

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

SULLIVAN TRANSFER AND STORAGE )  
COMPANY, a Corporation, )  
 )  
Petitioner, )

DOCKET 320 PAGE 228

MEMORANDUM AND ORDER

vs. )

STATE OF NEBRASKA DEPARTMENT OF )  
REVENUE AND WILLIAM E. PETERS, )  
State Tax Commissioner, )  
 )  
Defendant. )

This matter came before the court on appellant's appeal from the State Tax Commissioner's Findings and Order of June 16, 1978, in which tax deficiencies were assessed against petitioner. Briefs from petitioner and defendant have been received.

Appellant alleges that the packing material and containers used in interstate moves should not be subject to the Nebraska use tax. Appellant asserts that Neb. Rev. Stat. 77-2704 (1)(h) (Reissue 1976) provides an exemption to such taxation. However it appears to me that this provision is directed to property which is ordered in Nebraska but actually shipped to and used in another state. Here, the packing materials and containers are used in this state prior to being shipped outside Nebraska. The use of the packing material and containers by appellant prior to being shipped out of state precludes the application of 77-2704 (1)(h) in this case.

Appellant further contends that its actions do not constitute a "storage" or "use" for tax purposes due to Neb. Rev. Stat. 77-2702 (17) (Reissue 1976). Appellant considers the language, "Neither storage nor use as defined in the subdivision shall include the keeping, retaining, or exercising of any right or power over tangible personal property for the purpose of subsequently transporting it outside the state. . ." to apply to its activities because the packing materials and containers are

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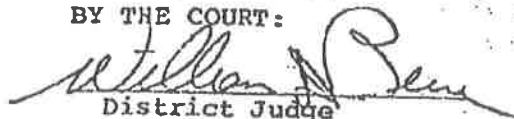
subsequently moved outside the state. However, this language cited by appellant clearly cannot apply when the appellant has used the property prior to shipment outside the state. Appellant is no longer "keeping, retaining, or exercising a right over the property", appellant is actually using the packing materials and containers in Nebraska in order to efficiently and safely ship its customers' goods. Therefore, it is the opinion of this court that the appellant's use of the packing materials and containers in Nebraska mandate that the court affirm the Finding and Order of the State Tax Commissioner.

Finally, appellant asserts that the Tax Commissioner was in error in failing to rule that the sale of a forklift engine by Industrial Irrigation Services, a company primarily engaged in the business of selling stationary engines used in irrigation systems, considered an occasional sale exempt from sales tax by Neb. Rev. Stat. 77-2702 (6) (Reissue 1976). Appellant has construed the statute too narrowly. The record indicates that Industrial Irrigation Services is in the business of selling engines and that they sold the appellant an irrigation engine sufficiently modified to fit into a forklift. The engine was part of Industrial Irrigation's inventory. It is the opinion of this court that the sale of the engine by Industrial Irrigation does not constitute an occasional sale under Nebraska law and therefore this court affirms the Findings and Order of the State Tax Commissioner.

Costs are taxed to appellant.

Dated this 16 day of July, 1981.

BY THE COURT:

  
District Judge