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**STATE OF MINNESOTA**
**IN SUPREME COURT**

---

Ronald L. Schober,

Relator,

v.

Commissioner of Revenue,

Respondent.

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# BRIEF AND APPENDIX OF RELATOR RONALD L. SCHOBER

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## STATEMENT OF THE ISSUES

1. DOES A SALES TAX PAID ON BUILDING MATERIALS WHEN INSTALLED INTO REAL PROPERTY, CONSTITUTE A RETAIL SALE UNDER MINN. STAT. § 297A WHEN THE PAID SALES TAX IS LISTED ON AN INVOICE AS A COST TO THE HOME OWNER AT THE COMPLETION OF THE PROJECT PURSUANT TO MINN. STAT. § 325F.60?

1a. DOES THE COMMISSIONER'S DETERMINATION TO ASSESS A SALES TAX TO MR. SCHOBER A SECOND TIME CONSTITUTE A DOUBLE TAXATION VIOLATION PROTECTED UNDER THE U.S. CONSTITUTIONAL 14TH AMENDMENT?

2. DOES THE COMMISSIONER HAVE AUTHORITY UNDER LAW TO COLLECT A TAX THAT IS NOT PROVIDED FOR UNDER LEGISLATIVE INTENT OR ENACTMENT OF MINN. STAT. § 297A?

3. WAS MR. SCHOBER PREJUDICED BY THE INTRODUCTION OF EVIDENCE REGARDING HIS DEPARTMENT OF REVENUE CRIMINAL PROCEEDINGS RUNNING SIMULTANEOUSLY WITH THE TAX COURT PROCEEDINGS?

3a. WAS MR. SCHOBER'S CREDIBILITY UNDERMINED BEFORE THE TAX COURT BY THE CONTINUAL REFERENCE OF THE DEPARTMENT OF REVENUE'S SIMULTANEOUS CRIMINAL MATTERS?

4. IS MR. SCHOBER REQUIRED TO PAY SALES TAX ON THE PURCHASE OF A MOTOR VEHICLE THAT WAS PURCHASED

THROUGH A MINNESOTA DEALERSHIP, THEN IMMEDIATELY DOMICILED IN A FOREIGN STATE THROUGH THE STATES' RECIPROCITY AGREEMENT?

## STATEMENT OF THE FACTS

Mr. Schober purchased materials and installed those materials into Real Property dwellings directly for the owner. (T.35.) The sales tax on all materials was paid at the retailer when the materials were purchased by Mr. Schober as the end user.

Mr. Schober would then invoice his clients for the installation labor of the improvements, material used in the improvements, and for the reimbursement of exact sales tax he paid on those now-installed materials. Mr. Schober does not mark-up his material costs and informs his clients his cost is their cost.[1](Fn.1) He conducts business as a Contractor; and does no retail sales. Since Mr. Schober does not conduct retail sales in the State of Minnesota, he is not required by law to register or file with the state for Sales and Uses tax.

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[1] It should be noted that Mr. Schober offered clients his cost including any discounts on material with review of material receipts upon clients' request.

Mr. Schober did not operate a place of business in the State of Minnesota as a retail store location, operate any other business, nor have any other residential address other than 625 Chaucer Lane, Watertown, Minnesota. (T.24.)

Mr. Schober never applied nor received a certificate of exemption for sales tax purposes in the State of Minnesota.

**1. A SALES TAX PAID ON BUILDING MATERIALS INSTALLED INTO REAL PROPERTY, DOES NOT CONSTITUTE A RETAIL SALE UNDER MINN. STAT. § 297A WHEN THE PAID SALES TAX IS LISTED ON AN INVOICE AS A COST TO THE HOME OWNER AT THE COMPLETION OF THE PROJECT PURSUANT TO MINN. STAT. § 325F.60?**

The Commissioner of Revenue stated the listed sales tax on Mr. Schober's invoices were retail sales and the tax collected was governed under Minn. Stat. § 289A.31 LIABILITY FOR PAYMENT OF TAX, subd. 7(a) Sales and Use Tax (2006); and Minn. Stat. § 297A.61 GENERAL SALES AND USE TAXES - DEFINITIONS, subd. 4(a) Retail Sales.

