

No. A09-0717

STATE OF MINNESOTA
IN SUPREME COURT

Ronald L. Schober,

Relator,

vs.

Commissioner of Revenue,

Respondent.

**BRIEF OF
RESPONDENT COMMISSIONER OF REVENUE**

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STATEMENT OF ISSUES

1. Relator collected payment from customers via invoices that separately itemized and calculated "sales tax" at the "rate" of 6.5%. Minnesota Statute Section 289A.31, subdivision 7(e) designates as state funds any amounts collected under a representation that such sums are taxes imposed by Chapter 297A, "even if erroneously or illegally" collected. Did the Tax Court correctly conclude based on the evidence that the Commissioner properly assessed Relator for the sales tax he collected but did not pay to the Department of Revenue?

The Tax Court upheld the Commissioner's assessment based on Relator's invoice practice, which used a separate entry for "sales tax," a tax rate designation, and a separate sales tax amount calculated based on the invoiced material and/or labor charges.

Minn. Stat. § 289A.31, subd. 7(e)

Wybierala v. Comm'r of Revenue, 587 N.W.2d 832 (Minn. 1998)

Trung Minh Hua d/b/a Trung Hua Graphics & Design v. Dep't of Revenue, No. 65969, 2008 Westlaw 624767 (Wa. Bd. Tx App., Feb. 13, 2008)

2. Relator claimed the collected sales tax reimbursed him for his sales tax expenses, and the Commissioner's assessment therefore was an unconstitutional double taxation. Did the Tax Court correctly conclude that there was no constitutional violation because the evidence did not support Relator's claim, and because he has a refund remedy available for any overpayment of sales tax?

The Tax Court concluded that there was no Fourteenth Amendment violation in assessing Relator for collected but unremitted sales tax.

Soo Line Railroad Co. v. Comm'r of Revenue, 377 N.W.2d 453 (Minn. 1985)

3. The Commissioner's Order assessed Minnesota use tax on Relator's 2000 vehicle purchase because there was no evidence that sales tax was paid on that purchase. Relator originally objected to this assessment, but voluntarily withdrew his objection at the start of trial. Did Relator waive the right to challenge the use tax assessment in this appeal when he withdrew his objections at the start of trial and there is no evidence in the record that contradicts the Commissioner's assessment?

The Tax Court was not asked to rule on this issue.

Zip-Sort, Inc. v. Comm'r of Revenue, 567 N.W.2d 34 (Minn. 1997)

Minn. Stat. § 297B.03

STATEMENT OF THE CASE

The Commissioner issued a Notice of Change in Sales and Use Tax to Relator Ronald Schober on January 30, 2006. (R.A.27-28). The Commissioner assessed Minnesota sales tax based on the "collection of Minnesota sales tax, and failure to remit said tax to the state of Minnesota" in connection with Relator's home repair and remodeling business, Timber Creek Renovation. (R.A.29) Minnesota use tax was assessed on Relator's 2000 truck purchase, in Minnesota, as there was "no evidence that [he] paid sales tax" on that purchase. (*Id.*) Relator appealed administratively, the Commissioner reduced both the sales and use tax assessments based on the additional

information submitted,¹ and then issued a Notice of Determination on Appeal that upheld the balance of the tax assessments. (R.A.11)

Relator appealed to the Minnesota Tax Court. (R.A.5) A Pretrial Conference was held on August 13, 2008 to discuss the relevancy of certain criminal proceedings, Relator's proposed trial continuance, and trial management issues. (A.22) The Tax Court denied the trial continuance request, and the parties agreed to confer again about the remaining issues. (A.26, 28-29) Trial was held before the Minnesota Tax Court on August 15, 2008. At the start of the trial, Relator withdrew his objection to the Commissioner's assessment of use tax, penalty, and interest on his vehicle purchase. (R.A.67-70) The trial was therefore limited to Relator's objections to the Commissioner's sales tax assessment. (R.A.70) Testimony was taken and exhibits were entered into the record. The court then ordered the parties to submit briefs and any additional exhibits on the sales tax liability. (Tr. 112-17) The Tax Court thereafter issued its Findings of Fact, Conclusions of Law, and Order for Judgment. (A.1)

This certiorari proceeding followed.

STATEMENT OF FACTS

Relator Ronald Schober started and operated Timber Creek Renovation ("Timber Creek"), which provided repair and remodeling work to residential customers located

¹ The use tax assessment on the vehicle purchase was reduced by the cost of a non-taxable warranty charge. The sales tax assessment was reduced by the amount of credits given to some customers during the audit period, and to account for outstanding balances on some invoices as Relator operated on a cash basis method of accounting. (R.A.55-57)

primarily in Minnesota. (R.A.78-79). Neither Mr. Schober nor Timber Creek were registered with the Minnesota Department of Revenue to file tax returns or pay taxes. (R.A. 72-73) Mr. Schober, who was required to register with the Department because he operated Timber Creek and collected sales tax, did not report any sales tax collections to the Department. (R.A.74-75, 77)

As part of its investigation of Mr. Schober's tax liabilities, the Department found that Timber Creek's customers had paid Minnesota sales tax when Mr. Schober invoiced them for his materials and/or labor charges. (R.A. 71-72) As neither Timber Creek nor Mr. Schober had paid the collected sales tax to the Department, the Commissioner assessed Mr. Schober for the tax collected in multiple transactions.² (R.A.29). The Commissioner's sales tax assessment was made under the statutory authority that designates as "state funds from the time of collection" any "amounts collected, even if erroneously or illegally collected, from a purchaser under a representation that they are taxes imposed under Chapter 297A." Minn. Stat. § 289A.31, subd. 7(e); A 5.

