

**IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA**

**NORRIS PUBLIC POWER DIST.  
ET AL.**

**Plaintiffs,**

**vs.**

**DEPARTMENT OF REVENUE,  
MARY JANE EGR.**

**Defendants.**

**CI 05-4158**

**ORDER**

**THIS MATTER COMES** before the court on the plaintiffs' Complaint seeking a declaratory judgement and injunctive relief and the defendant's Motion to Dismiss under Rule 12b1 and 12b6. Evidence was produced and the matter was argued. The court has received briefs from all parties.

**BACKGROUND**

Plaintiff Norris Public Power District is a public corporation and political subdivision of the State of Nebraska, organized and created pursuant to NEB. REV. STAT. §§ 70-601 to 70-681 (2003 and Cum. Supp. 2004), and has its principal office in Beatrice, Nebraska. Plaintiff Seward County Public Power District is a public corporation and political subdivision of the State of Nebraska, organized and created pursuant to NEB. REV. STAT. §§ 70-601 to 70-681 (2003 and Cum. Supp. 2004), and

has its principal office in Seward, Nebraska. Collectively, the plaintiffs will be referred to as the Districts. The Districts are engaged in the business of the transmission and distribution of electric power at wholesale and retail to customers located in all or part of a five county area, including certain villages and cities where each sells electric power to customers at retail.

Defendant Nebraska Department of Revenue is a department of State government, established pursuant to NEB. REV. STAT. § 77-360 (2003). Defendant Mary Jane Egr is the duly acting and qualified Tax Commissioner of the State of Nebraska.

The Districts bill their customers for certain lease fees and gross revenue taxes, in some cases as part of their electric rate charge, and in some other cases as a separate line item on the bill. It is these lease fees and gross revenue tax charges the Districts contend are not gross receipts for tax purposes, and thus are not subject to sales tax.

The Districts ask that the court declare certain charges which are billed by the Districts to their electric customers are not part of "Gross Receipts" subject to Nebraska sales tax. They seek an injunction preventing the Tax Commissioner from declaring these charges to be part of Gross Receipts for tax purposes and enjoining the Tax Commissioner from issuing a deficiency assessment for unpaid sales taxes against the Districts.

The defendant has filed a motion to dismiss the Districts' complaint based on the lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

By agreement of the parties, the case proceeded to a permanent injunction

hearing on an accelerated schedule. The court also considers the defendant's motion to dismiss. The court will first consider the defendant's motion to dismiss the complaint.

### MOTION TO DISMISS

#### Subject Matter Jurisdiction; Rule 12b1

"Existence of an actual case or controversy is necessary for the exercise of judicial power, even though it is not a constitutional prerequisite for jurisdiction." *In re Estate of Reading*, 261 Neb. 897, 904, 626 N.W.2d 595 (2001). Furthermore, "[D]eclaratory judgment proceedings do not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." *Ryder Truck Rental v. Rollins*, 264 Neb. 250, 253, 518 N.W.2d 124 (1994).

To establish the existence of a case or controversy the plaintiffs must show that they are at risk of imminent harm for which there is no adequate remedy at law. Plaintiffs concede that "[n]o final action has been taken by the Tax Commissioner," as to whether the lease fees and gross revenue tax charges of the Districts will be assessed and no final determination has been made to issue an assessment based on the taxability of items encountered by auditors during their audit. Plaintiffs' Brief in Opposition to Motion to Dismiss, 18. The plaintiffs point to no other source of imminent harm. As the Nebraska Supreme Court observed in *US Ecology, Inc. v. Dep't of Environmental Quality*, 258 Neb. 10, 18, 601 N.W.2d 775 (1999), the threat of denial of an application is not enough to create a case or controversy. Continuing, the court noted that, "DEQ and DHHS had made no decision regarding the license application at

the time this action for declaratory relief was commenced." *Id.*

The Districts find themselves similarly situated. While it is possible that they may be liable for a sales tax on the lease fees and gross revenue tax, there has been no final decision made, no deficiency assessments levied and no fines imposed for late or non-payment. Thus, the issue is not yet ripe for adjudication.