Mr. Schober's invoices conformed to the "shall" requirements set forth under consumer protection statutes. (Minn. Stat. § 325F.60 INVOICE, subd. 1: requirements (2007).) The shop copy of the invoice had material receipts attached by use of staple. (T.22-23.) The body of the invoice listed each item under description so as to

inform the client of the cost breakdown. All of Mr. Schober's invoices are void of subtotal lines. (T.29-30.). The sales tax paid on building materials were listed on the invoices for reimbursement which were exact amounts paid at retail by Mr. Schober and evidenced by receipts.

The Commissioner has referred to Mr. Schober as a Contractor. Division of Revenue Appeals employee, Mr. Cerney, stated that this request for reimbursement is permissible under the Department of Revenue's guidelines set forth in Contractors Fact Sheet #128.

Mr. Schober listed under the invoice description the sales tax percentage for which he paid at time of retail material purchase. This gave his client information as to the percentage of purchase along with the tax amount. Minnesota requires a person to pay the applicable sales tax percentage in the local for which the material is purchased; and a Use tax for where it will be used if the tax allocation is different. (T.53-55.)

**1a. THE COMMISSIONER'S DETERMINATION TO ASSESS A SALES TAX TO MR. SCHOBER A SECOND TIME CONSTITUTES A DOUBLE TAXATION VIOLATION PROTECTED UNDER THE U.S. CONSTITUTIONAL 14TH AMENDMENT?**

Mr. Schober purchased construction materials and installed those materials into Real Property dwellings directly for the owners. When the materials were purchased by Schober as the end user, the sales tax on all materials was paid at retail by Schober.

The Commissioner has determined that Mr. Schober must pay the sales tax the second time because Mr. Schober listed the sales tax for reimbursement in the body of his invoices to his clients. Mr. Schober's receipts have evidenced the fact that the amounts are the exact amounts he requested for reimbursement.

Mr. Schober has not been paid by all clients for the sales tax listed in the invoices. In other-words some invoices are still open accounts. The Commissioner has finally accepted the "cash method" of accounting for Mr. Schober's business practices rather than the "accrue method" of accounting.

## 2. THE COMMISSIONER DOES NOT HAVE AUTHORITY UNDER LAW TO COLLECT A TAX THAT IS NOT PROVIDED FOR UNDER LEGISLATIVE INTENT OR ENACTMENT?

Here again, Mr. Schober made improvements at the owners request on their Real Property dwellings. Through a computer program option during initial setup of the company, the sales tax option could be listed (Fn.2.) on labor for selected improvements (Fn.3.).

Unlike real property, personal property would be subject to sales tax on material and labor of improvements to those dwellings as a total project. The computer invoicing program allowed for the selection of which clients were to be assessed the sales tax on labor; personal verse real property.

Mr. Schober discovered that invoices were listing a sales tax for the installation labor in the body of the invoice under description to real property clients.

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[2] Once an item is designated as taxable in the program setup menu, the item automatically generates an associated invoice line description for the sales tax.

[3]Personal Property improvements require tax on labor v. Real Property improvements do not.

Mr. Schober discovered the error on February 10, 2004. Upon his own initiative, Mr. Schober addressed the problem with his clients, and made reimbursement of the tax. This reimbursement was done by credit applied to future work to be performed, credit applied to due invoices, or by payment of bank check directly to his client (the real property owners). All of the reimbursement was made to Mr. Schober's clients prior to the Commissioner's Notice of Determination dated April 18, 2007. (See Appellant's Pre-Trial Brief @ 5-6.)

Again, for the factual basis of this case, Mr. Schober does not operate a 'retail place of business' in Minnesota. (T.25.) Mr. Schober's invoice format does not represent a "Retail Sales Invoice." (T.29-30.). Mr. Schober's uses a 'cash basis' accounting methods.

**3. MR. SCHOBER WAS PREJUDICED BY THE INTRODUCTION OF EVIDENCE OF HIS 'DEPARTMENT OF REVENUE' CRIMINAL PROCEEDINGS RUNNING SIMULTANEOUSLY WITH THE 'DEPARTMENT OF REVENUE' TAX COURT PROCEEDINGS.**

In 2005, the Department of Revenue searched Mr. and Mrs. Schober's residence via a warrant with Suzanne Amundson as

the lead investigator. (T.15.) Subsequently, the Department of Revenue charged Mr. Schober with eight (8) counts of Willful Evasion of Income Tax and four (4) counts of Failure to Pay Excise Tax (1998 F-250 Ford Truck).