By the time of trial, the parties had resolved disputes over several individual customer transactions, so that only the transactions with eleven (11) customers remained at issue. (R.A.11) The evidence before the Tax Court showed the invoices for those customers included separate sums for labor, materials, and an amount separately

² The tax Order was issued to Mr. Schober because he was a sole proprietor, and as indicated on his invoices, customers were directed to "make check[s] payable to Ron Schober." (R.A.103-08)

designated as “sales tax” and calculated as 6.5% of the designated (with a “T”) labor or material charges. (R.A. 71-72, 76)

Mr. Schober claimed that his invoices charged only the sales tax he had incurred in purchasing materials to use on customer projects. (R.A. 84, 87, 89). For labor charges, Mr. Schober explained that a computer error resulted in invoiced sales tax charges. *See, e.g.*, Relator Br. at 11. None of the collected sales tax amounts were reported to or paid to the Department. (R.A. 80, 83) For each individual customer, the record showed as follows.

(1) H. Nelson - Invoice No. 4103 (Comm’r Trial Exhs. 9-9A) (R.A.96-98).

The transaction with H. Nelson involved the purchase and installation of patio blinds. Mr. Schober bought the blinds at Hirschfield’s, for a pretax cost of \$340.58; with tax, the total Hirschfield’s charge was \$362.72. (R.A.96) Mr. Schober’s invoice charged Ms. Nelson \$362.72 for the blinds, designated that charge with a “T,” and then separately charged \$50.00 for installation and \$23.58 for “sales tax.” (*Id.*) Mr. Schober did not pay the \$23.58 sales tax that he collected on Invoice No. 4103 to the Department of Revenue. (R.A.Trial Tr. at 87). The Commissioner assessed Mr. Schober for this collected, but unremitted, tax. (R.A.18 (Nelson, 10/25/04 entry))

Below, Mr. Schober relied on Appellant Exhibit 102 to substantiate his sales tax charges. (R.A.136-37) However, the charges shown on the Home Depot receipts in this exhibit appeared unrelated to the work for H. Nelson, and the receipts were dated almost six (6) months after Mr. Schober’s invoice to his customer. (R.A.136)

(2) Gomez - Invoice Nos. 4071-72 (Comm'r Trial Exhs. 10-10-A) (R.A.100-02)

Invoice No. 4071 charged 6.50% sales tax on a \$70.00 invoice charge for "2 Dimmer Switches." (R.A. 100) Mr. Schober did not pay the sales tax he collected via this invoice (\$4.55) to the Department of Revenue. (R.A.82)

Below, Mr. Schober relied on Appellant Exhibit 104, which was a collection of Home Depot receipts, to support the sales tax charge. (R.A.140-41) None of these receipts, however, showed a charge for "2 Dimmer Switches," nor a charge for \$70.00.³

Gomez Invoice No. 4072 lists separate charges for flooring materials, "Delivery," "Shipping," and "Sales Tax." (R.A.100) Mr. Schober charged his customer, on a pre-tax basis: \$684.00 (Dutch Harbor carpet); \$462.00 (Andora Falls carpet); \$291.20 (Pad); and \$99.18 (Vega vinyl flooring). (*Id.*) The evidence showed that Mr. Schober paid, on a pre-tax basis, the following for these flooring materials: \$576.00 (Dutch Harbor carpet); \$462.00 (Andora Falls carpet); \$264.40 (Pad); and \$99.18 (Vega vinyl flooring). (R.A.101)

Mr. Schober charged his customer sales tax at the rate of "6.50%" on each of these flooring materials, for total sales tax of \$99.86. (R.A.100) His supplier had charged Mr. Schober Minnesota sales tax of \$91.10 on these materials. (R.A.101)

Below, Mr. Schober relied on Appellant Exh. 104 to substantiate his invoiced sales tax charges. These receipts, however, included charges for items that appeared to

³ Nor would any grouping of the Home Depot receipts in this exhibit reach \$70.00, or the sales tax charged on Invoice No. 4071. (R.A.140-41)

be unrelated to the materials and labor charges on Invoice No. 4072 (e.g., “fuel cell,” “pipe,” “window cap,” “40w appl bulb”), the Exhibit 104 charges were not listed on Invoice No. 4072, and the charges did not substantiate the sales tax charged on Gomez Invoice No. 4072. (R.A.140-41)

The Department assessed Mr. Schober for the sales tax that he charged and collected from his customer in these transactions. (R.A.18 (Gomez entries 7/14/04 & 7/17/04)).

(3) Blesi - Invoice No. 2064 (Comm’r Trial Exh. 11) (R.A.103).

Mr. Schober concedes that he incorrectly charged Minnesota sales tax in this transaction, which was invoiced as a labor charge to install the customer’s storm door. (R.A.103) *See* Schober Br. at 11-12. He did not pay the collected tax to the Department of Revenue. (R.A.82) The Commissioner assessed Mr. Schober for the collected tax, \$11.70. (R.A.17) (Blesi 6/30/02 entry)).

(4) Malone - Invoice No. 2092 (Comm’r Trial Exh. No. 12) (R.A.104).

This project involved bathroom remodeling work. Invoice No. 2092 showed material charges (\$17.65), labor charges (\$275.00) and “sales tax” (\$17.88). (R.A.104) Mr. Schober concedes that he incorrectly charged this customer sales tax on the labor charges, and acknowledged that he did not remit the collected tax to the Department of Revenue. *See* Schober Br. at 11-12; (R.A.82). The Commissioner assessed Mr. Schober for the tax he collected from his customer but did not remit to the State. (R.A.17 (2/16/2002 entry)).

