IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA EX REL., CLAIR CALLAN, Plaintiff, v. MINNESOTA CORN PROCESSORS, A Minnesota Corporation authorized to do business in the State of Nebraska, MARY JANE EGR, State Tax Commissioner, and DAVID HEINEMAN, State Treasurer, Defendants.	)	Case No. CI00-345 **ORDER**

INTRODUCTION

This is an action for declaratory and injunctive relief brought by Plaintiff Clair Callan against Defendants Minnesota Corn Processors, Inc. ["MCP"], Mary Jane Egr, State Tax Commissioner, and David Heineman, State Treasurer. Plaintiff's Petition seeks to present two issues. The first issue Plaintiff raises concerns the proper deposit of a payment made by MCP to the State of Nebraska subsequent to a district court decision determining that MCP improperly received refunds of motor vehicle fuel tax credits earned by MCP. Plaintiff asserts that the payment made by MCP, which totals more than five million dollars, should be deposited in the Ethanol Production Incentive Cash Fund, and not the Highway Trust Fund. The second issue Plaintiff raises concerns the transferability of motor vehicle fuel tax credits restored to MCP's importer account subsequent to the district court decision. Plaintiff asserts that no statutory or regulatory authority exists to authorize the transfer of MCP's motor vehicle fuel tax credits to other motor vehicle fuel importers.

Defendants have filed demurrers to the Petition. While the demurrers assert several grounds upon which the Petition is subject to demurrer, the Court finds that it is only necessary to address the failure of the Petition to state a cause of action with respect to either of the two issues Plaintiff seeks to raise. For the reasons discussed below, the Court finds that these claims fail to state a cause of action as a matter of law, and that, since the defects to the Petition cannot be cured by amendment, the Petition should be dismissed.

FACTUAL BACKGROUND

This action is the third in a series of cases brought by Plaintiff attacking various aspects of the ethanol tax credit program enacted by the Nebraska Legislature. In 1992, the Ethanol Authority and Development Act was adopted by the Legislature, and signed into law by the Governor. 1992 Neb. Laws, LB 754 (***codified at*** Neb. Rev. Stat. §§ 66-1301 to 66-1329 (Cum. Supp. 1992) [the "Act"]. The Act was later recodified at Neb. Rev. Stat. §§ 66-1330 to 66-1348 (Supp. 1993). Effective September 1, 1993, §§ 66-1326 and 66-1329 were recodified at §§ 66-1344 and 66-1347. 1993 Neb. Laws, LB 364. The Act, as amended, is presently codified at Neb. Rev. Stat. §§ 66-1330 and 66-1348 (1996 and Supp. 1999).

In order to fulfill the Act's goal "to encourage the processing, market development, promotion, distribution and research" on ethanol products (§ 66-1331), the Act provides a tax credit for ethanol producers of twenty cents per gallon of ethanol produced in Nebraska, which credit "shall be in the form of a nonrefundable, transferable motor vehicle

fuel tax credit certificate." Neb. Rev. Stat. § 66-1344(4) (Supp. 1999).[1] Producers are required to enter into a written agreement with the State Tax Commissioner and the Administrator of the Nebraska Ethanol Board to be eligible to receive credits under § 66-1344. Neb. Rev. Stat. § 66-1347 (1996).[2] The Ethanol Production Incentive Cash Fund (EPICF) was established as the source of funds for payment of the motor vehicle fuel tax credits provided under the Act. Neb. Rev. Stat. § 66-1345 (Supp. 1999).

In 1992, MCP entered into an Ethanol Production Credit Agreement with the State of Nebraska. (Petition, ¶ 6, and Exhibit 1). The Agreement was entered into by MCP, Todd Sneller, Administrator of the Nebraska Ethanol Board, and M. Berri Balka, State Tax Commissioner. Pursuant to the Agreement and the Act, MCP reported to Balka the gallons of ethanol it produced each month, and Balka issued to MCP the transferable motor vehicle fuel tax credits it earned each month. (Petition, ¶ 7).

