IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

SANITARY AND IMPROVEMENT DISTRICT NO. 1 OF STANTON COUNTY, NEBRASKA, Plaintiff, vs. JOHN M. BOEHM, STATE TAX COMMISSIONER, AND THE NEBRASKA DEPARTMENT OF REVENUE, Defendants.	)	Docket 440, Page 107 ORDER

This is an appeal pursuant to Neb. Rev. Stat. §84-917 (Cum. Supp. 1989) from Findings and Order entered by defendant John M. Boehm, State Tax Commissioner, denying a sales tax refund claim submitted by plaintiff, Sanitary Improvement District No. 1 of Stanton County, Nebraska (hereinafter "SID") and declaring that SID was not exempt from sales tax on its purchases of sewer service from the City of Norfolk, Nebraska.

SID is a governmental subdivision created pursuant to the provisions of Article VII, Chapter 31, of the Nebraska Revised Statutes relating to sanitary and improvement districts formed under the Act of 1949. SID owns and operates a water system and sanitary sewer system for the purpose of collecting and removing sewer effluent from residences of the district. By providing this water and sewer service, SID is a public utility as defined in Nebraska Sales and Use Tax Regulation 1-066.01.

Gross receipts received from the furnishing of water and sewer services are subject to sales tax pursuant to Neb. Rev. Stat. §77-2703(1) (Cum. Supp. 1988). As a public utility, SID

is thus required by statute to collect sales tax on the gross receipts it receives from furnishing these services. SID is licensed to collect and remit sales tax on such services, which SID has done for the period October, 1987 through September, 1988.

Prior to September, 1987, SID performed all phases of its sewer service, including collection, treatment and disposal, through its own facilities. On September 15, 1986, SID executed an Interlocal Agreement with the City of Norfolk, Nebraska (hereinafter "City"). The Agreement provides that the Trustees of SID determined it to be in the best interest of its residents to close its treatment plant and lagoon and construct a sanitary sewer line from the district's system to connect with the City's sewer system.

In September 1987, the interceptor main identified in the Agreement was completed and the City began accepting effluent from SID. Under this system, effluent is collected from the residences of the district via the sewer lines owned and maintained by SID. The effluent is then channeled through the interceptor main constructed by SID. At different points along the interceptor main, effluent from several other City customers is discharged into this main. The main then connects into the City's system. From this juncture, this system is owned and maintained by the City. The effluent is transported through the City's system until reaching the City's plant, where it is treated and disposed of.

For providing this service to SID, the City imposes a

monthly charge. A water and sewer bill is issued to SID by the City. The monthly charge is based upon the flow volume, organic strength and solid content of the effluent.

City of Norfolk, Nebraska, is a public utility as defined in Nebraska Department of Revenue Sales and Use Tax Regulation 1-066.01. It is licensed to collect and remit sales tax on the gross receipts it receives from furnishing sewer service. The City, therefore, collects sales tax on its monthly charges to SID.

SID imposes a monthly charge upon is residents for the sewer service it provides. This charge reflects all costs incurred by SID to furnish its utility services, including the sewer service charge from the City, repair, maintenance and other overhead costs. SID collects and remits sales tax on such charges from its customers.

SID submitted a letter to the Nebraska Department of Revenue on March 9, 1988, requesting, in part, a ruling that it was excluded from payment of sales tax on the service provided by the City. The Department advised SID by correspondence dated May 17, 1988, that it was required to pay the tax on the sewer charges from the City. SID then requested a conference with representatives of the Department, Tax Policy Division. Following this conference, SID was again advised by correspondence dated September 15, 1988, that it was required to pay the tax on the sewer charges from the City. SID subsequently filed a claim for refund of sales taxes and request for declaratory ruling. Following a hearing before the Department, SID's claim for

refund was denied, and the Tax Commissioner's Order further declared SID liable for sales tax on its purchase of sewer service from the City of Norfolk. SID subsequently instituted this appeal seeking review of the Tax Commissioner's Findings and Order.