Below, Mr. Schober argued that he attempted to refund the erroneously collected tax to his customer. *See* Schober Post-Trial Br. at 27 (filed Minn. Tx. Ct., Oct. 7, 2008). The customer, however, did not negotiate Mr. Schober's check. (*Id.*)

5. Petersen - Invoice 2116 (Comm'r Trial Exh. 13) (R.A.105).

This transaction involved labor for floor installation and cabinetry work, and materials charges. Sales tax at the rate of 6.5% was charged on some of the labor and materials charges. (R.A.105) Similar to other transactions, Mr. Schober conceded that he charged the sales tax, and acknowledged that he did not remit the tax collected to the Department of Revenue. *See* Schober Br. at 25 (explaining erroneously collected tax); (R.A.82). Mr. Schober explained below that he refunded this tax to his customer in 2006. The Commissioner acknowledged that repayment was made, though outside the relevant time frame. (R.A.62, 158) Given this timing issue, Mr. Schober's remedy was to file a refund claim. (*Id.*)

6. Norman - Invoice No. 4016 (Comm'r Trial Exh. 14) (R.A.107-14).

This customer's invoice showed several charges for labor and materials. Sales tax was charged on the pre-tax cost for a French door. (R.A.107-08) Below, Mr. Schober conceded that he charged the sales tax, and that he did not pay the collected tax to the Department of Revenue. (R.A.82) The Commissioner assessed Mr. Schober for the sales tax charged and collected, \$91.23. (R.A.18 (12/5/03 entry))

7. Mlezazgar - Invoice No. 2021 (Comm'r Trial Exh. 15) (R.A.115-16).

The work for this customer resulted in several entries for labor charges. "Sales tax" at the rate of 6.50% was imposed on each labor charge, resulting in a total, separately stated, sales tax charge of \$88.24. (R.A.115) Mr. Schober conceded below that he did not pay the collected sales tax to the Department of Revenue. (R.A.82) He relied below on Appellant Exhibit 106, which listed a credit for "erroneous sales tax." (R.A.142-44)

The Commissioner asserted below that Appellant's Exhibit 106 was not credible, for several reasons. First, the invoices shown in Commissioner's Trial Exhibit 15 and Appellant's Exhibit 106 are both dated the same day (2/25/2002) and with the same invoice number (2021). (R.A. 115, R.A., 142-43) Yet one shows a "credit" and one does not. Second, the customer's outstanding balance differs between the two exhibits (\$445.74 on Commissioner's Trial Exh. 15, vs. \$357.50 on Appellant's Exhibit 106). (R.A. 116, 143) Third, the address and graphics for Timber Creek Renovation are inconsistent between the two exhibits. (R.A.115-16, 142-43)

Nevertheless, a portion of the sales tax charged on the customer's outstanding balance, *see, e.g.*, Relator's Br. at 10, 31, was credited in the administrative appeal. The Commissioner adjusted the original assessment to include only the sales tax collected from the customer based on the partial payment made to that point. (R.A.12 ("adjustments were made to reflect the partial payment" of Mlezazgar invoice); R.A.55-56).

8. Brooks - Invoice Nos. 4011, 4014 (Comm'r Trial Exh. 16) (R.A.117-21).

The work for this customer resulted in several labor charges, with sales tax charges of \$359.45 (Invoice No. 4011) and \$52.59 (Invoice No. 4014). (R.A.119-20) Mr. Schober conceded that he did not pay this collected sales tax to the Department of Revenue. (R.A.82) Below, Mr. Schober relied on Appellant Exhibit 107, which he argued provided the customer with a credit for the "erroneous sales tax." (R.A.145-46) However, as late as April, 2006 — 2 years after he claimed the invoice shown in Exhibit 107 extended a credit for the erroneous sales tax charges — Mr. Schober issued a Statement to this customer for a past-due balance that did not reflect the alleged credit. (R.A.121)

Further, the Commissioner adjusted the sales tax assessment related to the work for this customer to accommodate the amount the customer still owed Timber Creek. (R.A.55-56) The Commissioner then assessed Mr. Schober for the sales tax collected, but not paid to the Department, based on the customer's partial payments. (R.A.17-18 (2/3/03, 1/3/04, 2/6/04 entries)); (R.A.12 ("adjustments were made to reflect the partial payment" of Brooks invoices)).

9. Corneille - Invoice Nos. 2081, 2113, 3084 (Comm'r Trial Exh. 17) (R.A.122-25).

Three separate transactions for this customer led to sales tax charges imposed on labor and materials charges. (R.A.122, 124-25) Mr. Schober admitted below that he did not pay to the Department the collected sales tax. (R.A.82) The Commissioner assessed Mr. Schober for the sales tax collected in these transactions. (R.A.17) (entries dated

8/8/02, 11/14/02, and 9/2/03). Below, Mr. Schober argued that he reimbursed this customer in August, 2006. The Commissioner acknowledged that repayment outside the audit period may provide Mr. Schober with a refund opportunity. (R.A.62, 158)

10. Grodahl - Invoice Nos. 2112, 2091, 2093, 2101, 3017, 3121 (Comm'r Trial Exh. 18) (R.A.126-31).

Multiple transactions with this customer resulted in sales tax imposed on labor and material charges. (R.A.126-31) Mr. Schober conceded below that the collected sales tax (\$443.70) was not paid to the Department of Revenue. (R.A.82) Mr. Schober relied upon Appellant Exhibit 109, which he claimed reflected a credit extended to the customer for the erroneously collected tax. (R.A.154) However, this credit was allegedly extended on an invoice dated over one year before the sales tax was originally charged in some cases. (*Id.*) There were also discrepancies between Commissioner Exhibit 18 (Invoice No. 2112) and Mr. Schober's version of that invoice, as different addresses, contact information, and graphics were used on the two invoices. (*Id.*)

11. Dechery - Invoice Nos. 2051, 3122 (Comm'r Trial Exh. 19) (R.A.132-33).

This project involved a variety of work for the customer. Invoice No. 2051, which was part of Commissioner Trial Exhibit 19, included a charge for "Deltonia Underlayment" at a pre-tax cost of \$30.10 (0.43 per square foot * 70 square feet=30.10). (R.A.132) Mr. Schober charged 6.5% sales tax on this invoice item, as well as on his

labor charges, for a total sales tax charge of \$194.03. (*Id.*) Mr. Schober's cost, including tax, for the Deltonia Underlayment was \$26.83.⁴ (R.A.134)

Invoice No. 3122, also part of Trial Exhibit 19, included a charge for 1 gallon of Devine Maple, at a pre-tax cost of \$36.99. (R.A.133) Mr. Schober added sales tax to this charge (\$2.40). (*Id.*) The supplier's list price for 1 gallon of Devine Maple was \$36.99, but Mr. Schober paid a discounted price, \$25.49 (pre-tax). (R.A.135).