As a licensed motor vehicle fuel importer, MCP also reported its motor vehicle fuel tax liability on a monthly basis. Between September 1, 1992, and December 31, 1993, MCP tendered the transferable motor vehicle fuel tax certificates it earned to the Nebraska Department of Revenue [the "Department"]. The motor vehicle fuel tax certificates tendered to the Department by MCP exceeded MCP's motor fuel tax liability. The excess was credited to MCP's importer account with the Department. (Petition, ¶s 7-9). MCP

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[1] The credit originally did not include the word "nonrefundable." Neb. Rev. Stat. § 66-1326(1) (Supp. 1993). Prior to its recent amendment in 1999 by LB 605, § 1, the credit was found at Neb Rev. Stat. § 66-1344(1) (1996).

[2] Section 66-1347 was repealed effective October 1, 1999. 1999 Neb. Laws, LB 605, § 8.

applied for a refund of the excess credits. Refunds were paid to MCP on warrants drawn on the Highway Trust Fund. During the calendar year 1993, MCP was paid refunds totaling $5,050,606.98. (Petition, ¶s 10-12). While the refunds received by MCP were paid out of the Highway Trust Fund, the EPICF reimbursed the Highway Trust Fund for the amount of the credits issued, less a certain percentage which decreased over a period of time between 1993 and 1997. Neb. Rev. Stat. § 66-1345 (2)(a) to (c) (Supp. 1999) and 66-4,142 (1996).

PRIOR LITIGATION

A. *Callan v. Balka* - (*Callan I*)

In 1993, Plaintiff brought an action seeking a declaration that §§ 66-1326 and 66-1329 of the Act (later codified at §§ 66-1344 and 66-1347) unconstitutionally permitted the extension of the State's credit to private entities in violation of Neb. Const. art. XIII, § 3. ***Callan v. Balka***, District Court of Lancaster County, Nebraska, Docket 497, Page 298. The district court affirmed a motion for summary judgment filed by defendant Balka, and upheld the constitutionality of the motor vehicle fuel tax credits under the Act. On appeal, the Supreme Court upheld the constitutionality of the transferable motor vehicle fuel tax credits provided under the Act, concluding the Act's operation did not result in an unconstitutional extension of the State's credit. ***Callan v. Balka***, 248 Neb. 469, 536 N.W.2d 47 (1995).[3]

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[3] Three members of the Court joined the opinion upholding the Act's constitutionality; four members expressed the view that the Act was unconstitutional. The Constitution, however, provides that "[n]o legislative act shall be held unconstitutional except by the concurrence of five judges." Neb. Const., art. V, § 2.

B. ***Callan v. Minnesota Corn Processors* - (*Callan II*)**

In 1997, Plaintiff brought an action against MCP, Balka, and the State Treasurer, seeking to challenge, inter alia, the refunds paid to MCP in the amount of $5,050,606.98 in 1993 based on the excess motor vehicle fuel tax credits earned by MCP. ***State ex rel. Callan v. Minnesota Corn Processors***, District Court of Lancaster County, Nebraska, Docket 551, Page 127. Plaintiff alleged that the payment of refunds to MCP of motor vehicle fuel tax credits which exceeded MCP's motor vehicle fuel tax liability, was an unconstitutional extension of the State's credit in violation of Neb. Const. art. XIII, § 3. The district court held that the refund payments to MCP were "an unconstitutional extension of the credit of the state to a private corporation," and ordered MCP to "repay to the State of Nebraska all refunds received by it. . . ." *Id.* at 13.

EVENTS SUBSEQUENT TO CALLAN II

MCP appealed the district court's decision in ***Callan II.*** While this appeal was pending, MCP voluntarily paid $5,050,606.98 to the State Treasurer on or about October 27, 1999. (Petition, ¶ 15). The appeal was later dismissed. The amount paid by MCP was initially deposited in the Highway Trust Fund, but was later transferred to the State General Fund. (Petition, ¶ 16). Following notification of MCP's repayment, the State Tax Commissioner approved the restoration of a credit balance in MCP's importer account, along with transfer of these credits from MCP's importer account to other fuel importers licensed in Nebraska. (Petition, ¶ 18-19). Plaintiff brought this action for declaratory and injunctive relief in February 2000.

