particularly so when the Legislature has failed to take any action to change such an interpretation.” *Capitol City Tel., Inc. v. Neb. Dep’t of Revenue*, 264 Neb. 515, 527, 650 N.W.2d 467 (2002). Additionally, “There is a general rule of statutory construction that the interpretation of a statute given by an administrative agency to which the statute is directed is entitled to weight.” *Vulcraft, Div. of Nucor Corp. v. Karnes*, 229 Neb. 676, 678, 428 N.W.2d 216 (1988).

It is the duty of the court to interpret LB775 according to its plain language meaning. The court rejects Petitioner’s argument that the term “taxpayer” is meant merely as an identification term. Furthermore, the court rejects Petitioner’s assertion that “subject to” and “exposed to” are synonymous, and therefore rejects Petitioner’s argument that it satisfies the definition of “taxpayer” throughout the carry over period since Petitioner was only “exposed to” Nebraska income tax and not “subject to” it.

After considering the Act in its entirety, it is the conclusion of the court that the Petitioner should not be allowed to utilize its LB775 carryover credits for the 2001 and 2002 tax years because, at that time, it no longer met the requirements of a “taxpayer” as described in the Act. The ESOT was not subject to both Nebraska Sales and use tax and Nebraska income or franchise taxes and therefore was disqualified from using its unused LB775 tax credits. It is the conclusion of the court that the Commissioner was correct in denying the refund claim for Refund Claims 4 through 10.

**IT IS THEREFORE, HEREBY ORDERED, ADJUDGED, AND DECREED** that the decision of the Commissioner is affirmed. Costs of this action are taxed to the petitioner.

DATED AND SIGNED this 1<sup>st</sup> day of July, 2006.

**BY THE COURT:**



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**John A. Colborn**  
**District Court Judge**

cc: *Douglas R. Aberle*, Attorney for Plaintiffs  
*Jay Bartel*, Attorney for Defendants