Mr. Schober conceded that he collected sales tax from his customer but did not pay that tax to the Department of Revenue. (R.A.82) The Commissioner therefore assessed Mr. Schober for the tax he collected from the Decherys, but did not pay to the Department of Revenue. (R.A.17 (Dechery entries 5/7/02 & 12/13/03))

⁴ See ProSource Invoice, "Laminate cushion" marked as "Deltonia Underlayment" (R.A.134); Trial Tr. at 84-85 (ProSource invoice reflects charges for Deltonia underlayment on Dechery invoice). At 0.36 per square foot, the supplier's pre-tax charge for 70 square feet of this material was \$25.20; with sales tax, the total cost for this material was \$26.83 ($6.5\% * 25.20 = 1.63 + 25.20 = 26.83$).

ARGUMENT

The Commissioner's Order is presumed correct and valid. Minn. Stat. § 271.06, subd. 6 (2008); *see also F-D Oil Co. v. Comm'r of Revenue*, 560 N.W.2d 701, 707 (Minn. 1997) (noting orders are "presumed to be valid and correctly determined"). Thus, Mr. Schober bore the burden below to show the Commissioner erred in his assessment. *See Wybierala v. Comm'r of Revenue*, 587 N.W.2d 832, 835 (Minn. 1998).

Mr. Schober challenges the Tax Court's findings and its legal conclusions. This Court reviews the Tax Court's fact findings to determine whether reasonable evidence sustains those findings. *See, e.g., Watlow Winona, Inc. v. Comm'r of Revenue*, 495 N.W.2d 427, 431 (Minn. 1993); *Morton Bldgs., Inc. v. Comm'r of Revenue*, 488 N.W.2d 254, 257 (Minn. 1992) (citing *Red Owl Stores, Inc. v. Comm'r of Taxation*, 117 N.W.2d 401, 407 (Minn. 1962)). Mr. Schober's challenges to the Tax Court's legal conclusions are subject to this Court's de novo review and plenary power. *See F-D Oil Co., Inc.*, 560 N.W.2d at 704; *Morton Bldgs.*, 488 N.W.2d at 257.

I. RELATOR COLLECTED SALES TAX FROM HIS CUSTOMERS UNDER A REPRESENTATION THAT THE TAX WAS IMPOSED BY CHAPTER 297A, AND THEN FAILED TO REMIT THE COLLECTED TAX TO THE STATE. THE TAX COURT THEREFORE CORRECTLY UPHELD THE COMMISSIONER'S ORDER ASSESSING RELATOR FOR THE COLLECTED BUT UNPAID TAX.

Minnesota's sales tax is a "trust" tax; that is, it is a tax that, when collected, is held in trust for the state (through the Minnesota Department of Revenue). *See* Minn. Stat. § 289A.31, subd. 7 (collected sales tax sums "must be held as a special fund in trust for" the state); *see also Igel v. Comm'r of Revenue*, 566 N.W.2d 706, 708 (Minn. 1997)

(“when a corporation collects sales tax from third parties, the corporation does so under an obligation to hold the tax in trust for and to pay it over to the State of Minnesota.”); *Benoit v. Comm’r of Revenue*, 453 N.W.2d 336, 339 (Minn. 1990) (acknowledging that trust taxes “are held in trust for and paid over to the state of Minnesota”). In practice, the sales tax is paid by the consumer, with the vendor acting merely in a collector’s role. *See, e.g.*, Hellerstein & Hellerstein, State & Local Taxation, ¶ 12.01 (3d Ed. 2009) (noting that state sales taxes are usually separately stated and excluded from the base of the tax to promote “the understanding that the sales tax is a discrete charge, apart from the price of an item, that is paid by the consumer and collected by the vendor.”).

The Commissioner’s Order was issued under the mandate of Section 289A.31, subdivision 7(e), which requires any such sums collected, even if “erroneously or illegally” so collected, to be held in trust for and turned over to the State. *See* Minn. Stat. § 289A.31, subd. 7(e). Mr. Schober conceded two critical points below: (a) sales tax was collected from his customers, and (b) the collected sales tax was not paid to the Commissioner of Revenue. Thus, the Tax Court had only to consider whether there was a legal reason that excused Mr. Schober’s failure to remit those collected sums to the State. Based on the language of the statute and the evidence, the Tax Court concluded there were no such reasons. Because the Tax Court’s decision was justified by the evidence, and was consistent with the statutory mandate, its opinion should be affirmed.

A. The Tax Court's Decision Is Justified By The Evidence.

The evidence at trial established that Mr. Schober presented Timber Creek customers with an itemized invoice that included a "T" behind individual sums charged for either materials or his hourly labor; a separate description for "sales tax;" a separate entry for the sales tax rate (6.5%); a separate entry for the amount of sales tax charged on the entries marked with a "T;" and a total line, which computed the sum of all the individual entries under the Amount column, including the sales tax. The language and structure of these invoices leads to the inescapable conclusion that Mr. Schober collected sales tax via a representation that it was a tax imposed by the state, for several reasons.

First, there are particular items designated as taxable ("T"), while some items are not so designated. Second, there is a separate line and description entry for "sales tax." Third, there is a separate column for "Rate," in which Mr. Schober consistently entered 6.5%, the same rate imposed by Chapter 297A, immediately following the "sales tax" description. *See* Minn. Stat. §297A.62 (2006).⁵ Fourth, the "amount" column represented a computation of the statutory sales tax rate applied to the charges for the designated taxable items. Fifth, a "Total" box at the bottom of the invoice represented the sum of all dollar charges entered in the "amount" column. Together, these elements confirm that tax was collected under a representation that it was imposed by the State. *See Wybierala v. Comm'r of Revenue*, Nos. 6646-6647, 1998 Westlaw 103323 (Minn.

⁵ The same statute used the same rate between 2002 and 2004, the years at issue here. *See* Minn. Stat. § 297A.62 (2002), (2004).

