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IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

LANCASTER COUNTY

2001 FEB 5 PM 12 28

CLERK OF THE DISTRICT COURT

SOUTHEAST NEBRASKA COOPERATIVE CO.,	)	
	)	**Case No. CI 00-3514**
Plaintiff,	)	
	)	
vs.	)	**JUDGMENT**
	)	
STATE OF NEBRASKA, NEBRASKA DEPARTMENT OF REVENUE and MARY JANE EGR, Tax Commissioner,	)	
	)	
Defendant.	)	

DEPT. OF JUSTICE

FEB 0 6 2001

STATE OF NEBRASKA

THIS MATTER CAME on for trial on January 29, 2001, as an appeal from the determination of the Tax Commissioner of the Nebraska Department of Revenue (Department) under the Nebraska Administrative Procedures Act, **NEB. REV. STAT.** §84-901, *et seq*. Evidence was adduced. The Court was duly advised in the premises. The court finds that judgment should be entered remanding this matter to the Department for further proceedings consistent with this judgment.

Southeast Nebraska Cooperative Co., a Nebraska cooperative corporation (Southeast), filed an application for a sales and use tax refund arising out of four construction projects: Filley, Sterling, Burchard and Beatrice, Nebraska. The tax refunds are being sought under the Air and Water Pollution Control Tax Refund Act. NEB. REV. STAT. §77 – 27,149 *et seq*. The Department granted refunds of $13,348.55 and denied the remainder of the application. Southeast appeals.

Facts

On July 30, 1999 Southeast filed a request with the Department of

Environmental Quality (DEQ) as required by NEB. REV. STAT. §77 – 27,150, for the projects at Filley, Sterling, and Burchard. On August 12, 1999 Southeast filed a similar request for the project at Beatrice.

October 25th 1999 Southeast applied for a sales and use tax refund of $33,313.75 based on these four construction projects. On October 26, 1999 the request was returned to Southeast by the Department indicating the need for additional information.

On February 4th 2000 DEQ issued findings required by NEB. REV. STAT. §77 – 27,150 (1). The findings were issued in four separate letters, one for each of the construction projects. In each letter, DEQ found:

> "the facility: (1) is designed and operated primarily for control, capture, abatement or removal of industrial or agricultural waste from water, (2) is suitable and reasonably adequate, and (3) meets the standards and regulations adopted pursuant to the Environmental Protection Act...."

Nebraska statutes require that if DEQ makes such finding, it notify the owner "of its approval" (NEB. REV. STAT. §77-27,150 (2)), and notify the tax commissioner "who shall issue the refund" (NEB. REV. STAT. §77-27,151).

Following receipt of the notices from DEQ, Southeast made a new application for refund of sales and use taxes paid in these four construction projects to the Department on February 10, 2000. The Act requires a refund applicant to include with its application for refund:

> "(a) Plans and specifications of such facility including all materials incorporated therein; (b) a descriptive list of all equipment acquired by the applicant for the purpose of industrial or agricultural waste pollution control; (c) the proposed operating procedure for the facility; and (d) the acquisition cost of the facility for which a refund is claimed."

NEB. REV. STAT. §77 – 2 7,150 (1).

In this case, the determining factor of whether or not a tax refund is due is whether the refund requested is for taxes paid on a facility as defined under the Act. This term is defined as follows:

> "Facility shall mean any system, equipment or apparatus, or disposal system, including disposal wells, or any treatment works, appliance, equipment, machinery or installation constructed, used or placed in operation primarily for the purpose of reducing, controlling or eliminating air or water pollution caused by industrial or agricultural waste, including the generation of electricity; *provided,* that facilities such as air conditioners, dust collectors, filters, fans, and similar facilities designed, constructed or installed solely for the benefit of the person for whom installed or the personnel of such person, and facilities designed or installed for the reduction or control of automobile exhaust emissions shall not be deemed air pollution control facilities for purposes of this subdivision;"

NEB. REV. STAT. §77-27,149 (1).

On June 6, 2000 the Department notified Southeast that it would grant a refund for only certain portions of the construction projects and not the remainder. The Department requested assistance from Southeast to identify those portions of the projects that would qualify under the Department's definition of facility. There followed a series of correspondence between the Department and Southeast and Southeast's legal counsel.