An "alford plea" was entered by the Carver County District Court on November 23, 2005 for one count of Willful Tax Evasion with other counts of Income Tax Evasion and Excise Tax dismissed as part of the plea agreement which included a full audit.

Suzanne Amundson, testified at the sentencing hearing that the Department had filed returns for Mr. Schober indicating taxes owed were about $7,000.00 and will increase with interest and penalties around $10,000.00. Ms. Amundson was the only State witness to testify in the Tax Court Trial. (T.11.)

Subsequent to completion of incarceration and probation, Mr. Schober filed for Post-Conviction Relief. Relief was granted. The "Alford Plea" was withdrawn and the income tax conviction was vacated. All eight (8) felony and four (4) gross misdemeanor charges were then again pending.

The Department of Revenue audit was completed with results of Mr. Colombo withdrawing the Departments returns and accepting Mr. Schober's income tax returns on May 4, 2006. The Department of Revenue reimbursed Mr. Schober for 2001 – 2004 income tax returns in the amount of $1261.00. (See Affidavit of Ronald Schober – Tax Court)

An Order of Determination by the Commissioner of Revenue was made listing tax liability on contractor invoices and of a sales tax on the 1998 F-250 Ford Truck. Appeal was filed and the Tax Court Trial was scheduled for August 15, 2008.

Mr. Schober scheduled a Pretrial conference under CRP 16 for inquiry of immunity from pending prosecution or clarification for 5th Amendment Privilege at the Tax Trial. (T.6, 16-18.)

There was no protection provided at trial to prevent self-incrimination testimony regarding the F-250 motor vehicle; sales tax (civil proceeding) and excise tax (criminal proceeding).

Mr. Schober was willing to stipulate to the residency at time of vehicle purchase in the year 2000. (T.6.) The "Commissioner ha[s]

(sic) 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." (T.5.)

The Tax Court reiterated the "understanding that whatever testimony, whatever evidence would be submitted pertaining to the motor vehicle issue then would not be necessary since at this point the Appellant is conceding the motor vehicle tax?" (T.7, 19-23.)

Mr. Schober responded, "Yes, and it was even on the pretrial conference I think Ms. Coyle DeMeules had indicated that she would still go ahead and put on testimony even though I stipulate to the residency of Minnesota at that time...." (T.7-8.)

Mr. Schober objected to the extensive exhibits on the issue of the truck and requested that they be separated for the Court. (T.12.)

The Tax Court rendered its decision on February 3, 2009.

Carver County Prosecuting Attorney dismissed all charges on January, 2009. Carver County District Court Judge entered an order dismissing all charges on June 2009.

### 3a. MR. SCHOBER'S CREDIBILITY WAS UNDERMINED BY THE INTRODUCTION OF THE DEPARTMENT OF REVENUE'S SIMULTANEOUS CRIMINAL MATTER.

The Tax Court ended the trial mid-way with the suggestion that the invoices be discussed by a brief/reply methodology.

The Commissioner rang the 'criminal conviction bell' early on in their pretrial brief (Commissioner's Pre-Trial Brief @ 2.Fn.1). This informed the Court of the eight (8) felony counts (Willful Income Tax Evasion) and four (4) gross misdemeanor counts (Excise Tax Evasion - 98 Ford F-250), with the resulting "Alford" guilty plea and conviction.

The continuum of the bell ringing was displayed throughout the post-trial and reply briefs by referring to Mr. Schober's invoice practices as non-credible. (Post-Trial Brief @ 8 & 12.)(Reply Brief @ 7,10,11,12)

The Commissioner of Revenue cited Trung Minh d/b/a Trung Hua Graphics & Design v. Dept. of Revenue, No. 65969 (Wash.Bd.Tax App., Feb 13, 2008) and went on to aligned Mr. Schober with these other income tax evaders for which a true "retail

sales tax" was charged on invoices but never reported and paid. (Reply Brief @ 13.) Then, stating Mr. Schober's invoices were even less credible than the cited case. The Tax Court reiterated the case law and mirrored the comments of the Commissioner of the lesson to learn. (FOFCOL @ 6.)