Tax Ct., Feb. 6, 1998), *aff'd*, 587 N.W.2d 832 (Minn. 1998); *see also* *Trung Minh Hua d/b/a Trung Hua Graphics & Design v. Dep't of Revenue*, No. 65969, 2008 Westlaw 624767 at *6 (Wa. Bd. Tx App., Feb. 13, 2008) (noting that an objective review of evidence supported conclusion that taxpayer “was collecting a tax in the name of the state”) (R.A.160)

In *Wybierala*, the taxpayer provided customers with invoices for waste collection services that reflected “a charge in addition to the waste collection service fee.” 1998 Westlaw 103323 at 2. (R.A.174) The invoices either left the charge unnamed or designated it as a “tax.” *Id.* “Generally, prior to July 1, 1991, the tax/unlabeled charge was 6% of the service fee and 6.5% after that date.” *Id.* Two witnesses testified on behalf of the taxpayer that the charge was a “surcharge,” not a tax. *Id.*; *see also id.* at 4 (noting taxpayer’s argument that charge was for “collection and disposal services”). The Tax Court rejected the taxpayer’s evidence and upheld instead the substance of the taxpayer’s invoice practices:

We disregard Appellant’s testimony because we found his answers confusing, evasive and argumentative. . . . we rely upon the invoices introduced into evidence that indicate that Poor Richard’s and Haul A Way collected tax from their customers. We do not believe the testimony . . . that the charge was not a tax and find it significant that the charge was 6% of the charge for waste service rendered from January 1990 through June 1991 when the sales tax rate was 6% and 6.5% after that date when the sales tax rate increased.

Id. at 4-5; *see also* *Wybierala*, 587 N.W.2d at 837 (noting, in affirming tax court, that court “relied on the only evidence it found credible, the documentary evidence”); Hellerstein & Hellerstein, *State & Local Taxation*, ¶ 12.01 (3d Ed. 2009) (reviewing sales

tax “features” that “effectuate the understanding that the sales tax is a discrete charge, apart from the price of an item”).

If anything, Mr. Schober’s invoices are more compelling than those reviewed in *Wybierala*. In contrast to the *Wybierala* invoices, which listed only “tax” or no description, and an amount representing 6% or 6.5% of the charged amount, Mr. Schober designated the items subject to tax with a “T,” used the description “sales tax,” showed a rate of tax consistent with that imposed by Chapter 297A (6.5%), calculated a sum for tax that equaled 6.5% of the amounts designated with a “T,” and added the separately calculated sales tax to the amounts charged for materials or labor. *See, e.g., Barker Furnace Co. v. Lindley*, No. 6813, 1981 Westlaw 2815 at 3 (Ohio App., June 2, 1981) (finding sales tax charged where amount was labeled as such and computed “in accordance with the statutory rate”). (R.A.167)

Thus, the amounts Mr. Schober collected as sales tax were “state funds from the time of collection.” Minn. Stat. § 289A.31, subd. 7(e). Regardless of the reasons why Mr. Schober collected that tax, he was required to report it “on a return filed with the Commissioner.” *Id.* He did not, and therefore the Commissioner correctly assessed that tax, along with penalties and interest.

B. Mr. Schober’s Explanations For His Sales Tax Charges Are Neither Relevant Nor Credible. The Tax Court Therefore Correctly Upheld The Commissioner’s Order.

Mr. Schober conceded below, and generally admits in this appeal, that he charged and collected sales tax from Timber Creek customers. *See Relator’s Br.* at 9. He

explains simply that he either erred in doing so (on labor charges) or was entitled to do so to recover “the exact sales tax” he had already paid. *See* Relator’s Br. at 7, 11. In addition, Mr. Schober argues that he was required to list and charge sales tax on his invoices to comply with Minn. Stat. § 325F.60 (2006). *See* Relator’s Br. at 9, 28. None of these reasons, however, justify his failure to turn the collected tax over to the State.

First, the Tax Court considered and rejected these arguments finding them unsupported by the evidence and irrelevant to Mr. Schober’s tax liability. (A.5) Mr. Schober testified at trial, and the relevant invoices were introduced into evidence. The Tax Court was therefore in the best position to judge witness credibility, the evidence, and these arguments, and found that credibility lacking. *See Wybierala*, 587 N.W.2d at 837 (recognizing Tax Court’s ability to judge credibility). Nothing in Mr. Schober’s arguments before this Court undermines the Tax Court’s credibility determinations.

Second, Mr. Schober acknowledges that he incorrectly charged tax on labor, but then argues that the State cannot require him to pay an “erroneous tax.” Relator’s Br. at 32-33. Section 289A.31 addresses, and rejects, this argument. By its literal terms, subdivision 7(e) requires Mr. Schober to pay the tax he collected to the State, even if “erroneously or illegally collected.” (emphasis added). Thus, regardless of whether sales tax is correctly, or incorrectly, imposed on labor charges, the record confirms that Mr. Schober collected taxes on labor charges.

Indeed, the mandatory nature of Section 289A.31 reflects a policy decision to deem the fact of collection dispositive. The reason for that collection is irrelevant. Thus, once collected under the described representation (“taxes imposed under Chapter 297A”),

the collector's only option is to pay those funds to the state. *See, e.g., Trung Minh Hua d/b/a Trung Hua Graphics & Design*, No. 65969, 2008 Westlaw 624767 at *6 ("The lesson to be learned from this case is: if you collect a tax from your customers, you must pay it to the government."); *Décor Carpet Mills, Inc. v. Lindley*, 413 N.E.2d 833, 835 (Ohio 1980) (finding wrongfully collected sales tax is "a tax collection for the benefit of the state of Ohio"). The Court therefore does not need to consider whether labor charges are subject to tax, or whether Mr. Schober's tax on labor charges was either erroneous or illegal. The only relevant fact is that tax *was* collected, including on labor charges, and that collected tax was not paid to the State. The Tax Court correctly concluded that Mr. Schober was therefore liable to the State for that collected tax.