ISSUES PRESENTED

Plaintiff's Petition seeks to raise two issues:

1. Whether the five million plus dollar payment by MCP to the State should be deposited in the Ethanol Production Incentive Cash Fund?

2. Whether any statutory or regulatory authority exists to permit MCP to transfer motor vehicle fuel tax credits from its importer account to other licensed importers in the State of Nebraska?

ANALYSIS

I.

STANDARD OF REVIEW IN RULING ON A DEMURRER

A defendant may demur to a petition when it appears on its face "that the petition does not state facts sufficient to constitute a cause of action." Neb. Rev. Stat. § 25-806(6) (1995). "[A] demurrer tests the substantive legal rights of the parties, based on facts and reasonable inferences therefrom, not conclusions." ***Matheson v. Stork***, 239 Neb. 547, 551, 477 N.W.2d 156 (1991). In considering a demurrer, a court must

> assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.

Becker v. Ravenna Bank, 237 Neb. 810, 812, 468 N.W.2d 88 (1991).

Judged by these standards, the Court concludes that the demurrers to Plaintiff's Petition must be sustained for failure to state a cause of action. Moreover, as the defects

to the Petition may not be cured by further amendment, the Plaintiff's Petition must be dismissed. Neb. Rev. Stat. § 25-854 (1995); ***Schmuecker Bros. Implement Co. v. Sobotka***, 217 Neb. 114, 348 N.W.2d 130 (1984).

A. The Plain Language of Neb. Rev. Stat. § 81-1121(7) (1994) Directs that the Five Million Plus Dollars Paid by MCP Must be Deposited in the Highway Trust Fund, Not the Ethanol Production Incentive Cash Fund.

Initially, Plaintiff seeks a declaration that the five million plus dollars paid by MCP to the State should be deposited in the Ethanol Production Incentive Cash Fund (EPICF). The Petition alleges that the five million plus dollar payment made by MCP to the State was made subsequent to a ruling by the District Court of Lancaster County directing MCP to repay this amount to the State because MCP had improperly received refund payments based on excess motor vehicle fuel tax credits. The Petition alleges that the refund disbursements to MCP were made from the Highway Trust Fund. (Petition, ¶s 10, 11, 12). The Petition further asserts that MCP paid this amount to the State Treasurer, and that the funds were initially deposited in the Highway Trust Fund. (Petition, ¶ 16). It is further alleged that the funds were later transferred to the General Fund. (Petition, ¶ 16). Plaintiff alleges that the payment by MCP should be deposited in the EPICF. (Petition, ¶ 17).

These factual allegations establish that Plaintiff is incorrect as a matter of law in asserting that the payment by MCP should be deposited in the EPICF. Plaintiff's assertion is contrary to Nebraska statute. Neb. Rev. Stat. § 81-1121(7) (1994) provides:

> Whenever it is ascertained that by mistake or otherwise the State of Nebraska or any of its departments, agencies, or officers shall have caused to be made a

> disbursement which for any reason is refunded to the state, the amount so disbursed and refunded to the state shall be credited to the fund and account from which the disbursement was made as an adjustment of expenditures and disbursements and not as a receipt. Such credited refund shall be considered part of the original appropriation to the department or agency and to the appropriate program and may be expended therefrom without further or additional appropriation. When a refund to the state or any of its departments or agencies is related to a transaction which occurred during a prior fiscal period, the refund shall be credited to the unappropriated surplus account of the fund from which the disbursement was originally made. (Emphasis added).