**4. MR. SCHOBER WAS NOT REQUIRED TO PAY SALES TAX ON THE PURCHASE OF A MOTOR VEHICLE THAT WAS PURCHASED THROUGH A MINNESOTA DEALERSHIP, THEN IMMEDIATELY DOMICILED IN A FOREIGN STATE THROUGH THE STATES' RECIPROCITY AGREEMENT.**

The Appellant moved to Minnesota in November 1999 from the State of Oregon. While in Oregon, he had owned real property, purchased and registered a 1992 Mercury Cougar; held an Oregon driver's license; and opened a bank account.

Subsequent to moving into Minnesota, the Appellant purchased an additional vehicle in June of 2000, from a Minnesota dealership, Domino Ford. Immediately upon purchase of this 1998 F-250 Ford Truck; it was registered, titled, licensed, and domiciled in the State of Oregon. An extended warranty was purchased from Domino Ford for $1600.00 that provided service repair coverage only in the western states of Washington, Oregon, and California.

In 2005, the F-250 Ford truck was registered, licensed, and insured in the State of Minnesota where it remains.

## 1. Department of Revenue's Intervention and Claims.

The Department of Revenue served a Search Warrant upon Mr. and Mrs. Schober at their residence in Watertown, Minnesota. The business records from Mr. Schober's construction company were taken from his home office.

The result of the Search caused the Commissioner of Revenue to charge eight felonies for willful evasion on income tax for the years 2000 – 2004. Additional gross misdemeanors were charged for the years 2000 – 2004 for failure to pay an excise tax on the 1998 F-250 Ford truck. Charges were filed in the Carve County District Court in May of 2005.

The Notice of Determination on Administrative Order was entered on April 18, 2007, listing a liability for a sales tax under MS 297A for retail sales. The Order also listed a liability for the F-250 Ford sales tax on the purchase of the vehicle from a Minnesota Dealership. Notice of Appeal of an Order of the Commissioner of Revenue was filed on July 10, 2007.

In the Carver County District Court, Judge Kanning: signed the Order of Transfer for Case# 10-CV-08-90 on January 16, 2008.

Mr. Schober scheduled a Pre-Trial Conference hearing on August 13, 2008. The trial commence on August 15, 2008. Shortly into trial, Judge Perez ordered the trial to conclude and that the discussion of invoices be presented by Post-Trial Briefs. The Order by Tax Court Regular Division, Chief Justice Perez; Case# 7935R for which Mr. Schober seeks review was issued February 3, 2009.

## 2. Criminal and Civil Claims Run Simultaneously.

Mr. Schober entered an "Alford Plea" to one count of Willful Evasion of Income Tax with all other charges dismissed on November 23, 2005.

Mr. Schober was granted Post-conviction Relief by the sentencing Court Judge in the Carver County on September 8, 2008. The "Alford Plea" was allowed to be withdrawn, conviction was vacated, and all charges were now pending.

Carver County prosecuting attorney dismissed charges on all criminal matters on December 24, 2008. Mr. Schober's attorney was notified by court administrator dated January 14, 2009. Mr. Schober was sent a fax by his attorney regarding dismissal on January 27, 2009. The Order from the Tax Court was filed February 3, 2009.

The District Court Judge signed the Order for the State's Dismissal of Charges on June 3, 2009.

### 3. Concession Of Motor Vehicle Tax Due Lack Of 5th Amendment Protection.

Mr. Schober scheduled a Pre-Conference Hearing before the Tax Court to discuss Immunity or 5th Amendment Rights to avoid any testimony that he would be compelled to give in the Tax Court from being used against him in the pending criminal charges. (Statement of the Proceedings.10.)

The Commissioner failed to recognize that all original charges were back on the table once the "Alford Plea" was withdrawn. (Statement of the Proceedings.4. & 8.) Since prosecution for the criminal charges was in a continuum state of time running

simultaneous with the Tax Court Proceedings, anything glean in the Tax Court could be used against Mr. Schober subsequently. The Commissioner had knowledge of the Post-Conviction relief being sought by Mr. Schober. (Statement of the Proceedings.8.)