Third, Mr. Schober's argument that he was only collecting tax that he had already paid on material purchases is unavailing. The Commissioner acknowledges that contractors are entitled to recover the costs they incur on a project, including sales tax the contractor may pay when purchasing project materials. *See* Dep't of Revenue Fact Sheet No. 128 (R.A.178). Recovery of incurred costs, however, does not carry with it approval to separately impose, calculate, and collect a sum designated as sales tax, unless that tax is paid to the State. Further, Mr. Schober's invoices showed separate charges for his costs and for sales tax, rather than merely charges for costs incurred. *See Trung Hua Graphics & Design*, 2008 Westlaw 624767 at 7 ("The Board supports the public policy that "tax" is a term reserved for the government. Businesses should use other terms for additional charges they chose to impose on their customers."). In addition, even if he sought only to recover his incurred costs, the manner in which Mr. Schober collected

these sums — under a representation that it was a tax imposed by Chapter 297A — requires that the collected tax be paid to the State.

Fourth, the Tax Court considered but rejected Mr. Schober's claim that he sought to recover only the "exact amount" of tax he paid for materials because the evidence contradicted this claim. *See, e.g., Byers v. Comm'r of Revenue*, 735 N.W.2d 671, 673 (Minn. 2007) (noting that Tax Court will not be reversed on findings unless "evidence as a whole does not reasonably support the decision"). A review of the evidence before the Tax Court confirms this finding is justified. Trial Exhibit 9, for example, is Mr. Schober's invoice charging a customer with the pre-tax cost for a Hirschfield's blinds, plus sales tax at the rate of 6.5% on that cost.⁶ Mr. Schober's receipt for his purchase of those blinds shows a lower, pre-tax cost and a corresponding lower sales tax charge.⁷ In other words, Mr. Schober recovered his sales tax "costs" when he charged the fully taxed cost of the blinds. Yet, he still charged Minnesota sales tax, at the rate of 6.5%, on that fully taxed cost. *See also* Comm'r Exhs. 10, 19 (R.A.99-102; 132-35).

The Commissioner does not argue that Mr. Schober was not entitled to recover the sales tax he paid for the materials he used on his customers' projects. Fact Sheet No. 128 advised him clearly how to do so: by including that tax within (as part of) his other charges, rather than a separate line item, separately calculated under the statutory rate, and invoiced as a separate charge to the customer. For this reason, Commissioner Trial

⁶ \$362.72 and \$23.58, respectively. (R.A.96)

⁷ \$340.58 and \$22.14, respectively. (R.A.97)

Exhibit 14, which shows invoice and purchase charges related to a door, may appear to have charged only the amount of sales tax that Mr. Schober paid in purchasing the door. However, as explained *supra*, the representation that Mr. Schober was charging and collecting the tax imposed by Chapter 297A requires that the collected tax be turned over to the State.⁸

Last, Mr. Schober argues that Minnesota Statute Section 325F.60 requires an itemized listing of charges, including sales tax. This statute does not, however, eliminate Mr. Schober's tax liability. Section 325F.60 requires the customer's invoice to include an itemized listing of charges, which may include (in addition to materials, labor, or other charges) tax. Mr. Schober's argument necessarily assumes that he was required *to charge* sales tax because the statute requires an invoice to list tax. *See* Minn. Stat. § 325F.60 (2008). Yet for at least some charges, Mr. Schober admits that he erroneously charged tax. *See* Relator's Br. at 7. Logically then, Section 325F.60 is inapplicable to Mr. Schober's erroneous sales tax charges. Moreover, as a contractor Mr. Schober is considered the end-user of the materials. Thus, he should *not* have listed sales tax on

⁸ Nor was there any relevant "taint" from the criminal proceedings, which preceded the Tax Court action, for several reasons. First, the criminal proceedings were concluded before the Tax Court action began and were a matter of public record. (A.23) Second, Mr. Schober's post-conviction petition was not granted until after the Tax Court trial. (A.20-21, 25). Third, once Mr. Schober stipulated to his Minnesota residency and withdrew his objection to the use tax assessment, the evidence regarding the Department's investigation was limited and brief. No mention was made of any charges (apart from the distinction made during the pretrial regarding the scope of the Department's criminal investigation authority, A.25-27).

material charges. Rather, consistent with *both* Section 325F.60 and with Fact Sheet No. 128, a contractor simply lists the tax-inclusive material cost as a single dollar amount.

Finally, nothing in Section 325F.60 supersedes the mandatory nature of Section 289A.31. In other words, even if Section 325F.60 can be construed to require a separate line entry for sales tax, Section 289A.31 then requires that tax to be turned over to the State once collected. *See* Minn. Stat. § 289A.31, subd. 7a (“the sums collected must be held as a special fund in trust for the state of Minnesota”).

II. THERE IS NO CONSTITUTIONAL VIOLATION IN REQUIRING MR. SCHOBER TO TURN OVER THE SALES TAX HE COLLECTED TO THE STATE OF MINNESOTA.

Mr. Schober argues that requiring him to pay to the State the sales tax that he collected violates the 14th Amendment to the United States Constitution and Article 10 of the Minnesota Constitution.⁹ *See* Relator’s Br. at 30. These alleged constitutional violations occur, Mr. Schober contends, because he is subject to double taxation. *See id.* The Tax Court correctly rejected this constitutional claim. *See Minnesota Automatic Merchandising Council v. Salomone*, 682 N.W.2d 557, 561 (Minn. 2004) (court invokes every presumption in favor of constitutionality and statute “will not be declared unconstitutional unless the party challenging it demonstrates beyond a reasonable doubt that the statute violates some constitutional provision.”).

⁹ “The power of taxation shall never be surrendered, suspended, or contracted away. Taxes shall be uniform upon the same class of subject . . .” MINN. CONST., Art. X, §1.

First, there is no unconstitutional double taxation because Section 289A.31, subdivision 7e applies equally to all persons that collect tax under a representation that it is imposed by Chapter 297A. *See Soo Line Railroad Co. v. Comm'r of Revenue*, 377 N.W.2d 453, 456 (Minn. 1985) (noting that double taxation violates Article X only where “the same property or person is taxed twice for the same purpose for the same taxing period by the same taxing authority without taxing all property or persons in the same class a second time.”) (citation omitted). Subdivision 7e does not distinguish between any persons or property in requiring that all sums collected as sales tax be turned over to the State. The statute is applied uniformly, and thus there is no constitutional violation.

