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V. CONCLUSION

We affirm the district court's order to the extent it found that the Wolfs' daycare violated the "no business activities" covenant and to the extent it granted summary judgment on the defenses of estoppel, laches, and unclean hands. But as to the Wolfs' affirmative defense of waiver, we reverse the district court's grant of summary judgment and remand the cause with directions to conduct further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MCCORMACK, J., not participating.

BRIDGEPORT ETHANOL, LLC, APPELLANT, V. NEBRASKA DEPARTMENT OF REVENUE, A NEBRASKA ADMINISTRATIVE AGENCY, AND DOUGLAS EWALD, IN HIS CAPACITY AS THE STATE TAX COMMISSIONER FOR THE STATE OF NEBRASKA, APPELLEES.

818 N.W.2d 600

Filed August 10, 2012. No. S-11-916.

1. **Administrative Law: Judgments: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record.
2. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Statutes: Appeal and Error.** 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.
4. **Statutes: Legislature: Intent: Appeal and Error.** In discerning the meaning of a statute, an appellate 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.
5. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
6. **Sales: Taxation: Words and Phrases.** The definition of manufacturing machinery and equipment limits the exemption from sales tax for the purchase of such machinery and equipment to items purchased by a person engaged in the business of manufacturing for use in manufacturing.

7. **Statutes: Taxation.** Tax exemption provisions are strictly construed, and their operation will not be extended by construction.
8. ____: ____. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
9. **Statutes: Legislature: Intent.** In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.
10. **Taxation: Proof.** The burden of establishing a tax exemption is placed upon the party claiming the exemption.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

William E. Peters, of Peters & Chunka, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

INTRODUCTION

After the claimant's attempt to obtain a refund of sales tax on building materials used in the construction of an ethanol production plant was administratively denied in part, the claimant sought judicial review. This appeal turns on a statutory limitation of the exemption for manufacturing machinery and equipment and the limited statutory authority for appointment of a purchasing agent. Because the statute limits the exemption to purchases by the manufacturer and because a contractual provision purporting to entitle the manufacturer to all tax credits for taxes paid by a construction contractor was not effective as a purchasing agent appointment, we affirm.

BACKGROUND

The Nebraska Revenue Act of 1967[1] exempts from sales tax the gross receipts from the sale, lease, or rental of

[1] Neb. Rev. Stat. §§ 77-2701 to 77-27,135.01 and 77-27,228 to 77-27,236 (Reissue 2003 & Cum. Supp. 2008).

manufacturing machinery and equipment.[2] The definition of "[m]anufacturing machinery and equipment"[3] includes a number of categories of machinery or equipment but limits the definition to such items that are "purchased, leased, or rented by a person engaged in the business of manufacturing for use in manufacturing."[4]

In June 2007, Bridgeport Ethanol, LLC (Bridgeport), entered into a contract with ICM, Inc., for the design and construction of a dry mill fuel-grade ethanol plant located near Bridgeport, Nebraska. The contract set the total price for completion of the work at $67,450,000. The contract obligated ICM to furnish such items as materials, equipment, labor, and tools. The contract also contained a provision stating that the contract price included all sales and use taxes, that Bridgeport "for all purposes has paid for such taxes," and that Bridgeport was entitled to all tax credits for the payment of such taxes from any state agency. The sales and use taxes applicable to the project were estimated to be $2,100,000. Under the contract, ICM was obligated to keep all receipts and to account for all taxes it paid and Bridgeport would then use those receipts and the accounting to obtain the tax credits.

As applicable to the facts of this case, a contractor is defined as a person who annexes building materials to real estate.[5] A contractor can elect to be taxed as a retailer or as the consumer of building materials annexed to real estate.[6] A contractor's election status is described by one of three "option" numbers, depending upon which statutory subsection the contractor has elected. For example, an "Option 1" contractor is taxed as a retailer and is not considered the final consumer of building materials annexed to real estate.[7] On the other hand, "Option 2" and "Option 3" contractors

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[2] § 77-2704.22.

[3] § 77-2701.47(1).

[4] *Id.*

[5] See § 77-2701.10.

