

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

FARMERS COOPERATIVE, a cooperative)
corporation organized under the laws of the)
State of Nebraska,)

CASE NO. CI 16-3038

Petitioner,)

vs.)

STATE OF NEBRASKA, NEBRASKA)
DEPARTMENT OF REVENUE, and TONY)
FULTON, TAX COMMISSIONER OF THE)
STATE OF NEBRASKA,)

ORDER

Respondents.)

INTRODUCTION

THIS MATTER came before the Court on July 21, 2017, on the appeal of Petitioner Farmers Cooperative (the “Cooperative”) from Respondents the Department of Revenue (“Department”) and Tax Commissioner’s decision denying a claim for refund of Nebraska use tax. Andrew C. Pease appeared on behalf of the Cooperative. L. Jay Bartel appeared on behalf of Respondents. A certified transcript¹ was filed with the Court on October 5, 2016. The Court heard arguments and took the matter under advisement. The Court, being fully advised in the premises, finds and orders as follows.

¹ All references to the certified transcript will be cited as “Tr. __,” followed by the corresponding page number.

FACTUAL AND PROCEDURAL BACKGROUND

The Cooperative is a cooperative corporation organized under the laws of the State of Nebraska, with its principle place of business located at 208 W. Deport, Dorchester, Nebraska 68343. The Cooperative is engaged in the business of buying and selling agricultural products and inputs, including the manufacture of fertilizers for retail sale to farmers. Pet. for Review ¶ 1.

On July 21, 2016, the Cooperative filed a Nebraska Sales and Use Tax Refund Claim Form 7, seeking a refund of use tax allegedly paid on the purchases of equipment for a dry fertilizer plant. Tr. 1-2. The Cooperative alleged the equipment qualified for exemption as manufacturing machinery and equipment under NEB. REV. STAT. § 77-2704.22. Tr. 2. The Cooperative's letter attached to the refund claim stated, "[t]he use tax was calculated on a total of \$1,204,569.90 which represen[ted] three checks written May 28, 2013 through October 23, 2013" for an equipment that was "installed in a Dry Fertilizer Plant located in Jansen, Nebraska and placed in service October 2013." Tr. 2. The total amount of claim for refund was \$66,251.35. Tr. 1.

The Cooperative's refund claim included an invoice from Waconia Manufacturing, Inc. ("Waconia") dated May 14, 2013, listing various items with a ship date of May 20, 2013. Tr. 5-12. The term of the invoice was "NET 15 days." Tr. 5. The invoice indicated a down payment previously paid by the Cooperative in the amount of \$200,507.10. Tr. 12. After deducting the down payment, the total amount of the invoice was \$572,285.25. Tr. 12. The Cooperative paid the total amount due by check dated May 28, 2013. Tr. 3.

The Cooperative also included a second invoice from Waconia dated May 31, 2013, listing various items with a ship date of May 30, 2013. Tr. 14-21. The term of the invoice was

“NET 15 days.” Tr. 14. The total amount of the invoice was \$632,284.65. Tr. 21. The Cooperative paid \$491,776.95 of the total amount due by check dated June 13, 2013. Tr. 13. On October 18, 2013, Waconia sent a statement to the Cooperative, reflecting the payment received in the amount of \$491,776.95 for Invoice 0057033 dated May 31, 2013, and the remaining “10% Holdback Due” in the amount of \$140,507.70. Tr. 4. The Cooperative paid the remaining balance by check on October 23, 2013. Tr. 22.

The Cooperative calculated and paid use tax based on the amounts invoiced in May 2013, which was \$1,204,569.90 (\$572,285.25 + \$632,284.65). Tr. 2. The use tax was included in the Cooperative’s Nebraska and Local Sales and Use Tax Return Form 10, for the October 2013 tax period, which was filed on November 19, 2013. Tr. 75, 84. On July 21, 2016, the Cooperative requested a refund of \$66,251.35 for use tax paid on the total purchase amount of \$1,204,569.90. Tr. 2.

On August 2, 2016, the Department denied the Cooperative’s refund claim as untimely, stating:

The Department has disapproved your refund claim. State law provides that a claim for refund must be filed within 3 years from the required filing date following the close of the period for which the overpayment was made. Your claim was filed on July 21, 2016. This means invoices dated prior to July 1, 2013 are past statute. The dates on the invoices provided are May 14, 2013 & May 31, 2013. Please refer to the enclosed Form 7 instructions for your appeal rights.

On August 30, 2016, the Cooperative filed a Petition for Review.

STANDARD OF REVIEW

This appeal is governed by the Administrative Procedure Act (“APA”). “Any final action of the Tax Commissioner may be appealed, and the appeal shall be in accordance with [APA].”