Mr. Schober elected to concede on the sales tax of the motor vehicle in order to preserve the record from being used against him in the pending criminal matters promulgated by the Commissioner.

If it had not been for these simultaneous matters, Mr. Schober would have not concede the issue and brought forth the motor vehicle sales tax to fruition before the Tax Court.

## ARGUMENT

### STANDARD FOR REVIEW.

The Tax Court's Finding of Fact and Conclusion of Law (FOFCOL) was not supported by the evidence or the law. Under such mixed questions of fact and law, the Reviewing Court will

"correct erroneous application of law,... and review such conclusions under an abuse of discretion standard." Langford Tool & Drill Co. v. Phenix Biocomposites, LLC, 668 N.W.2d 438, 442 (Minn. App. 2003)(quoting Rehn v. Fischley, 557 N.W.2d 328, 333 (Minn. 1997).

When reviewing the final order of the Tax Court, the Appellate Court may reverse if the order is not justified by the evidence or was not in conformity with the law. Minn. Stat. § 271.10, subd.1 (2006); S. MInn. Beet Sugar Coop. v. County of Renville, 737 N.W.2d 545, 551 (Minn. 2007). ("We review the Tax Court's conclusions of law de novo and findings of fact for clear error." S. MInn. Beet Sugar Coop. v. County of Renville, 737 N.W.2d at 551).

**1. A SALES TAX PAID ON BUILDING MATERIALS INSTALLED INTO REAL PROPERTY, DOES NOT CONSTITUTE A RETAIL SALE UNDER MINN. STAT. § 297A WHEN THE PAID SALES TAX IS LISTED ON AN INVOICE AS A COST TO THE HOME OWNER AT THE COMPLETION OF THE PROJECT PURSUANT TO MINN. STAT. § 325F.60.**

The Tax Court stated:

> "The evidence shows the Appellant calculated sales tax on some invoices based on the total amount he paid to his vendors, not just pre-tax amounts. (Fn4 - See, e.g., Exs. 9, 9A, 10, 10A, 19, 19A)" (FOFCOL.5-6.)"

These exhibits that the Court refers to are the Commissioner's Exhibits. Mr. Schober brought to the attention of the Court missing receipts that the Commissioner neglected to provide with invoices.

> "The thing that is not inclusive of the Commissioner's exhibit here is another, again, very similar to the Heather Nelson 9 and 9A is that they were void of this particular receipt of materials." (T.112.)

Thus, the invoice exhibits did not support the sales tax amount. (T.119, 11-13.) The Commissioner responded by,

> (Ms. DeMeules)
>
> "I think you have additional exhibits you want to provide the Court. Whether or not I included them,.." (T.119, 14-18.)
>
> (Mr. Schober)
>
> "Well, they are actual receipts that were attached to the invoice." (T.119, 19-20.)(See also T.22.)

The Tax Court concluded that Mr. Schober mark his exhibits with a three-digit numbering, starting with 102. (T.120.) Mr. Schober submitted all client invoices as exhibits with copies of receipts and totals to show that the listed tax on the invoice was equal to the material receipts. (See, Appellant's Post-Trial Brief @ 15-17)

The error of the Tax Court is evidenced by not giving any reduction to Mr. Schober's tax liability, with even the simplest understanding invoices such as Invoice #4016 (Appellant's Exhibit 105) (Appellant's Post-Trial Brief @17-18). The Commissioner even concurred that that sales tax was equal to the amount paid at retail as listed on the invoice for reimbursement. (Commissioner's Post-Trial Brief @ 11, fn.10).

The Tax Court's Finding of Fact and Conclusion of Law concluded Mr. Schober's invoices represented a retail sale under Minn. Stat. § 297A and any tax collected should have been remitted to the Department of Revenue. (FOFCOL.7)

Mr. Schober made improvements directly for the owners of their Real Property dwellings. (Minn. Stat. § 272.03 Definitions. Subd 1. Real Property). Mr. Schober would purchase and install material for

those improvements. When the material was purchased by Mr. Schober as the end user, the sales tax on the material was paid at the retailer by Mr. Schober. ( Minn. Stat. § 297A.61 DEFINITIONS. Subd. 4. Retail sale (d)) and ( Minn.R. 8130.1200 SALES OF BUILDING MATERIAL..., Subpart 1. General rule).