"In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning." ***Nelson v. City of Omaha***, 256 Neb. 303, 310, 589 N.W.2d 522, 527 (1999). The plain language of § 81-1121(7) establishes that the five million plus dollar payment by MCP to the State must be deposited in the Highway Trust Fund. The statute is broad and all-encompassing, and requires that "whenever it is ascertained by mistake or otherwise" that the State has "caused to be made a disbursement which for any reason is refunded to the state," then the amount disbursed and refunded "shall be credited to the fund and account from which the disbursement was made. . . ." Neb. Rev. Stat. § 81-1127(7) (1994) (emphasis added). This language is clear and unambiguous. It means that, if State funds are erroneously paid and later refunded, the repayment shall be credited to the fund from which the disbursement was originally made. Generally, in construing a statute, the word "shall" is considered mandatory and is inconsistent with the

idea of discretion. ***Shepherd v. Nebraska Equal Opportunity Comm'n***, 251 Neb. 517, 557 N.W.2d 684 (1997). By stating that the funds "shall" be paid to the fund from which the original disbursement was made, the Legislature clearly intended that this result is mandatory.

Plaintiff concedes that the fund from which the refunds to MCP were originally paid was the Highway Trust Fund. Because the Ethanol Production Incentive Cash Fund ["EPICF"] reimbursed the Highway Trust Fund, Plaintiff argues that § 81-1121(7) "has no application in the instant case." Brief of Plaintiff at 2. Plaintiff contends that the repayment by MCP must be placed in the EPICF, alleging a "conflict" exists between § 81-1121(7) and § 66-1345(2). The Court finds that Plaintiff's contentions are incorrect for several reasons.

First, Plaintiff's claim that the payment by MCP is not required to be placed in the Highway Trust Fund, the fund from which it is undisputed that the refunds paid to MCP were originally made, is directly contrary to the plain language of § 81-1121(7). Plaintiff argues that the repayment of the amounts disbursed from the Highway Trust Fund by the EPICF creates an "anomaly" or constitutes an "intervening act" which "renders § 81-1121(7) inapplicable." Brief of Plaintiff at 2. Plaintiff does not (and cannot) argue that the plain language of § 81-1121(7) does not dictate that the repayment by MCP must be placed in the Highway Trust Fund; rather, Plaintiff argues that such a result would "cause a double payment to the Highway Trust Fund" because when credits assigned by MCP to other motor vehicle fuel importers are paid out of the Highway Trust Fund, the EPICF would again be required to reimburse the Highway Trust Fund pursuant to § 66-1345(2).

The Court is not free to ignore the plain language of § 81-1121(7). Plaintiff in effect asks the Court to ignore the clear language of the statute, which requires that the payment by MCP must be placed in the fund from which disbursement was originally made, which is the Highway Trust Fund. There is nothing in the statute which limits its application in the manner urged by Plaintiff. It is irrelevant whether the disbursements made from the Highway Trust Fund were later reimbursed by funds transferred from the EPICF. The statute plainly mandates that MCP's payment must be deposited into the fund from "which the disbursement was made. . . ." § 81-1121(7). The statute provides no discretion, as it requires that the funds repaid by MCP "shall" be paid to the fund from which disbursement was originally made, which is, of course, the Highway Trust Fund. The Court declines to accept Plaintiff's invitation to rewrite the statute to provide an exception which does not exist in the plain language of the statute.

Second, Plaintiff mistakenly asserts that it is necessary for the payment by MCP to be placed in the EPICF to avoid a conflict between § 81-1127(7) and § 66-1345(2). In his prior order in ***Callan II***, Judge Burns determined that the EPICF improperly reimbursed the Highway Trust Fund for refund payments made to MCP, since the refunds did "not represent motor fuel taxes not collected." Docket 551, Page 127, Judgment at 11. While the payment of refunds to MCP was found to be improper, MCP still possesses transferable motor vehicle fuel tax credits for ethanol produced during 1992 and 1993. When these credits are transferred or assigned to motor vehicle fuel importers, these credits will be paid out of the Highway Trust Fund. If § 81-1121(7) is followed, and the five million plus dollars repaid by MCP is placed in the Highway Trust Fund, then the credits

will be paid by those funds placed in the Highway Trust Fund resulting from MCP's payment, and not "motor fuel tax that was not collected" under § 66-1345(2). So long as any part of the five million plus dollars repaid by MCP remains in the Highway Trust Fund, the reimbursement provisions of § 66-1345(2) are not triggered, and there will be no "double payment" to the Highway Trust Fund.

