

NEBRASKA SUPREME COURT  
AND NEBRASKA COURT OF APPEALS  
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**COPY**

March 22, 2006

L. Jay Bartel  
ATTORNEY GENERAL  
2115 State Capitol  
Lincoln, NE 68509

**IN CASE OF:** S-04-001402, Eatmon Well Service Co., Inc. v. Department of Motor Vehicles

**The following internal procedural submission or filing by a party:**

Submission to Court **submitted or filed** 02/07/06

**has been reviewed by the court and the following order entered:**

Reversed with directions to dismiss. Connolly, Justice, Wright, Justice, not participating. See memorandum opinion.

Respectfully,

CLERK OF THE SUPREME COURT  
AND COURT OF APPEALS

**NOTICE**

**Docket Fee for Petitions for Further Review**

As of July 1, 2005, pursuant to Neb. Rev. Stat. § 33-103.01, a docket fee of \$50.00 shall be paid to the Clerk of the Supreme Court at the time of filing a Petition for Further Review. Such docket fee shall be required for each appellate case number in which further review is sought, regardless of consolidation of cases for opinion by the Court of Appeals, and by each party filing for further review. This docket fee shall be waived for an indigent person who has been granted leave to proceed in forma pauperis on appeal by the trial court.

**COPY**

Eatmon Well Service Co., Inc., )  
 )  
 Appellee, )  
 )  
 v. )  
 )  
 State of Nebraska, )  
 Department of Motor Vehicles, )  
 )  
 Appellant. )

No. S-04-1402.

Memorandum Opinion  
and  
Judgment on Appeal

**FILED**

MAR 22 2006

CLERK  
NEBRASKA SUPREME COURT  
COURT OF APPEALS

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-  
LERMAN, JJ.

CONNOLLY, J.

The Nebraska Department of Motor Vehicles (DMV) appeals the district court's order determining that servicing rigs used by Eatmon Well Service Co., Inc. are exempt from tax under the Diesel Fuel Tax Act. Neb. Rev. Stat. §§ 66-650 to 66-683 (2003) (repealed in 2004). The district court reversed a deficiency determination made by the DMV. On appeal, the DMV contends that it lacked subject matter jurisdiction to determine whether Eatmon was tax exempt. We agree that the DMV lacked subject matter jurisdiction over issues arising under the Diesel Fuel Tax Act. Therefore, the district court also lacked jurisdiction. Accordingly, we reverse with directions to dismiss.

BACKGROUND

Eatmon is an oil well servicing company. As part of its operation, Eatmon uses servicing rigs that burn dyed diesel fuel. When servicing a well, the rig is driven to the site,

parked over it, and anchored to the ground. It is then used to install equipment. The rig remains stationary at the site during servicing, which can take from a day to several months. Eatmon fuels the rig from 100-gallon fuel storage tanks that are hauled to the job site. Ninety percent of the fuel in the rig is consumed while it is stationary and less than 10 percent is consumed when traveling to the site.

The rig is not used for transportation of people or property and does not have seats for passengers. The top speed of a rig is 50 m.p.h. Because of its size, it must have a special oversize permit to travel on the roadways and it cannot legally travel at night, during adverse weather, or on the interstate highway.

Since 1993, Eatmon paid taxes under the International Fuel Tax Agreement Act (IFTAA) and paid taxes on the portion of diesel fuel used to travel to job sites. In 1999 or 2000 the DMV raised questions about Eatmon's use of dyed diesel fuel.

In 2002, the DMV conducted an audit and notified Eatmon of a tax deficiency under the IFTAA. According to the DMV, Eatmon was responsible for paying taxes on the entire portion of fuel used in the rig. Eatmon challenged the deficiency, contending that it was exempt from paying for the portion of fuel used at job sites because the rig is not a "motor vehicle" under IFTAA. It further argued that it was exempt from taxes under § 66-672, which provides exemption for diesel fuel used in agriculture,

quarrying, or other non-highway use. The DMV held an administrative hearing and the hearing officer affirmed the deficiency determination. The district court reversed, determining that although the rig was a motor vehicle, it was exempt from the tax under § 66-672. The DMV appeals.

#### ASSIGNMENTS OF ERROR

The DMV assigns that the DMV and the district court lacked subject matter jurisdiction over the action and that the court erred when it determined that Eatmon was exempt from the tax.

#### STANDARD OF REVIEW

Subject matter jurisdiction is a question of law for the court. *Ptak v. Swanson*, 271 Neb. 57, \_\_\_ N.W.2d \_\_\_ (2006).

Statutory interpretation presents a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. See *Hauser v. Nebraska Police Stds. Adv. Council*, 264 Neb. 605, 650 N.W.2d 760 (2002).

#### ANALYSIS

The DMV contends for the first time on appeal that it did not have subject matter jurisdiction to determine whether under the Diesel Fuel Tax Act an exemption from tax applied. Thus, the district court also lacked jurisdiction. Eatmon, however, argues that there was jurisdiction under IFTAA. Neb. Rev. Stat. §§ 66-1401 to 66-1415 (Reissue 2003).

Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *In re Interest of Devin W. et al.*, 270 Neb. 640, \_\_\_ N.W.2d \_\_\_ (2005). The parties did not raise the matter of subject matter jurisdiction in the district court. However, lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005). Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent; nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

To determine whether the DMV had subject matter jurisdiction over exemptions under the Diesel Fuel Tax Act we compare both acts. The IFTAA illustrates the DMV's limited role in motor fuel taxation. It provides:

. . . to simplify motor fuel tax licensing, bonding, reporting, and remittance requirements imposed on motor carriers involved in interstate commerce by authorizing [the DMV] to participate in cooperative fuel tax agreements with another state or states to permit the administration, collection, and enforcement of each state's motor fuel taxes by the base state.

Neb. Rev. Stat. § 66-1402 (Reissue 2003). The IFTAA then provides measures for the collecting taxes and auditing.

The DMV also has the power to suspend, revoke, cancel, or refuse to issue or renew licenses for failure to comply with the IFTAA or pay motor fuel taxes. Neb. Rev. Stat. § 66-1406.02 (Reissue 2003). The amount of tax imposed and collected under an agreement is determined as provided in chapter 66, articles 4 and 6, which includes the Diesel Fuel Tax Act. The director of the Department of Revenue in administering those articles "shall provide information and assistance to [the DMV] regarding the amount of tax imposed and collected for time to time as may be necessary. § 66-1405. The DMV also has the power to perform audits "to determine if the motor fuel taxes to be collected under the agreement have been properly reported and paid to each state participating in the agreement." § 66-1408.

But the Diesel Fuel Tax Act is enforced by the Department of Revenue, Motor Fuel Tax Enforcement Division. See § 66-683. The exemptions to taxes on diesel fuel are covered under the Diesel Fuel Tax Act. Section 66-672 provides:

(1) Diesel fuel shall be exempt from the taxes imposed by sections 66-4,142 and 66-668 to 66-670 when the fuel is used for:

(a) Agricultural, quarrying, industrial, or other nonhighway use;

(3) The department shall refund tax paid on undyed diesel fuel used for an exempt purpose. The purchaser of tax-paid, undyed diesel fuel used for an exempt purpose shall file a claim for refund with the department on forms prescribed by the department and shall provide such documentation and maintain such records as the department reasonably requires to substantiate that the fuel was used for an exempt purpose.

Statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Midwest Neurosurgery v. State Farm Ins. Cos.*, 268 Neb. 642, 686 N.W.2d 572 (2004). To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005).

Although the DMV has the power to collect taxes and conduct audits under the IFTAA, the Diesel Fuel Tax Act specifically covers exemptions from tax. IFTAA does not give the DMV the power to make determinations regarding tax exemptions that are covered in the Diesel Fuel Tax Act. Instead, the Department of Revenue administers the Diesel Fuel Tax Act. Therefore we agree with the DMV that it lacked subject matter jurisdiction over the action. Although it could audit Eatmon under the IFTAA and reach a deficiency determination, it could not make determinations regarding exemptions to tax as provided in the Diesel Fuel Tax

Act. Because the DMV lacked jurisdiction, the district court, acting as an appellate court, also lacked jurisdiction. See *Trew v. Trew*, 252 Neb. 555, 567 N.W.2d 284 (1997).

#### MOTOR VEHICLE DETERMINATION

In its brief, Eatmon argues that the DMV and district court incorrectly determined that their rig was a motor vehicle subject to tax. Eatmon, however, did not file a separate cross appeal of that determination.

A cross-appeal must be properly designated, under Neb. Ct. R. of Prac. 9D(4) (rev. 2000), if affirmative relief is to be obtained. *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002). Rule 9D(4) provides:

Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

Here, Eatmon's argument was not set forth in a separate division of the brief or presented as a cross appeal. Therefore, we do not address issues concerning the determination that the rig was a motor vehicle.

#### CONCLUSION

We determine that although the DMV had power to audit and collect taxes, it lacked subject matter jurisdiction to



determine whether Eatmon was exempt from tax under the Diesel Fuel Tax Act. Accordingly we reverse with directions to dismiss the exemption determinations.

REVERSED WITH DIRECTIONS TO DISMISS.

WRIGHT, J., not participating.

THE STATE OF NEBRASKA, ss.

I hereby certify that I have compared the foregoing copy of an opinion filed by this Court with the original on file in my office and that the same is a correct copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of this Court, in the City of Lincoln.



*Janet Tompkins*  
Clerk/Deputy Clerk

SUPREME COURT NO.	S-04-1402
TRIAL TRIBUNAL NO.	CI03-2512
DATE OPINION FILED	March 22, 2006
DATE OPINION CERTIFIED	March 22, 2006