I.

SID DOES NOT QUALIFY FOR EXCLUSION OR EXEMPTION FROM SALES TAX ON CHARGES IMPOSED FOR THE PROVISION OF SEWER SERVICES BY CITY.

Neb. Rev. Stat. §77-2703(1) (Cum. Supp. 1988), in addition to imposing a tax on the gross receipts from all sales of tangible personal property sold at retail in the state, imposes such tax on "the gross receipts of every person engaged as a public utility. . . "Subsection (1) (a) of §77-2703 further provides, in part:

> Tax imposed by this section shall be collected by the retailer from the consumer.

The definition of "gross receipts", contained in Neb. Rev. Stat. §77-2702(4)(b) (Cum. Supp. 1988), provides, in part:

> Gross receipts of every person engaged as a public utility specified in subdivision (4)(b) of this section. . .shall mean:
>
> (iii) In the furnishing of gas, electricity, sewer and water service. . .the gross income received from the furnishing of such services upon billings or statements rendered to consumers for such utility services; . . .

Furthermore, the definition of "retailer" in Neb. Rev. Stat. §77-2702(12)(a) (iv) (Cum. Supp. 1988) includes:

> Every person engaged as a public utility in furnishing telephone, telegraph, gas, electricity, sewer, and water service, . . .

There is no dispute that SID is a public utility within the

meaning of these statutory provisions, nor is there any question as to the status of the City of Norfolk, Nebraska, as a public utility. As such, both SID and City are required to collect and remit sales tax on gross receipts derived from the sale of public utility services, including sewer services, to the consumers of such services. SID, like any other consumer of utility services provided by City, is billed monthly for such services, and City properly collects and remits sales tax on the gross receipts derived from such charges. The Tax Commissioner properly denied SID's refund claim, and correctly ruled that SID did not qualify for exemption from sales tax on its purchases of sewer services from City.

A. The sewer services furnished by City to SID do not constitute "joint use" or "other use of facilities" between public utilities within the meaning of Sales and Use Tax Reg. 1-066.14.

SID contends that it qualifies for exemption under the provisions of Nebraska Department of Revenue Sales and Use Tax Reg. 1-066.14, which provides:

> Persons engaged in providing gas, electric, water, and sewer service are considered the consumers of materials, supplies, and other items of tangible personal property. Charges made between public utility companies, including telephone companies, for joint use of facilities, wheeling of energy, use of duct space, use of pole or pin space or other use of facilities in connection with furnishing any such utility services are not subject to the tax.

Subsection .03 of Reg. 1-066 provides: "The gross receipts received from furnishing sewer service are subject to the tax regardless of the nature of the use." This provision follows the language contained in Neb. Rev. Stat. §§77-2702(4) (b) and

77-2703(1) (Cum. Supp. 1988), providing for the taxation of gross receipts from the provision of public utility services, including sewer service. The first sentence of Reg. 1-066.14 simply makes it clear that tangible personal property consumed in providing sewer or other utility service is subject to the tax. It does not exempt the consumption or furnishing of such services from taxation because the services are not "tangible personal property". Subsection .14 applies to the taxability of tangible personal property consumed by a utility in providing their services. Subsection .03, however, applies to the taxability of the service furnished and consumed, which, in this instance, includes the sale of sewer service to SID by City.

SID also contends the second sentence of Reg. 1-066.14 exempts it from payment of sales tax because the City's monthly bill for its service qualifies as "[c]harges made between public utility companies. . .in connection with furnishing. . .utility services". SID argues that, as the effluent collected from the residences of the district flows through the City's system and is treated by the City's plant, this constitutes "use" of the City's facilities within the meaning of Reg. 1-066.14. This argument is without merit.