[6] *Id.*

[7] See, § 77-2701.10(1); 316 Neb. Admin. Code, ch. 1, § 017.05 (2009).

are taxed as the consumers of building materials annexed to real estate.[8]

ICM elected to be an Option 3 contractor. As such, ICM maintained a tax-free inventory of building materials that were intended to be annexed to real estate and agreed to remit the use tax when the materials were withdrawn from ICM's inventory.[9] As an Option 3 contractor, ICM agreed to pay sales tax on all tools and materials consumed in the completion of its projects that were not annexed to real estate,[10] including projects performed for an exempt entity. The bill of exceptions contains records of numerous purchases by ICM, as well as the sales and use taxes ICM paid, in performing its work under the contract.

In September 2010, Bridgeport filed a claim for overpayment of sales and use tax. Specifically, the claim requested reimbursement for sales tax paid on manufacturing equipment for the claim period "[b]eginning 12/01, 2006 and [e]nding 02/28, 2009." The claim set forth an overpayment of $1,602,182.34 in state and local sales and use taxes. Of that amount, $1,570,294.22 was based on sales and use taxes paid by ICM and $31,888.12 represented the sales and use taxes paid by Bridgeport.

In March 2011, the Nebraska Department of Revenue and Douglas Ewald in his capacity as the State Tax Commissioner (collectively the Department) partially approved Bridgeport's refund claim. The Department approved an overpayment of $6,324.84 of sales tax for Bridgeport's direct purchases of software and equipment used in the manufacturing process. But the Department disapproved $1,570,294.22 of the claim, representing sales and use taxes paid by ICM on building materials and equipment. The Department noted that ICM, not Bridgeport, was the purchaser of the building materials and that under § 77-2708(2)(a), the erroneously collected tax could

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[8] See, § 77-2701.10(2) and (3); 316 Neb. Admin. Code, ch. 1, §§ 017.06 and 017.07 (2009).

[9] See § 77-2701.10(3).

[10] See § 77-2701.10.

be refunded only to the purchaser. And under §§ 77-2701.47 and 77-2704.22, the exemption for manufacturing machinery and equipment is limited to purchases made directly by a manufacturer. Thus, the Department concluded that the sales and use taxes paid by ICM on building materials were not eligible for a refund.

Bridgeport sought judicial review in the district court, which affirmed the decision of the Department. The court observed that there was no statutory authority allowing Bridgeport to claim ICM acted as its purchasing agent. The court agreed with the Department that Bridgeport was not the purchaser of building materials and manufacturing machinery and equipment purchased and annexed at the plant and was not eligible to claim the manufacturing machinery and equipment exemption.

Bridgeport timely appealed to the Nebraska Court of Appeals, and we moved the case to our docket.[11]

ASSIGNMENTS OF ERROR

Bridgeport assigns, restated and consolidated, that the district court erred in (1) determining that Bridgeport was not the purchaser of the manufacturing machinery and equipment and was not entitled to the exemption granted by § 77-2704.22, (2) finding that the tax provision of the contract with ICM was not effective as a purchasing agent appointment and that there must be statutory authority before such an appointment may be used under the sales tax statutes, and (3) finding that Bridgeport was not entitled to an exemption on "personal property" in the nature of manufacturing machinery and equipment or parts purchased by ICM.

STANDARD OF REVIEW

[1] In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record.[12]

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[11] See Neb. Rev. Stat. § 24-1106 (Reissue 2008).

[12] *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012).

[2] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[13]

ANALYSIS

[3-5] Resolution of Bridgeport's assignments of error entails statutory interpretation. Thus, we begin by recalling basic principles of statutory interpretation. 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.[14] In discerning the meaning of a statute, we 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.[15] If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.[16]

Manufacturing Machinery and Equipment Exemption.

[6] The Legislature has provided an exemption from sales tax for the purchase of manufacturing machinery and equipment.[17] But the definition of manufacturing machinery and equipment limits the exemption to such items purchased by "a person engaged in the business of manufacturing for use in manufacturing."[18] There does not appear to be any dispute that Bridgeport was engaged in the business of manufacturing, while ICM was not. But ICM, and not Bridgeport, made the purchases of the machinery and equipment.

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[13] *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012).

[14] *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011).

[15] See *Concrete Indus. v. Nebraska Dept. of Rev.*, 277 Neb. 897, 766 N.W.2d 103 (2009).

[16] *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

[17] § 77-2704.22.

