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FILED

No. A-08-1632

STATE OF MINNESOTA
IN SUPREME COURT

McLane Minnesota, Inc.,

Relator,

vs.

Commissioner Of Revenue,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REHEARING

THOMAS R. MUCK
Atty. Reg. No. 075851
MASHA M. YEVZELMAN
Atty. Reg. No. 387887

FREDRIKSON & BYRON, PA
Suite 4000
200 South Sixth Street
Minneapolis, MN 55402-1425
(612) 492-7000

ATTORNEYS FOR RELATOR

LORI SWANSON
Attorney General
State of Minnesota

RITA COYLE DEMEULES
Assistant Attorney General
Atty. Reg. No. 0191644
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 296-0692

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Respondent Commissioner of Revenue ("Commissioner") submits this answer in opposition to the Petition for Rehearing of Relator McLane Minnesota, Inc. ("McLane").

INTRODUCTION

McLane asks the Court to reconsider its decision upholding the Commissioner's Order denying McLane's refund claim brought under Minnesota's Tobacco Tax and rejecting McLane's constitutional challenge to that tax; or, to revise its opinion to address alleged factual misstatements that McLane perceives as the flaws that led the Court to uphold the Tax Court's thorough opinion. McLane claims: (a) that the Court misstated a material fact when it assumed that McLane was the "one and only" tax-liable distributor; and (b) that the Court's misstatement of a material fact affected its analysis of McLane's Commerce Clause challenge to Minnesota's tobacco tax. Neither of these claims justify further review. Consequently, the petition should be denied.

GROUNDS FOR REHEARING

The grounds for a rehearing before this Court are extremely narrow. In general, rehearing will be granted only where this Court has overlooked, failed to consider, misapplied, or misconceived: (a) a controlling statute, decision or principle of law; (b) a material fact; or (c) a material question in the case. *See* Minn. R. Civ. App. 140.01. The standards embody principles—first articulated by the Court many years ago—that there be a mechanism to correct "some manifest errors of fact," or address instances in which the record shows a "strong reason to believe that the Court has erred in its decision."

Derby v. Gallup, 5 Minn. 119 (Gil. 85, 104-05) (1860). Rehearing, then, is not afforded simply to allow a disgruntled party to reargue points previously presented to the Court.

As discussed below, McLane's petition fails to demonstrate any manifest error in the Court's decision. Neither further consideration nor revision is warranted.

REASONS FOR DECLINING REHEARING

I. MCLANE CONCEDED THAT IT WAS THE TAX-LIABLE DISTRIBUTOR FOR THE TRANSACTIONS AT ISSUE. THE POSSIBILITY OF OTHER TAX-LIABLE DISTRIBUTORS IN TRANSACTIONS THAT ARE NOT AT ISSUE IS IRRELEVANT.

McLane argues that reconsideration is required because the Court misstated a material fact when it referred to McLane as "the tax-liable distributor." Pet. at 2. McLane construes that phrase "in the sense that [McLane] is the one and only tax-liable distributor," a construction that McLane rejects. *Id.*

McLane conceded below and before this Court that it was the tax-liable distributor for the transactions at issue. The light in which McLane now perceives its concession does not demonstrate a manifest error, for several reasons.

First, it "was undisputed below that McLane was the tax liable distributor" because McLane was the entity that brings or causes tobacco products to be brought into Minnesota. *See* Comm'r Br. at 16 (Minn. Sup. Ct., filed Nov. 17, 2008). The Commissioner cited to the testimony of McLane's witness to demonstrate this concession. *See Id.* ("Q: You would agree that McLane is the taxpayer for the tobacco products that it distributes in the state of Minnesota? A: Yes.") (R.A.76). In response, McLane conceded that it was "not asserting that it is not the tax-liable distributor."

McLane Reply Br. at 13 (Minn. Sup. Ct., filed Dec. 1, 2008). Thus, regardless of how McLane now perceives "the tax-liable distributor," the Court used this phrase consistently with McLane's concession.

Further, the context of the Court's reference to McLane as "the tax-liable distributor" confirms that it was a reference to the transactions for which McLane was assessed tax liability. The Court specifically referred to McLane as the "tax-liable distributor *for the purposes of the sales at issue*." Slip Op. at 10 (emphasis added). McLane did not raise any concern about the possibility that it could be viewed as the "one and only" tax-liable distributor for those transactions. Even assuming McLane's "one and only" construction is plausible for the more broadly stated "the tax liable distributor," no reconsideration or revision is required to address a newly-realized construction argument. Nor is it relevant that McLane believes other distributors "may also owe" tax on McLane's purchases. This new theory is squarely foreclosed by McLane's concessions. In addition, McLane did not offer a statutory construction theory suggesting that more than one distributor was the tax-liable entity in the transactions at issue. Thus, the Court would have had no reason to identify merely "a tax-liable distributor," particularly given that McLane had already conceded that it was "the tax-liable distributor."

The Court's designation of McLane as "the tax-liable distributor" is entirely correct. Further, that phrase is consistent with the statutory language, which imposes tax on the tax-liable distributor, "not just any distributor." Slip. Op. at 10. Reconsideration is therefore unnecessary.