Generally, the same rules of construction and interpretation used to determine the meaning and application of statutes are applied in the construction and interpretation of rules and regulations of administrative agencies. 2 Am.Jur.2d Administrative Law §307 (1962). An examination of the provisions of Reg. 1-066.14 demonstrates that charges between public utility

companies are not subject to sales tax where one of five situations exist. These situations are: (1) Joint use of facilities; (2) Wheeling of energy; (3) Use of duct space; (4) Use of pole or pin space; or (5) Other use of facilities in connection with furnishing any such utility services. SID's claim for exemption pursuant to this regulation focuses only on the provisions relating to charges between public utilities for the "joint use of facilities" or "other use of facilities". Based on the plain and ordinary meaning of the language contained in Reg. 1-066.14, it is evident that the Tax Commissioner properly determined that SID did not qualify for exemption pursuant to these provisions.

In order for SID to qualify under the exemption contained in Reg. 1-066.14 on the basis asserted, it must "use" the City's facilities as this term is commonly defined and understood. Of particular significance is the definition of "use" provided within the sales and use tax statutes in Neb. Rev. Stat. §77-2702(20) (Cum. Supp. 1988), which defines "use" as ". . .the exercise of any right or power over tangible personal property incident to the ownership or possession of that tangible personal property. . ." This definition of "use" is in accord with the commonly accepted meaning of this term, which has been defined as follows: "the act or practice of using something". . . ."the privilege or benefit of using something". . ."the ability or power to use something". . ."the legal enjoyment of property that consists in its employment, occupation, exercise, or practice". Webster's Third New International Dictionary 2523

(1981).

The record fully supports the conclusion that SID makes no "use" of the City's facilities, as that term is commonly defined and understood. SID has no right or power over City's facilities incident to ownership or possession; exerts no physical control over these facilities; has no ownership or possession interest; and has no right in determining when or in what manner the facilities of City will be operated. In reality, the only "use" of the City's facilities is made by the City itself. The fact that sewer effluent from the residents of SID flows through the pipes and treatment plant of City does not, in any way, constitute a "use" by SID of City's facilities within the meaning of Reg. 1-066.14.

Similarly, it cannot be said that SID makes "joint use" of the City's facilities. There is nothing in the record to support the existence of any "use" of the City's facilities by SID, "joint" or otherwise. SID does not qualify for exemption under the provision concerning the "joint use" of facilities. The passage of sewer effluent through a system of pipes owned and maintained by a separate and distinct entity simply does not constitute "joint use" or any "other use" of facilities within the terms of Reg. 1-066.14.

B. The imposition of sales tax on gross receipts from the consumption of sewer services provided by City to SID, and the imposition of sales tax on the gross receipts from utility services provided by SID to its customers, does not constitute "double taxation".

SID also contends the Tax Commissioner erred in failing to find that the imposition of sales tax on gross receipts received

by City for the sewer service consumed by SID, and the assessment of sales tax on the monthly charges imposed on residents of SID for plaintiff's utility services, constitute "double taxation".

No "double taxation" exists under the circumstances presented herein, as the sales tax imposed on the gross receipts derived from City's charges to SID for the provision of sewer service, and the sales tax imposed on customers of SID on the monthly statements issued by SID for providing its utility services to such customers, represent the taxation of two separate and distinct transactions. The first transaction is the furnishing of sewer service by the City to SID. The second transaction is the furnishing of sewer and water service by SID to residents of the district. In the first transaction, SID bears the ultimate legal incidence of the tax. In the second transaction, it is the residents of the district who bear the ultimate legal incidence of the tax. Two separate and distinct transactions exist, each of which is specifically subject to taxation. The same subject matter is not taxed twice, and therefore, the Tax Commissioner correctly determined that double taxation did not occur.

II.

The decision of the Tax Commissioner herein is not affected by error of law, is supported by competent, material, and substantial evidence, is neither arbitrary nor capricious, and should be and hereby is affirmed.

Dated: October 17, 1989.

BY THE COURT:

Donald E. Endacott
District Judge