As § 66-1345(2) is not triggered to cause the EPICF to reimburse the Highway Trust Fund, it does appear, at first glance, that the credits acquired by motor vehicle fuel importers from MCP will be paid out of the Highway Trust Fund. It could be argued that this result is contrary to the directive that "the credits shall be funded through the Ethanol Production Incentive Cash Fund but shall not be funded through either the Highway Cash Fund or the Highway Trust Fund." § 66-1345(2).

In actuality, however, no improper payment occurs from the Highway Trust Fund. The underlying purpose behind the provision that credits cannot be paid out of the Highway Trust Fund is to insure that the Highway Trust Fund is not ultimately responsible for payment of the credits. The credits are, in the normal course, temporarily absorbed by the Highway Trust Fund, and the Highway Trust Fund is later reimbursed by a transfer of funds from the EPICF.

In the instant case, if the five million plus dollar payment by MCP is placed in the Highway Trust Fund (as is required by § 81-1121(7)), the statutory reimbursement mechanism in § 66-1345(2) will not be triggered, so the EPICF will not be required to make a "double payment" into the Highway Trust Fund. The Highway Trust Fund, however, will already have an excess of five million plus dollars resulting from deposit of the payment

by MCP. As the transferable credits are used to reduce the Highway Trust Fund up to the total amount of the credits repaid by MCP, the surplus in the Highway Trust Fund will be eliminated. When all five million plus dollars of credits have been taken to reduce this amount from the Highway Trust Fund, the Highway Trust Fund will be made whole. This is consistent with the statutory prohibition against the use of funds from the Highway Trust Fund to fund the credits provided in the Act, as, in effect, the credits will be funded by the payment by MCP, which § 81-1121(7) requires must be placed in the Highway Trust Fund.

In sum, the plain language of § 81-1121(7) mandates that the five million plus dollar payment by MCP must be deposited in the Highway Trust Fund. Also, contrary to Plaintiff's claim, there is no conflict between § 81-1121(7) and § 66-1345(2) which supports any contention that the payment must be placed in the EPICF. If the payment is placed in the Highway Trust Fund, as it must be, the credits transferred or assigned by MCP to other motor vehicle fuel importers will merely offset the amount paid by MCP, and will not reduce in any way the Highway Trust Fund. As there will be no basis for reimbursement of the Highway Trust Fund from the EPICF under these circumstances, there is no merit to Plaintiff's claim that the Court should ignore the plain language of § 81-1121(7) based on an alleged conflict between that provision and § 66-1345(2). As a matter of law, Plaintiff's claim that the payment by MCP should be deposited in the EPICF fails to state a cause of action, and must be dismissed.

B. Motor Vehicle Fuel Tax Credits Under the Nebraska Ethanol Development Act are Transferable Pursuant to Neb. Rev. Stat. § 66-1344

(Supp. 1999) and the Nebraska Supreme Court's Decision in *Callan v. Balka*, 248 Neb. 469 (1995).

Plaintiff further alleges that "no statutory or regulatory authority exists" for the transfer of motor vehicle fuel tax credits earned by MCP as an ethanol producer to motor vehicle fuel importers. Plaintiff seeks a declaration that the transfer of such credits by MCP to others is "void" and an order enjoining the State Tax Commissioner from allowing MCP to assign such credits.

This purported claim fails to state a cause of action because motor vehicle fuel tax credits earned by ethanol producers pursuant to an agreement entered into under the Ethanol Development Act are by statute expressly declared to be "transferable." Specifically, Neb. Rev. Stat. § 66-1344(4) (Supp. 1999) provides that the credits "shall be in the form of a nonrefundable, transferable motor vehicle fuel tax credit certificate." (Emphasis added).[4]

The plain language of the Ethanol Development Act clearly establishes that credits such as those earned by MCP are in the form of "transferable" motor vehicle fuel tax credit certificates. Thus, as a matter of law, the Petition fails to state a cause of action, as, by statute, such credits are "transferable." The Nebraska Supreme Court specifically upheld the constitutionality of these "transferable" motor vehicle fuel tax credits in ***Callan I***.