[18] § 77-2701.47(1).

[7,8] We are mindful that tax exemption provisions are strictly construed, and their operation will not be extended by construction.[19] Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.[20]

Under the plain language of the statutes, Bridgeport is not entitled to the exemption, because it was not the purchaser of the manufacturing machinery and equipment. Bridgeport tries to circumvent this issue by characterizing its payment of $67,450,000 for a design-built ethanol plant as a purchase of manufacturing machinery and equipment entitling Bridgeport to the exemption. But ICM purchased the component parts to build the plant and paid the applicable sales and use taxes on such purchases. Bridgeport cannot obtain a refund of taxes that it never paid.[21]

Bridgeport cites to our opinion in *Concrete Indus. v. Nebraska Dept. of Rev.*,[22] but that case does not support Bridgeport's position. In *Concrete Indus.*, a manufacturer purchased parts that it used to build its own manufacturing machinery and equipment and filed a claim for overpayment of sales and use tax. The Department denied the manufacturer's claim, and the district court determined that parts purchased by the manufacturer were not machinery or equipment within the meaning of the statutes. This court determined that the purchase was exempt from sales tax. We reasoned that it would make little sense to exempt from sales and use tax machinery that is already assembled and each part of that machinery if it was purchased to replace an original part, but to impose a tax on the purchase of the same parts when they are purchased to assemble the machinery in the first place. Significantly, and unlike the situation in the instant case, the manufacturer made the purchase of the component parts.

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[19] See *Concrete Indus. v. Nebraska Dept. of Rev., supra* note 15.

[20] *Id.*

[21] See § 77-2708.

[22] *Concrete Indus. v. Nebraska Dept. of Rev., supra* note 15.

[9] ICM's election to be an Option 3 contractor had important consequences under the sales and use tax statutes and regulations. "Contractors may choose how they want to treat building materials for tax purposes."[23] An Option 3 contractor "must pay use tax on all manufacturing machinery and equipment and any related repair or replacement parts [it] purchase[s] and annex[es] for a customer."[24] Such contractor has to pay use tax on manufacturing machinery and equipment even if the contractor had a purchasing agency appointment from a manufacturer.[25] As earlier mentioned, an Option 3 contractor is taxed as the consumer of building materials annexed to real estate and remits tax on building materials when withdrawn from inventory for the purpose of being annexed to real estate.[26] And because property that will be attached to real estate or an improvement to real estate constitutes building materials,[27] any manufacturing machinery and equipment annexed to real estate are building materials. Bridgeport quotes legislative history regarding the exemption and argues that the exemption is not affected by the classification of a contractor. But in order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.[28] Seeing no ambiguity, we need not resort to legislative history.

We reject Bridgeport's argument that the Department's regulation effectively repeals the manufacturing machinery and equipment exemption. Bridgeport contends that the regulation requiring Option 3 contractors to pay use tax on manufacturing machinery and equipment that the contractor purchases and annexes for a customer[29] had the effect of voiding the

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[23] 316 Neb. Admin. Code, ch. 1, § 017.03 (2009).

[24] 316 Neb. Admin. Code, ch. 1, § 017.07F(1) (2009).

[25] *Id.*, § 017.07F(1)(a).

[26] See § 77-2701.10(3).

[27] § 77-2701.44.

[28] *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007).

[29] See 316 Neb. Admin. Code, ch. 1, § 017.07F(1).

manufacturing machinery and equipment exemption. But, based on the definition of manufacturing machinery and equipment,[30] in order to obtain the exemption under § 77-2704.22, the purchases of manufacturing machinery and equipment must be made by a person engaged in manufacturing for use in manufacturing. An Option 3 contractor who makes qualifying purchases but is not engaged in manufacturing will not be entitled to the exemption. On the other hand, manufacturers who make the purchases are entitled to the exemption. So, too, are manufacturers who buy qualifying manufacturing machinery and equipment from an Option 1 contractor. This is because an Option 1 contractor is considered a retailer and does not collect sales tax on qualifying manufacturing machinery and equipment sold to a manufacturer, regardless of whether the equipment remains tangible personal property or is annexed.[31] On the other hand, an Option 3 contractor is considered a consumer of annexed materials[32] but is a retailer for sales of building materials or other property that is not annexed and must collect sales tax on the amount charged.[33] We conclude that the district court correctly determined that Bridgeport was not entitled to the exemption based upon purchases of building materials, including manufacturing machinery and equipment, made by ICM.