Second, there is no constitutional violation, nor any other violation, in requiring Mr. Schober to turn over the sales tax he collected. Mr. Schober contends that the better approach is to require his customers to seek refunds, or to allow him to reimburse his customers through payments or credits. *See Relator Br.* at 33-34. However, this Court has sanctioned customer refunds only where the erroneously collected tax has first been paid to the State. *See, e.g., Acton Const'n Co. v. Comm'r of Revenue*, 391 N.W.2d 828, 831-32 (Minn. 1986) (noting sales tax “was erroneously collected and paid to the State” and considering whether refund owed to customers or contractors). Refunds are owed to customers who “actually bore the burden of the tax” because the sales tax is not intended to “become a windfall to the vendor.” *Id.* at 832.

Here, the Commissioner recognized that some customer repayments were made in the audit period, and credited Mr. Schober with those repayments. (R.A.56-57; 157-58) Some customers, however, refused repayment or were not given a repayment option

(Nelson, Brooks). Nevertheless, Mr. Schober is not entitled to the windfall of erroneously collected sales tax and therefore cannot retain those sums. For the remaining customers, repayment was claimed to have been made outside the audit period. While not recognized in reducing the assessed amount, the Commissioner acknowledged that those repayments may provide Mr. Schober with the opportunity to claim a credit on future returns, or to file refund claims. *See* Minn. Stat. § 289A.50, subd. 2 (2008); *see also* Cerney Aff., ¶¶ 3-6. (R.A.157-58)

Finally, there is no constitutional violation resulting from Mr. Schober's cash method of accounting. *See* Relator Br. at 31. The Commissioner recognized that method, and provided Mr. Schober with a credit to reflect outstanding balances owed. (R.A.56)

The Tax Court correctly rejected the constitutional challenge to Section 289A.31. Its Order should therefore be affirmed.

III. RELATOR WITHDREW HIS OBJECTION TO THE COMMISSIONER'S USE TAX ASSESSMENT. HE THEREFORE WAIVED THE RIGHT TO OBJECT TO THAT ASSESSMENT ON APPEAL. MOREOVER, USE TAX WAS PROPERLY ASSESSED ON THE TRUCK PURCHASE BECAUSE RELATOR WAS A MINNESOTA RESIDENT AT THE TIME OF THAT PURCHASE.

The record before the Tax Court demonstrates clearly that Mr. Schober withdrew his objection to the Commissioner's use tax assessment. That portion of the Commissioner's Order is therefore not properly before this Court for review. Even if the Court elects to reach this issue, Mr. Schober bore the burden of proof. There is no

evidence in the record to support reversing the assessment. The Commissioner's Order assessing use tax should therefore be upheld.

A. Relator Voluntarily Withdrew His Objection To The Commissioner's Use Tax Assessment. He Is Therefore Not Entitled To Review On This Issue.

The record below shows Relator's history of withdrawing, and then reviving, his challenges to the Commissioner's use tax assessment on the vehicle purchase. By the time of trial, however, this equivocation ended with the final withdrawal of any such challenge.

For example, before filing his appeal with the Tax Court, Relator had already effectively agreed that the Commissioner's use tax assessment on his vehicle purchase was proper. His representative stated on May 1, 2006 that the tax "amount due and owing" on the vehicle was "\$1,291.88." (R.A.58) Further, while Mr. Schober preserved his objections to the sales tax assessment during the administrative appeal, he acknowledged that there was no dispute on the use tax assessment. (R.A.59) ("Based on the above we conclude that no sales tax, *with the exception of the vehicle* is due [and] owing.") (emphasis added). Based on these representations and additional information submitted on the vehicle purchase price, the Commissioner agreed to make Relator's "requested adjustment" to reduce, but otherwise uphold, the use tax assessment. (R.A.55)

In his Notice of Appeal, however, Relator retreated from his administrative position and asserted a challenge to the use tax assessment. (R.A.7) Then, shortly before

trial, Relator appeared to have again dropped the challenge to the use tax assessment. (A.19) His Statement of the Case, filed shortly before trial, did not identify the Commissioner's use tax assessment as an issue for trial. The Commissioner therefore advised the Tax Court that he intended to seek "judgment in the Commissioner's favor" on the vehicle tax if Relator "no longer challenges that part of the Commissioner's Order." (A.19)

Next, during the Pretrial Conference call on August 13, 2008, Relator offered to stipulate that he was a Minnesota resident when he bought the vehicle. (A.23) This offer was put on the record at the trial, when the following exchange occurred:

Ms. DeMeules: In the pretrial conference call on Wednesday, we had a bit of a discussion about the extent to which Mr. Schober concedes residency at the time of the truck purchase. The Commissioner would like a statement on the record to clarify the extent to that, and whether he actually withdraws his appeal with respect to the tax, penalty, and interest assessed on that purchase. If he doesn't withdraw it, then I believe the Commissioner has to put on testimony and evidence regarding his residency and the extent to which he sought to create a record of non-Minnesota residency in order to support the penalty assessment.

....

The Court: Okay. Mr. Schober, we did have a pretrial conference call on Wednesday; is that correct?

Mr. Schober: Yes it is, Your Honor.

The Court: And at that time you indicated that you were not going to -- that you were conceding the motor vehicle tax; is that correct?

Mr. Schober: Yes, and was willing to stipulate to residency in the State of Minnesota.

The Court: So you accept that tax that has been assessed and the subsequent penalties involved with that; is that correct?

Mr. Schober: Yes, I will concede to the penalties, the interest and the negligence in that regards only to the extent that it is a small amount and I do not think that it's going to be great concerns in other matters that the Court has before it.

....

The Court: So at this point with respect to simply the motor vehicle issue, that issue is being conceded?

Mr. Schober: Correct.

(R.A.65-68).