NEB. REV. STAT. § 77-27,127. A petition for review filed pursuant to APA are conducted by the

district court without a jury de novo on the record of the agency. NEB. REV. STAT. § 84-917(5)(a). In a review of de novo on the record, the district court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *Schwarting v. Neb. Liquor Control Comm'n*, 271 Neb. 346, 351 (2006). To the extent the interpretation of statutes and regulations is involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made below, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 1007 (2002). The district court may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings. NEB. REV. STAT. § 84-917(6)(b).

ANALYSIS

This matter arises from the Cooperative's claim for refund of use tax alleged to have been erroneously paid to the Department.

A sales tax is imposed "upon the gross receipts from all sales of tangible personal property sold at retail in this state." NEB. REV. STAT. § 77-2703(1) (Cum. Supp. 2016). A use tax is imposed "on the storage, use, or other consumption in this state of tangible personal property purchased, leased, or rented from any retailer . . . for storage, use, or other consumption in this state." NEB. REV. STAT. § 77-2703(2). "The general theory behind the sales and use taxes is to impose a tax on each item of property, unless specifically excluded, at some point in the chain of commerce." *Interstate Printing Co. v. Dep't of Revenue*, 236 Neb. 110, 119 (1990). "If the item is purchased in Nebraska, the sales tax applies." *Id.* If the item is purchased outside

Nebraska, the use tax applies.” *Id.* “Together, the sales and use taxes provide a uniform tax upon the sale, lease, rental, use, storage, distribution, or other consumption of all tangible personal property.” *Intralot, Inc. v. Neb. Dep’t of Revenue*, 276 Neb. 708, 713 (2008). As Waconia, the retailer selling items of tangible personal property to the Cooperative, is located in Minnesota, use tax applied to the transactions at issue.

In Nebraska, the sales and use tax is established under NEB. REV. STAT. § 77-2708.

Section (1)(a) provides:

The sales and use taxes imposed by the Nebraska Revenue Act of 1967 shall be due and payable to the Tax Commissioner monthly or before the twentieth day of the month next succeeding each monthly period unless otherwise provided pursuant to the Nebraska Revenue Act of 1967.

Section (1)(b)(i) further provides, in relevant part:

On or before the twentieth day of the month following each monthly period . . . , a return for such period, along with all taxes due, shall be filed with the Tax Commissioner in such form and content as the Tax Commissioner may prescribe and containing such information as the Tax Commissioner deems necessary for the proper administration of the Nebraska Revenue Act of 1967.

The limitations period for filing a claim for refund of sales or use tax is set forth in NEB. REV.

STAT. § 77-2708(2)(b), which provides, in relevant part:

No refund shall be allowed unless a claim therefor is filed with the Tax Commissioner by the person who made the overpayment . . . within three years **from the required filing date following the close of the period for which the overpayment was made** Failure to file a claim within the time prescribed in this subsection shall constitute a waiver of any demand against the state on account of overpayment.

(emphasis added).

The central issue raised by the Cooperative’s appeal is the interpretation of the limitations period in which a claim for refund of sales and use taxes may be filed. Specifically, the

Cooperative argues that “the period for which the overpayment was made,” in cases of erroneously paid taxes, should mean the actual month in which the tax payment was made, not when it was due.

“Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.” *Archer Daniels Midland Co. v. State*, 290 Neb. 780, 788 (2015). In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.* “If the language of the statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.” *Id.*

Under the plain language of the statute, the “period for which the overpayment was made” under Section (2)(b) refers to the period for which the tax payment should have been made as required by the statute, not the date the taxpayer actually made the payment. The statute requires payment of all sales and use taxes due when the tax return is due. NEB. REV. STAT. § 77-2708(1)(b)(i) (“[A] return for such period, along with all taxes due, shall be filed with the Tax Commissioner . . .”). As such, the limitations period in Section (2)(b) is established by the “required filing date” for the period for which use tax is due, not the date of the actual overpayment. The Court must “give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.” *State ex rel. Lanman v. Bd. of Cnty. Comm’rs*, 277 Neb. 492, 500 (2009). Reading Sections (1) and (2) together, the Court finds the Cooperative’s interpretation of the statute to be untenable. Such interpretation would not be in accordance with the filing requirements under Section (1)(a) and (1)(b)(i) and

would impermissibly read the language “from the required filing date following the close of the period” out of the statute.

The Cooperative argues that due to the manufacturing machinery and equipment exemption, there was no use tax due for the property purchased, and accordingly, there was no “required filing date” based on the May 2013 invoices under Section (2)(b).

