

Bartel

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

CLERK OF JUSTICE

METROPOLITAN UTILITIES DISTRICT)
OF OMAHA, A Municipal Corporation)
and Political Subdivision of the)
State of Nebraska,)

JAN 05 1995

Plaintiff,)

Docket 508, Page 004.

vs.)

ORDER

M. BERRY BALKA, Tax Commissioner)
of the State of Nebraska; and)
STATE OF NEBRASKA, DEPARTMENT OF)
REVENUE,)

Defendants.)

This Appeal came on for hearing on the 11th day of January, 1995. Ronald Bucher was present for the plaintiff and L. Jay Bartel was present for the defendants. The Court 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 denying the plaintiff's claim for a refund of Nebraska sales tax. 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

Metropolitan Utilities District of Omaha [M.U.D.] is a municipal corporation engaged in the business of processing, selling, and distributing water and natural gas to the inhabitants of the City of Omaha and its surrounding area. On or about June 25, 1993, M.U.D. filed a Claim for Overpayment of

Sales and Use Tax with the Nebraska Department of Revenue [the Department] in which M.U.D. requested a refund for sales tax paid on electricity consumed pursuant to Neb. Rev. Stat. § 77-2704.13 (Cum. Supp. 1994). Specifically, M.U.D. claimed that its purchase of electricity was exempt because more than 50 percent of the electricity was used or consumed in processing, manufacturing, or refining tangible personal property. In said claim, M.U.D. claimed overpayment in the amount of \$159,931.21 from October 1, 1991 through September 30, 1992. The Department approved M.U.D.'s claim for overpayment paid on the electrical charges for its Liquified Natural Gas Plant in the amount of \$14,426.92, however, it denied the remainder of M.U.D.'s claim relating to electricity consumed at its water treatment plants.

The Department's rejection was based on its finding that over 50 percent of the electricity used by M.U.D. was used to move already treated water out of the plant, a function that does not reduce or transform the water into a different state, quality, form, property or thing as required by § 77-2704.13.

DISCUSSION

Neb. Rev. Stat. § 77-2704.13 provides in pertinent part:

Sales and use taxes shall not be imposed on the gross receipts from the sale, lease, or rental of and the storage, use, or other consumption in this state of:

(2) Sales and purchases of such energy sources or fuels. . .when more than fifty percent of the amount purchased is for use directly in processing, manufacturing, or refining, in the generation of electricity, or by any hospital.

Where the words of a statute are clear and unambiguous, no interpretation is needed, and in the absence of anything to

indicate the contrary, words will be given their ordinary meaning. Vulcraft v. Karnes, 229, Neb. 676, 678, 428 N.W.2d 505, 507 [Citation omitted]. Statutes providing for tax exemptions are to be strictly construed and the proponent of the exemption has the burden of proving entitlement to said exemption. Id. The Department has considered the above statutory authority and defined manufacturing or processing "as an action or series of actions performed upon tangible personal property, either by hand or machine, which results in that tangible personal property being reduced or transformed into a different state, quality, form, property or thing." Reg 1-089.02A(1). As a general rule, an administrative agency's interpretation of a statute is entitled to weight. Vulcraft, at 678, 428 N.W.2d at 507.

The definition adopted by the agency in this matter is consistent with the universally accepted definition of manufacturing and processing. For example, 68 Am. Jur. 2d Sales and Use Tax § 146 (1993) states:

The terms 'manufacturing' and 'processing' imply essentially a transformation or conversion of material or things into a different state or form from that in which they originally existed -- the actual operation incident to changing them into marketable products.

Consistent with the requirement that a change occur, merely transferring a product from one site to another does not constitute "processing". South Sioux City Rural Water v. Dep't of Revenue, 383 N.W.2d 585, 588 (Iowa 1986). Similarly, delivery and distribution of the product in question does not involve "processing" within the meaning of a sales or use tax exemption. Id. at 589. In South Sioux, the plaintiff was in the business of providing treated water. The court in South Sioux, construing a

definition of "processing" similar to the one now before the court, held that electricity used to pump already treated water out of the plant to holding tanks for eventual distribution was not electricity used in "processing" the product Id. at 588. The court reasoned that any electricity used subsequent to the treatment process of the water was merely used to preserve the water for distributing. Id. at 589. Delivery of an already finished product, the court continued, is not "processing". Id.

Likewise, the electricity now at issue before the court is used merely to remove an already finished product from the treatment plant. After being removed from the plant, the water undergoes no subsequent change in form. While removal of the water may be necessary in order to make room for additional water to undergo the treatment process, removal at this point is a mere transfer of the product from one site to another pending distribution.

Authority relied upon by the plaintiff is distinguishable from the case at bar as they involved the transportation of a partially processed product not fit for resale to another site where the change in form was completed, thus making sale of the product possible. See e.g., Indiana Dep't of State Revenue v. Cave Stone, Inc., 457 N.E.2d 520 (Ind. 1983) (transportation of crude stone from crusher to stockpiles played direct role in processing where stone was not altered into final most marketable form until drainage, which was accomplished through stockpiles, had occurred.); Ross v. Greene & Webb Lumber Co., 567 S.W.2d 302, 304 (Ky. 1978) (machinery used to transport cut lumber to stacking sheds for air drying was part of direct manufacturing

process); France Co. v. Evatt, 55 N.E.2d 652 (Ohio 1944)
(equipment used in transporting stone from crushing plant to yard
for draining, cleaning, blending, and reassembling is directly
involved in production for sale by processing).

As stated by the court in Bird & Son, Inc. v. Limbach, 543
N.E.2d 1161, 1166 (Ohio 1989), whereas the act of transporting a
partially processed product to another location where the product
continues to undergo change by the same processor may come within
the sales and use tax exemption for "processing", the
transportation of a product to the place of processing or from
that place once the product's form has undergone a complete
change does not likewise play a direct role in processing the
product.

THEREFORE, the decision of the Tax Commissioner is affirmed.

ENTERED this 4 day of May, 1995.

BY THIS COURT:



District Court Judge

cc: Ronald E. Bucher, attorney for Plaintiff
L. Jay Bartel, attorney for Defendants