Ultimately, on August 11, 2000 the Department issued a decision allowing $13,348.55 in sales and use tax refund. The decision allowing the refund was accompanied by ledger sheets prepared by Southeast for each of the four projects on which the Department indicated the invoices that it allowed for refund. The record in this case reflects that on the project in Filley the Department allowed $11,068.85; on the Beatrice project it allowed $679.95; on the Burchard project it allowed $715.75; and

on the Sterling project it allowed a refund of $884.00.

A hearing under section 77-27,150 (2) was not requested by Southeast. Consequently, the record before this court consists only of two volumes of a transcript containing 436 pages of correspondence between these governmental agencies and Southeast or its attorney.

There is nothing in the record to indicate that DEQ made any effort to identify portions of any of the construction projects which meet the definition of "facility" under the Air and Water Pollution Control Tax Refund Act (§77-27,149(1)).

Analysis

This court's review is limited to the facts presented in the documents contained in the transcript and inferences to be drawn from those facts. This record is wholely inadequate.

The decision letter of DEQ on each of the four facilities is ambiguous. It is not possible to determine whether DEQ used the term "facility" in the letters in the context of the definition contained in the §77-27,149 (1). DEQ may have used "facility" as a generic term to refer to the totality of the construction project, it might refer to the descriptive terms used in the letters (which appear to be narrower than the full construction project), or it might be restricted to only those items of the construction project which meet the definition of §77-27,149 (1) (leaving the determination of which portions qualify for refund to the Department).

From the information that can be gleaned from the scant record, there is a strong inference that DEQ did not intend to use "facility" consistent with the definition in §77 – 27,149(1). For example, DEQ's description of the Filley "facility" includes "... two large

fertilizer containers..." and a "load out facility located in a building." DEQ's letter is not clear. Is the whole building included, or only the load out facility? Are the fertilizer containers approved, or only the bladders?

DEQ made no finding of fact or conclusions of law as required by NEB. REV. STAT. §84-915. There is nothing in the record to indicate what information DEQ had prior to its February 4, 2000 approval letters. DEQ did not notify the tax commissioner of "the extent of commercial or productive value derived from any materials capture or recovered by the facility" as required by §77-27,151.

In addition to the above inadequacies in the record, the Southeast's application for refund to the Department does not comply with the statutory requirements of §77-27,150. The record does not show that Southeast submitted to the Department, plans and specifications of the facility (for which reimbursement is sought). There is no list of materials in the record, nor was there submitted a descriptive list of all equipment acquired by the applicant for the purpose of industrial or agricultural waste pollution control as required by §77-27,150 (1). The record shows only that over 350 pages of invoices was submitted to the Department. There is indication in the correspondence between the parties that some additional effort was made by Southeast to identify materials Included in the projects which the Department considered to be within the definition of "facility."

Finally, the Department has not made findings of fact and conclusions of law as required by NEB. REV. STAT. §84-915. The effort of putting tick marks on ledgers prepared by Southeast to indicate those invoices disallowed is not an adequate finding of fact.

The record is absent a showing that the applicant complied with §77-27,150 (a) and (b). The applicant bears the burden of proof in this appeal. The review by this court is *de novo* on the record made before the Department. The argument could be made that the tax commissioner's decision ought to be affirmed solely on the basis that the applicant has failed in its burden of proof. However, there is also nothing in the record to indicate that either the DEQ or the Department of Revenue raised this objection at the agency level and neither agency made the findings of fact or conclusions of law required by statute. Consequently, it is necessary that this matter be remanded to the Department of Environmental Quality and the Department of Revenue to make such determinations.

IT IS THEREFORE HEREBY ORDERED ADJUDGED AND DECREED that the decision of the Tax Commissioner dated August 11, 2000 is vacated and that a mandate issue from the Clerk of this court remanding this case to the Department of Environmental Quality and the Department of Revenue for further proceedings consistent with this order. The Department of Revenue must issue a final decision on the refund application of Southeast Nebraska Cooperative Co. within 180 days following the date of the mandate of this court.

Dated: February 2, 2001.

Steven D. Burns
District Judge