#### **Failure to State a Claim; Rule 12b6**

The court also finds that the plaintiffs have failed to state a cause of action. Injunctions may only be granted when there is a clear lack of an adequate legal remedy. *Northwall v. State*, 263 Neb. 1, 7, 637 N.W. 2d, 890, 896 (2002). The Districts describe the harm that may befall them as follows: "... the accrual of penalties and interest for the unpaid taxes if their position that the taxes are void does not prevail, and unquestionably will incur unrecoverable expenses in defending against the imminent administrative action to be taken by Defendants in attempting to collect the void taxes at issue." Plaintiffs' Brief in Opposition to Motion to Dismiss, 4. The Districts have other available remedies for the claimed harms. Should a deficiency assessment be imposed, the Districts may petition for redetermination under § 77-2709(7), and judicial review of the Tax Commissioner's final action under §§ 77-27,127 and 77-27,128. Further, the loss of money has seldom been viewed as irreparable harm. Payment of the tax is not required during this appeal process and in the event that taxes are paid and later found to be invalid, the Districts are entitled to a refund with interest. Although securing a refund of taxes paid is less convenient for the Districts than an injunction, mere inconvenience and financial hardship are not adequate

grounds for the lack of a legal remedy. *Hughes v. United States*, 953 F.2d 531, 536 (9th Cir. 1992).

It is also noted that the plaintiffs' claimed harm is curious. The argument presented is properly restated that if the plaintiffs are wrong and they are not entitled to an injunction (the tax is valid), then they are harmed by having to pay interest and penalties (presuming they do not pay the tax and seek a refund). The Districts point to no harm if they are correct that the tax is void other than the inconvenience of the administrative process.

#### **Jurisdiction under NEB. REV. STAT. §84-911**

Plaintiffs argument that this court has jurisdiction under NEB. REV. STAT. §84-911 (1999) is also without merit. That statute provides jurisdiction in the district court for the challenge of any rule or regulation of an agency which would infringe on the legal rights of the petitioner.

The Nebraska Supreme court has recognized a waiver of the State's immunity under § 84-911, for an action for a declaratory judgment as to the validity of rules or regulations of a state agency. *Logan v. Dep't of Correctional Services* 254 Neb. 646, 578 N.W.2d 44 (1998). However, the Districts have not pointed the court to a particular regulation of the Department of Revenue which they claim interferes with, or impairs, their rights. Rather, the plaintiffs appear to challenge the agency's interpretation of the statute authorizing the collection of taxes. Consequently, an abrogation of immunity under §84-911 does not confer jurisdiction on the court in this case.

#### **Anti-injunction Statute**

The defendant also asserts that the plaintiffs' suit is barred by the Anti-Injunction provisions of the Nebraska Revenue Act of 1967. This act states:

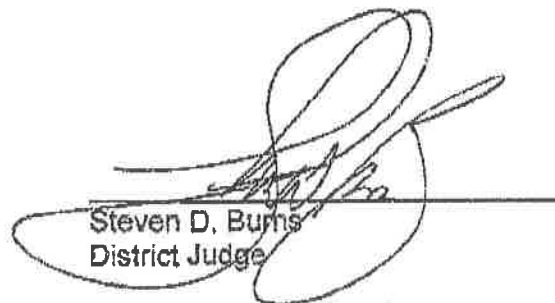
"Any final action of the Tax Commissioner may be appealed, and the appeal shall be in accordance with the Administrative Procedure Act. The appeal provided by this section shall be the exclusive remedy available to any taxpayer, and no other legal or equitable proceedings shall issue to prevent or enjoin the assessment or collection of any tax imposed under the Nebraska Revenue Act of 1967."

NEB. REV. STAT. §§ 77-27,127 (Supp. 2005).

Based on the foregoing discussion, it is not necessary for the court to consider whether the Legislature may prohibit or limit the court's exercise of its equitable powers.

**IT IS THEREFORE HEREBY ORDERED AND ADJUDGED** that the plaintiffs' complaint for Declaratory Judgement and injunctive relief is **DENIED** and defendants' motion to dismiss is **GRANTED**. This case is dismissed at the plaintiffs' cost.

Dated: December 21, 2005

  
Steven D. Burns  
District Judge