Purchasing Agent Appointment.

The provision in the contract concerning taxes did not constitute an appointment of a purchasing agent. Bridgeport claims that for sales tax purposes, the contractual provision had the effect of making Bridgeport the purchaser of materials.

Nebraska statutes specifically authorize the appointment of purchasing agents by certain entities. Such agents may be appointed by certain nonprofit religious, service for the blind or developmentally disabled, educational, medical, child-caring, or child placement organizations "for the purpose of

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[30] § 77-2701.47(1).

[31] See 316 Neb. Admin. Code, ch. 1, § 017.05F(1) (2009).

[32] § 77-2701.10(1) and (3).

[33] 316 Neb. Admin. Code, ch. 1, § 017.07D(1) (2009).

altering the status of the construction contractor as the ultimate consumer of building materials which are physically annexed to the structure and which subsequently belong to the owner of the organization or institution."[34] The appointment of purchasing agents by the state or certain governmental units is similarly authorized for the same purpose.[35]

But there is no statutory authority for the appointment of a purchasing agent under the facts of this case. Our conclusion is supported by *A & D Tech. Supply Co. v. Nebraska Dept. of Revenue*.[36] In that case, we stated that because the Legislature set forth the circumstances under which an agent of a tax-exempt organization could assume the benefit of tax-exempt status, the Legislature intended to exclude the possibility that an agent of a tax-exempt organization could assume the benefit of tax-exempt status under other circumstances. We further reasoned:

> Were we to conclude that the existence of an agency relationship generally allows the agent to assume the tax-exempt status of the principal, then the statutes providing for such an assumption of status would be an unnecessary redundancy. Instead, basic principles of statutory interpretation require us to interpret §§ 77-2704.12(3) and 77-2704.15(2) as delimiting the circumstances under which the agent of a tax-exempt organization may assume the tax-exempt status of the principal.[37]

We think similar reasoning applies here. If Bridgeport could alter the parties' statuses by including a provision in the contract, the statutes specifically authorizing a purchasing agent appointment in only a few circumstances would be unnecessary. Further, we find no authority for such an appointment under a tax incentive program.[38]

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[34] § 77-2704.12(3).

[35] § 77-2704.15(2).

[36] *A & D Tech. Supply Co. v. Nebraska Dept. of Revenue*, 259 Neb. 24, 607 N.W.2d 857 (2000).

[37] *Id.* at 31, 607 N.W.2d at 863-64.

[38] See Neb. Rev. Stat. §§ 77-27,187.02(4) and 77-5723(5) (Cum. Supp. 2008) and 77-4104(4) (Reissue 2009).

Personal Property.

Finally, Bridgeport claims that it was error to "consider all personal property involved in the building of the manufacturing plant as real estate."[39] Bridgeport points to a statute defining tangible personal property,[40] which statute is found outside of the Nebraska Revenue Act of 1967. The Nebraska Revenue Act of 1967, on the other hand, sets forth a different definition of tangible personal property.[41]

[10] But these definitions ultimately have no effect upon the issues in this case because there is simply no evidence that ICM sold personal property to Bridgeport or that ICM collected sales tax from Bridgeport. The burden of establishing a tax exemption is placed upon the party claiming the exemption.[42] Because ICM was the purchaser and consumer of the property annexed to real estate, Bridgeport failed to establish entitlement to the exemption from sales tax for purchases of manufacturing machinery and equipment.

CONCLUSION

We conclude that under the plain language of the statutes, Bridgeport was not entitled to the exemption from sales tax based upon ICM's purchases of manufacturing machinery and equipment. Because the statutes specifically allow for the appointment of purchasing agents in certain circumstances not present here, we conclude that the provision in the contract purporting to entitle Bridgeport to all tax credits for taxes paid by ICM was not effective as a purchasing agent appointment. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

STEPHAN, J., participating on briefs.

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[39] Brief for appellant at 19.

[40] See Neb. Rev. Stat. § 77-105 (Cum. Supp. 2008).

[41] § 77-2701.39.

[42] See *Concrete Indus. v. Nebraska Dept. of Rev.*, *supra* note 15.