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[4] The credit originally did not include the word "nonrefundable." Neb. Rev. Stat. § 66-1326 (1) (Supp. 1993). Prior to its recent amendment in 1999 by LB 605, § 1, the credit provision was found at Neb. Rev. Stat. § 66-1344(1) (1996).

Plaintiff argues that, as the credits have been assigned to MCP's motor vehicle fuel importer account, no further transfer or assignment of the credits can be made to other motor vehicle fuel importers, who in turn can apply the credits to offset their motor vehicle fuel tax liability.[5] The statute, however, imposes no limitation on the assignment or transferability of these motor vehicle fuel tax credits.

Plaintiff's position is contrary to the general rule regarding the assignability of claims against the government, including tax claims, stated in 72 Am. Jur. 2d *State and Local Taxation* § 1975 (1974), which recognizes that

> contracts with the state . . . are, in the absence of statutory limitation or restriction, assignable. The assignability of tax claims is, of course, subject to any statutory limitation or restriction upon the assignment of claims against the government, such as a restriction upon assignment before ascertainment of the amount due and its allowance by proper administrative authorities. But in the absence of express statutory provision against assignment of claims against the government, the assignability of a claim for tax refund is sustained by the weight of authority. . . .
>
> (Emphasis added).

Consistent with this general rule, various courts have held that in the absence of an express statutory prohibition against the assignment of claims for tax refunds, such claims are assignable. ***E.g. Puget Sound Nat'l Bank v. Washington Dept. of Revenue***, 123 Wash. 2d 284, 868 P.2d 127 (1994); ***Slater Corp. v. South Carolina Tax Comm'n***, 280

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[5] Plaintiff refers to such importers as "oil jobbers."

S.C. 584, 314 S.E.2d 31 (Ct. App. 1984); ***People ex rel. Stone v. Nudelman***, 376 Ill. 535, 34 N.E.2d 851 (1940). As the Supreme Court of Washington noted, "all contracts are assignable unless such assignment is expressly prohibited by statute or is in contravention of public policy," and "[t]ax statutes are no exception." 123 Wash. 2d at 288, 868 P.2d at 130.

While these cases concerned the assignability of tax refund claims, the Court finds that same principle should be applied to Nebraska's statute providing for motor vehicle fuel tax credits. Section 66-1344 contains no language prohibiting the assignment of such credits; in fact, the statute expressly contemplates that such credits will be assigned by providing that the credits are "transferable." Absent any such prohibition against assignment, the general rule applies, and MCP is free to assign credits in its motor fuel importer account to other motor vehicle fuel importers.

Plaintiff incorrectly asserts that it is necessary for the Department to adopt a rule or regulation prescribing a tax form which specifically states that motor vehicle fuel tax credits are "assignable." Absent a statutory prohibition against the assignment of motor vehicle fuel tax credits, such credits are freely assignable. There obviously is no need for the Department to adopt a rule or regulation providing that motor vehicle fuel tax credits are assignable, as the absence of a statutory prohibition against assignment of the credits means that motor vehicle fuel tax credits may be assigned by MCP to other motor vehicle fuel importers. Plaintiff's position is based on the mistaken notion that there must be explicit statutory authorization for the transfer or assignment of the credits in MCP's motor fuel importer account to other motor fuel importers. In actuality, the proper question to be

addressed is whether there is any statutory prohibition against the assignment or transfer of MCP's credits to other motor vehicle fuel importers. There is no such statutory prohibition; in fact, the statute provides that the credits are "transferable," without imposing any restriction or limitation on assignment.

Plaintiff erroneously contends that it is inappropriate to apply the general rule recognizing that claims against the government, including tax claims, are assignable absent an express statutory prohibition against assignment, because motor vehicle fuel tax credits cannot be considered "claims against the government." In this regard, Plaintiff contends that characterizing the tax credits as "claims against the government" is contrary to the Court's decision in ***Callan I***, and would somehow render the credits unconstitutional under Neb. Const. art. XIII, § 3.