Indeed, had McLane believed it important to distinguish between "a tax-liable distributor" and "the tax-liable distributor" (or "the one and only" tax-liable distributor), it certainly knew how to do so from past experience. *See, e.g., McLane Company, Inc. v. Washington State Dep't of Revenue*, 19 P.3d 1119, 1120-1122 (Wash. Ct. App. 2001) (addressing McLane's arguments on construction of "brings or causes to be brought" and describing different transactions in which a distributor other than McLane could be the tax-liable distributor). With its substantial experience in challenging the language of other states' tobacco tax statutes, McLane certainly could have clarified that its statutory construction theory encompassed multiple tax-liable distributors in any given transaction.

Second, McLane argues that it "did not intend to concede that it was the only distributor whose purchase price could be used to set the tax base." McLane Pet. at 3, n.8. This issue, however, was the focus of the Court's attention, *see* Slip Op. at 7 ("McLane contends the wholesale sales price is the price that Manufacturing charged Sales for its products."). The Court resolved that issue against McLane based on a thorough analysis of the relevant statutory language. *See* Slip Op. at 10 ("We reject this interpretation because it utilizes different meanings for the term "distributor" within related statutes."). Reconsideration is certainly not granted to address the same issue or legal conclusion expressly resolved by the Court's decision. Nor would revision to adopt McLane's preferred language ("a tax-liable distributor") change the analysis since the Court has already acknowledged that McLane's view of Sales' role in McLane's transactions impermissibly "utilizes different meanings for the term "distributor" within related statutes." *Id.*

The possibility that Sales may sometimes be a tax-liable distributor is equally irrelevant to the Court's designation of McLane as "the tax-liable distributor." The transactions generally described in Mr. Tamaro's Affidavit, on which McLane relies, *see* McLane Pet. at 3, n.8, do not involve McLane. The record below established that Sales is the tax-liable distributor when McLane is not a party to the transactions. *See* Comm'r Resp. Br. at 33, n.12 (explaining tax on "incidental sample distributions" that do not include a re-sell of products to McLane for further distribution). More importantly, Sales' sample transactions were not part of the Commissioner's Order and therefore were not at issue. *See, e.g., McLane Company, Inc.*, 19 P.3d at 1122 (noting that transactions in which distributor brought sample products into state for distribution, "not to sell to in-state distributors," not relevant to McLane's tax liability).

McLane conceded that it was the tax-liable distributor. There is no language in the Court's opinion designating McLane as the "one and only" tax-liable distributor. McLane's recent revelation that its concession could be construed with this meaning does not justify reconsideration or revision.

II. THE COURT PROPERLY RECITED THE FACTS IN REJECTING MCLANE'S CONSTITUTIONAL CHALLENGE TO THE TOBACCO TAX.

Next, McLane challenges the Court's recitation of the facts in the Court's analysis of McLane's Commerce Clause challenge. McLane admits that the Court correctly stated the facts at pages 4-5 of the Opinion, but challenges a single statement on page 21 of the opinion. There, the Court addressed McLane's argument that Minnesota's statutory

scheme encourages Sales to move to Minnesota and become the "in-state tax-liable distributor." The Court rejected McLane's argument, noting that Sales is already a licensed Minnesota distributor, but as it found earlier, is "currently not the tax-liable distributor because it does not bring tobacco products into Minnesota for sale." Slip Op. at 21.

Reconsideration is unnecessary because McLane admits that the Court correctly stated the facts when it explained the transactions from Manufacturing to Sales to McLane in Minnesota. *See* McLane Pet. at 4. Nor is rehearing or revision necessary to confirm that Sales can be a tax-liable distributor because, as explained *supra* at 5, those transactions are not at issue here. Further, the Court has already implicitly acknowledged that there can be more than one distributor in any given transaction, but the statute "necessarily refers to the previously mentioned tax-liable distributor, not just any distributor." Slip. Op. at 10. This is the same conclusion the Washington appellate court reached, in rejecting McLane's argument that Sales' role in bringing products into the state resulted in Sales' tax-liable distributor status:

> [Out]-of-state suppliers would fit the definition of "distributor" only if the sale for which they bring the products into the state is a sale to an in-state distributor. But the language suggests that the "sale" contemplated is a further sale in Washington by the in-state distributors. [To avoid a Commerce Clause problem], the bringing or causing to brought for sale language [must be construed to refer to] a later general distribution sale in Washington. And this interpretation fits the in-state distributors, not the out-of-state suppliers. We conclude that both the "in the business of selling" language and the bringing "for sale" language strongly point to the in-state distributors as persons liable for the tax."

Id. at 1122.

Finally, this Court provided a thorough and complete "analysis as to why the price paid by Sales cannot be used to establish the tax base." *See* McLane Pet. at 5. In doing so, the Court rejected McLane's argument that the price paid by Sales sets the tax base. McLane offers no authority suggesting that the Court's Commerce Clause analysis was legally faulty because of its description of Sales' role. McLane's disagreement with that analysis and the conclusion reached does not support reconsideration. The Court's opinion provides more than ample support for its holding and a clear direction for future administration of the tax.

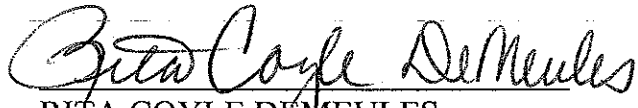
CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Petition for Rehearing be denied.

Dated: October 5, 2009.

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota



RITA COYLE DEMEULES
Assistant Attorney General
Atty. Reg. No. 0101644
(651) 296-0692

445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127

ATTORNEYS FOR RESPONDENT

AG: #2519354-v1