Consequently, the Commissioner agreed that no evidence on Mr. Schober's Minnesota residency in 2000 would be offered at trial. (R.A.70)

Issues that are not raised below are not considered on appeal absent a showing that the interests of justice require review. *See Putz v. Putz*, 645 N.W.2d 343, 350 (Minn. 2002) (noting that issue was not raised below, but that "well-being of children" was at stake and therefore court would address it in the interests of justice); *see also Zip-Sort, Inc. v. Comm'r of Revenue*, 567 N.W.2d 34, 39 n.9 (Minn. 1997) (noting that Court can consider theory not relied upon below where it is "plainly decisive" of the entire case and "there is no possible" disadvantage in not having a lower court ruling); Minn. R. Civ. App. P. 103.04 (scope of review may depend on whether "proper steps have been taken to preserve issues for review on appeal").

Here, there are no interests of justice that warrant review of the use tax issue, particularly given the unequivocal withdrawal of any objection to this assessment.

Further, review of this issue is not “plainly dispositive” of this appeal as it would not dispose of the entire appeal given that the use tax assessment and the sales tax assessment are authorized by separate statutes and distinct circumstances.

Moreover, the Commissioner would face considerable prejudice if the Court considered this issue in the absence of a fully developed factual record. The accuracy of the Commissioner’s use tax assessment depends on the fact-intensive residency and ownership principles. *See, e.g.*, Minn. Stat. § 297B.03(2) (2008) (tax on vehicle purchase is exempt if purchaser is a resident of another state at the time of purchase); *cf. Comm’r of Revenue v. Stamp*, 296 N.W.2d 867, 870 (Minn. 1980) (noting each residency case “turns on its own peculiar facts and circumstances”). This is because Minnesota’s use tax is imposed for “the privilege of using, storing, distributing, or consuming in Minnesota tangible personal property . . . purchased for use, storage, distribution, or consumption in this State.” Minn. Stat. § 297A.63, subd. 1 (2008); *see also Miller v. Comm’r of Revenue*, 359 N.W.2d 620, 621 (Minn.) (citations omitted), *cert. denied*, 471 U.S. 1116 (1985) (any exercise “of a right or power incidental to ownership” is a taxable use).

Once Mr. Schober withdrew his objection to the use tax assessment, and did not preserve the right to seek appellate review on that issue, the Commissioner refrained from presenting the evidence that would have contradicted Mr. Schober’s claim to an Oregon “domicile” for his truck. The Commissioner also refrained from presenting evidence that would have shown Mr. Schober’s use of the truck in Minnesota during the time that he claimed it was “domiciled” in Oregon; and/or that Mr. Schober was not a resident of another state when he bought the truck. *See* Minn. Stat. 297B.03(2). In short, while Mr.

Schober bore the burden of proof, the Commissioner was prepared to meet any claim that the truck purchase was exempt from tax by showing that Mr. Schober exercised rights and powers incidental to ownership while he and the truck were in Minnesota, at or shortly after its purchase. If anything, the interests of justice weigh in the Commissioner's favor here and against this Court's review.

B. Even If The Court Reaches This Issue, The Record Provides Ample Support For The Commissioner's Assessment.

All sales in Minnesota are presumed taxable unless an exemption is shown. *See* Minn. Stat. § 297A.665 (2006).¹⁰ For vehicle sales, tax is imposed at the sales tax rate on all sales made in Minnesota for which the vehicle “is required to be registered under the laws of this state.” Minn. Stat. § 297B.02, subd. 1 (2000). A vehicle must be registered in Minnesota if it is used or operated on streets or highways, *see* Minn. Stat. § 168.09, subd. 1 (2000). A motor vehicle purchase is exempt from Minnesota sales tax if the purchaser “was a resident of another state . . . at the time of the purchase and . . . subsequently becomes a resident of Minnesota, provided the purchase occurred more than 60 days prior to the date such person began residing in the state of Minnesota.” Minn. Stat. § 297B.03 (2) (2000).

¹⁰ The tax statutes in Chapter 297A were re-numbered as part of the 2000 Legislature's non-substantive re-codification of that Chapter, *see* 2000 Minn. Laws 796, 798-803, though most of the re-codification was not effective until July 1, 2001. *Id.* Since the audit of Mr. Schober's tax liability spanned both the original and the re-codified versions, and since the re-codification was not intended to make any substantive changes, the Commissioner has primarily cited to the current version of the applicable statutes, unless there was a substantive change to the language.

Mr. Schober originally claimed below, and argues here, that the truck he purchased in June, 2000, in Park Rapids, Minnesota, was “registered, licensed, domiciled and insured in” Oregon, and therefore his use of it in Minnesota was not subject to tax. There is no evidence in the record to support this contention, but even assuming this argument should be considered, legally Mr. Schober could not so register his truck while claiming a Minnesota domicile. Oregon bases vehicle registration on the Oregon residency of the vehicle owner, not the vehicle. *See Ore. Rev. Stat. § 803.360* (“No person may register . . . a vehicle in this state unless the person is domiciled in this state”). Mr. Schober, however, conceded that he was a Minnesota resident at the time of the truck purchase. He therefore could not register the truck in Oregon.

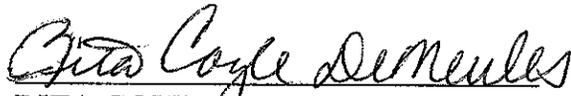
The bare claim to putting the truck in an Oregon garage, without more, does not overcome the presumptive validity of the Commissioner’s Order, particularly since nothing in the vehicle registration statute considers the “domicile” of the vehicle, as opposed to the owner’s residency and use of the vehicle. *See Minn. Stat. § 168.09, subd. 1*. Thus, even if the Court reaches this issue, it should affirm the Commissioner’s Order.

CONCLUSION

For all the reasons stated above, the Commissioner respectfully requests that the Court uphold the Tax Court's Order.

Dated: September 28, 2009

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CERTIFICATE OF COMPLIANCE

The undersigned, Rita Coyle DeMeules, hereby certifies pursuant to Minn. R. Civ. App. P. 132.01, subd. 3(c), that the word count of the attached Brief of Respondent Commissioner of Revenue is 7,539 words. The Brief complies with the typeface requirements of the rule and was prepared and the word count was made using Microsoft Word 2003.

Dated: September 28, 2009

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