Plaintiff's argument is premised on a mistaken understanding of the nature of the prohibition against the extension of the credit of the state under art. XIII, § 3, and the decision in ***Callan I*** upholding the constitutionality of the transferable motor vehicle fuel tax credits provided under the Ethanol Development Act. Article XIII, § 3, provides, in part, that "[t]he credit of the state shall never be given or loaned in aid of any individual, association, or corporation,. . . ." In ***Callan I***, the Court noted that the "key question" in determining whether the transferable motor fuel tax credits provided under the Act violated art. XIII, § 3, turned on "whether the state acts as a debtor by extending the state's credit to private corporations, associations, or individuals." 248 Neb. at 479, 536 N.W.2d at 53. The transferable motor vehicle fuel tax credits provided under the Act were found not to violate art. XIII, § 3, because "the ethanol tax credit program does not place the state in the

position of a debtor or guarantor," as "[t]he state is in the position of a creditor excusing the payment of the motor fuel tax by the debtor. . . ." ***Id.*** at 480, 536 N.W.2d at 53. The Court noted that this was a characteristic common to "[m]any provisions of the Nebraska Revenue Act of 1967 . . ." which "allow taxpayers to decrease their tax liability by the use of various types of credit." ***Id.*** The Court noted that, "in none of these instances involving tax credits does the state guarantee payment or lend its credit to the transaction." ***Id.***

In ***Callan I***, the constitutionality of the transferable motor fuel tax credits was upheld against Plaintiff's claim that the credits violated art. XIII, § 3, because the Court recognized that the State was not in the position of a "debtor" with respect to the credits, but, rather, was in the position of a "creditor" as the credits were used to offset a tax liability that would otherwise be owed by the debtor, the party which would otherwise incur a liability for motor vehicle fuel tax absent application of the credits. It is also clear from the Supreme Court's discussion of the manner in which the credits are used that it recognized the credits were "assigned to an 'oil jobber' to reduce the oil jobber's motor fuel tax liability." 248 Neb. at 478, 536 N.W.2d at 52. Assignment of the credits by MCP to other motor vehicle fuel importers (or "oil jobbers") does not, as Plaintiff suggests, alter the State's relationship as a creditor with regard to the use of such credits. The credits are used by these motor vehicle fuel importers to reduce the amount of motor vehicle tax due the state, which is precisely the use of the credits which the Court upheld as constitutional in ***Callan I***.

Plaintiff improperly attempts to attach significance to the Defendants' position that the assignability of such credits should be governed by the general rule applied to claims against the government, including tax claims, which recognizes that such claims are freely

assignable absent a statute expressly prohibiting their assignment. Absent direct Nebraska authority regarding the assignability of the tax credits at issue, it is entirely appropriate for the Court to apply the generally recognized principle regarding the assignability of tax refunds or other claims to motor vehicle fuel tax credits created under the Act. In fact, this principle is merely a recognition of the broader principle that "all contracts are assignable unless such assignment is expressly prohibited by statute or is in contravention of public policy." ***Puget Sound Nat'l Bank v. Washington Dept. of Revenue***, 123 Wash. 2d 284, 288, 868 P.2d 127, 130 (1994). The motor fuel tax credits under the Ethanol Development Act provided by virtue of MCP's agreement with the State are clearly rights created by contract which are assignable, absent any statutory prohibition against their assignment. There is no such prohibition; in fact, the statute provides that the credits are "transferable," without imposing any restriction or limitation on assignment. Therefore, the Court concludes that Plaintiff's claim that MCP is prohibited from transferring or assigning credits fails as a matter of law, and that the Petition fails to state a cause of action.

CONCLUSION

In conclusion, the Court finds that the Defendants' demurrers should be, and the same hereby are, sustained. As the defects to the Petition cannot be cured by further amendment, the Plaintiff's Petition is dismissed. Costs are taxed against Plaintiff.

ENTERED this 21 day of June, 2000.

BY THE COURT:

Earl J. Witthoff
District Court Judge

pc: Joseph M. Casson, Attorney for Plaintiff
L. Jay Bartel, Attorney for State Defendants
Robert T. Grimit, Attorney for Defendant MCP

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