The Cooperative’s argument fails for several reasons. First, the sole issue before the Court is whether the Department erred in denying the Cooperative’s refund claim as untimely under the statute. The Court will not assume that the property at issue qualified for exemption as manufacturing machinery and equipment. This issue has not been addressed by the Department. Second, “[e]very person **storing, using, or otherwise consuming** in this state property purchased from a retailer . . . [is] **liable for the use tax** . . . when his or her liability for the use tax becomes certain under the accounting basis used to maintain his or her books and records . . . [and such liability shall not extinguish] until the use tax has been paid to this state.” NEB. REV. STAT. § 77-2703(2)(a) (emphasis added). Under the Department’s regulations, “[a]ny property [sold] by any person for **delivery in Nebraska is presumed** to be sold . . . for **storage, use, distribution, or other consumption in Nebraska**, until the contrary proven.” 316 Neb. Admin. Code, ch. 1, § 002.02 (emphasis added). This means that the Cooperative’s use tax liability was triggered when the property was purchased and shipped to Nebraska in May 2013. After shipment, the property was either stored, used, or otherwise consumed in Nebraska in installing the equipment. Hence, the Cooperative was required to file tax returns and remit all use taxes due by the required filing date under the statute.

The Court must now address whether the Cooperative's claim for refund of use tax was filed within the limitations period under the statute.

Under NEB. REV. STAT. § 77-2708(1)(b)(iv):

A taxpayer who keeps his regular books and records on a cash basis, an accrual basis, or any generally recognized accounting basis which correctly reflects the operation of the business may file the sale and use tax returns required by the Nebraska Revenue Act of 1967 on the same accounting basis that is used for the regular book and records.

The "accrual basis" is "an accounting method that records entries of debits and credits when the revenue or liability arises, rather than when the income is received or an expense is paid."

Black's Law Dictionary (10th ed. 2014). The "cash basis" is "[a]n accounting method that considers only cash actually received as income and cash actually paid out as an expense."

Black's Law Dictionary (10th ed. 2014). "When a basis of accounting has been adopted for reporting sales tax, the retailer may not change that basis of accounting without prior permission from the Department of Revenue." 316 Neb. Admin. Code, ch. 1, § 009.01.

If the Cooperative was an accrual basis taxpayer, it would have been required to file and pay use tax when its liability for payment of the property arose. The date the liability arose here was the date of the invoices, not the final statement. The full amount of \$1,204,569.90 was invoiced to the Cooperative in May of 2013. The deadline to file a use tax return for tax arising in May of 2013 was June 20, 2013. Any refund claim for use tax based on these transactions was required to be filed within three years from June 20, 2013, or by June 20, 2016. The Cooperative's refund claim was not filed until July 21, 2016. Under the accrual basis of accounting, the Cooperative's refund claim was not filed within the three-year limitations period, and thus, was not entitled to any refund.


If the Cooperative was a cash basis taxpayer, it would have been required to file a use tax return by June 20, 2013, for the tax due on the payment of \$572,285.25 made on May 28, 2013. To be timely, the Cooperative was required to file any refund claim on this payment by June 20, 2016. On the payment of \$491,776.95 made on June 13, 2013, the Cooperative would have been required to file a use tax return by July 20, 2013. To be timely, the Cooperative was required to file any refund claim on this payment by July 20, 2016. The Cooperative's refund claim was not filed until July 21, 2016. Under the cash basis of accounting, the Cooperative's use tax refund claim on the payments of \$572,285.25 and \$491,776.95 was not filed within the three-year limitations period, and thus, was not entitled to any refund for those portions.

This then leaves the question of whether the Cooperative, if it was a cash basis taxpayer, could be entitled to a refund of use tax paid on the final payment of \$140,507.70 on October 23, 2013. The Department alleges the Cooperative is an accrual basis taxpayer. The record, however, is unclear which accounting method the Cooperative has adopted to use. The Department nonetheless argues that the Cooperative is not entitled to any refund under either accounting methods because there is no evidence that use tax was paid on the down payment of \$200,507.10. Thus, even assuming the Cooperative was a cash basis taxpayer, the Department would still need to determine whether the property at issue was eligible for exemption as manufacturing machinery and equipment, and whether use tax was paid on the down payment of \$200,507.10. Accordingly, the Court will remand the matter to the Department on this limited issue to determine whether the Cooperative was a cash basis taxpayer, and if so, whether the property at issue qualified for exemption as manufacturing machinery and equipment, without any outstanding use tax liability, thereby entitling the Cooperative to a refund.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the decision of the Nebraska Department of Revenue dated August 2, 2016, is hereby **AFFIRMED** in part and **REVERSED** and **REMANDED** in part in accordance with this opinion.

DATED this 19 day of October, 2017.

BY THE COURT:



Jodi L. Nelson
District Court Judge

cc: Thomas E. Jeffers, Attorney for Petitioner
tej@crosbylawfirm.com
Assistant Attorney General, L. Jay Bartel, Attorney for Respondents
jay.bartel@nebraska.gov