

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

EDWARDS SUBCORP., INC.,)
 EDWARDS MANAGEMENT CO., INC.)
 ROBERT and CHARLENE EDWARDS)
 d/b/a MC DONALDS AND)
 MC DONALDS EXECUTIVE OFFICES,)
)
 Petitioners,)
)
 vs.)
)
 NEBRASKA DEPARTMENT OF)
 REVENUE, STATE OF NEBRASKA,)
)
 Respondents.)

DOCKET 436, PAGE 271

ORDER

State of Nebraska

OCT 01 1990

Dept. of Justice

This is an appeal from a decision of the Tax Commissioner of the Nebraska Department of Revenue pursuant to Neb. Rev. Stat. §84-917 (Reissue of 1987). As this matter was appealed to this Court prior to the operative date of the amendment to §84-917, it is reviewed on the record of the agency. Petitioners were represented by Samuel Clark and the Respondents were represented by David Cygan, Assistant Attorney General. The record of the proceeding before the Tax Commissioner was submitted into evidence, briefs were submitted and argument was had before the Court.

The Court now finds and concludes as follows:

1. The deficiency determination in question was assessed against the entity "McDonalds Executive Offices". As such, McDonalds Executive Offices is the only entity that faces a liability to Nebraska Department of Revenue. No other legal entity or person was issued an assessment. Therefore, no case or controversy exists between the other named petitioners and the Nebraska Department of Revenue. Absent a case or contro-

versy, no justiciable question is presented, and this court lacks subject-matter jurisdiction. Accordingly, all petitioners, except McDonalds Executive Offices, should be dismissed.

2. The Omaha city sales tax was not applicable to sales made at petitioner's restaurant located at 10733 "Q" Street, Omaha, Nebraska during the period in question following annexation. Nebraska Local Option Sales and Use Tax Reg. 9-4 requires that, before a city sales tax can be imposed on newly-annexed lands, "such city shall forward to the State Tax Commissioner. . .a certified copy of the ordinance. . .Such ordinance. . .shall be accompanied by a certified map clearly showing the territory added. . ." The City of Omaha should have, but failed to strictly comply with this mandatory and jurisdictional requirement of Reg. 9.4 that a certified map be furnished. Therefore, the Omaha sales tax did not apply to sales made at the restaurant located at 10733 "Q Street. The decision of the Nebraska Department of Revenue as to the assessment of an Omaha city sales tax was affected by error of law, and therefore, prejudiced the substantial rights of petitioner.

3. The five-year period for issuing Notices of Deficiency Determination, as set forth in Neb. Rev. Stat. §77-2709(5)(c) (Reissue 1986), applies to the assessment of petitioner for consumer's use tax. During the period in question, petitioner filed Forms 10, completing the lines applicable to the sales tax. The lines applicable to the consumer's use tax were not,

however, completed. The filing of a sales tax return does not constitute the filing of a consumer's use tax return. As to the use tax, there was, therefore, a failure to make a return.

4. The two extension agreements effectively extended the time for issuing the Notices of Deficiency Determination for the consumer's use tax. The Notice of Deficiency Determination issued to petitioner regarding the consumer's use tax was within the time limits permitted by the extension agreements.

It is, therefore, ordered:

1. That all petitioners except "McDonalds Executive Offices" are dismissed.

2. That the decision of the Tax Commissioner of the Nebraska Department of Revenue sustaining the Notice of Deficiency Determination issued to petitioner for Omaha city sales tax for the period from October 1, 1982, through March 31, 1986, is reversed with directions to the Commissioner to refund to petitioner all funds collected for such sales tax pursuant to such notice, with interest as provided by law.

3. That the decision of the Tax Commissioner of the Nebraska Department of Revenue sustaining the Notice of Deficiency Determination issued to petitioner for consumer's use tax for the period from October 1, 1980, through July 31, 1983, is affirmed.

4. Each party shall pay its own court costs.

Dated September 28, 1990.

BY THE COURT:

Ronald E. Endicott

DISTRICT JUDGE