The Tax Court stated that TimberCreek Renovation (a sole-proprietorship) and Mr. Schober (an individual) should have been but were not registered with the Department of Revenue to collect sales tax. (FOFCOL.2).

Under the Department of Revenue's Instruction Booklet, Minnesota Sales and Use Tax, the 'who needs to register' question is answered directly on page 2. It states, "You must register to collect sales tax if you make taxable retail sales in Minnesota." This clearly indicates that neither TimberCreek nor Mr. Schober had an obligation to register since no retail sales were conducted. Again, real property improvements are not subject to a sales tax.

The Tax Court has held that the sales tax listed on Mr. Schober's invoices is due to the Department of Revenue as a retail sale. See: Bituminous Roadways, Inc. v. Commissioner of

Revenue, 324 N.W. 2d 799 (1982) ("a sales tax is imposed only when there is a retail sale"). The State Supreme Court concluded that "...once the contractor, subcontractor, or builder has incorporated the materials or supplies into a building, the materials and supplies lose their identity as personal property and become part of the realty." County of Hennepin v. State of Minnesota, et al. 263 N.W.2d 639 [Fn1] (1978).

Ergo, Mr. Schober's invoices followed the installation of building materials and labor to install them, thus, can not be deemed by the Tax Court as a "retail sale." This represents clear error.

Mr. Cerney, Appeal and Legal Services Specialist, at the Department of Revenue stated that the request for reimbursement of a sales tax on building material is permissible. He stated the sales tax Mr. Schober paid on materials should have been included with the total material cost as suggested by the Department of Revenue's guidelines set forth in Contractors Fact Sheet #128. It has been long held by the Minnesota Supreme Court that these Fact Sheet guidelines have no statutory authority. Commissioner of Revenue v. Richardson, 302 N.W.2d 23, 26 (Minn. 1981) (..."these instructions

have no legal effect"), and, Birkel v. Commissioner of Revenue, Dckt. No. 5514 (Minn. Tax Ct. Oct. 15, 1990) ("Instructions are merely a guide to the taxpayer...").

Mr. Schober's invoices followed the Consumer Protection Law requirements set forth below:

> Minn. Stat. § 325F.60 INVOICE, (2007)
>
> subd. 1 Definition: requirements. Notwithstanding the provisions of section 325F.56, subdivision 2, for the purpose of this section "repair" means... any repair work performed for a value of more that $50.00, including the price of parts and materials, to restore... dwelling place used primarily for personal, family, or household purposes.... Upon completion of the repairs, a shop shall provide the customer with a copy of a dated invoice for the repairs performed.... **The invoice shall contain the following information** (emphasis added):
>
> (a) the date of repair;
>
> (b) the name and address of the shop;
>
> (c) a description of all repairs performed;
>
> (d) an itemization of the charges for parts, **materials, labor, tax**, (emphasis added) delivery, ...and any other charges assessed against the customer;
>
> (e) ....

Mr. Schober listed the sales "tax" amount as a cost for reimbursement along with "any other charges assessed against the customer" in the body of his invoices in compliance with Consumer Protection Laws (Id.)

Furthermore, the Fact Sheet #128's inclusive application of a sale tax in with the material is equivalent to hiding the sales tax; contrary to Minn. Stat. § 325F.60.

**1a. THE COMMISSIONER'S DETERMINATION TO ASSESS A SALES TAX TO MR. SCHOBER A SECOND TIME CONSTITUTES A DOUBLE TAXATION VIOLATION PROTECTED UNDER THE U.S. CONSTITUTIONAL 14TH AMENDMENT.**

When the application of a statute to the undisputed facts of a case involves a question of law, it is reviewed de novo by the appellate court. Davies v. W. Publ'g Co., 622 N.W.2d 836, 841 (Minn. App. 2001)(citing Lefto v. Hoggsbreath Enters., Inc. 581 N.W.2d 855. 856 (Minn. 1998)), *review denied* (Minn. May 29,2001).

Double taxation is not forbidden by the 14th Amendment but prohibits its application under equal protection and due process clauses; and, similar Minn. Const. art. 10. Guilliams, et. Al. v.

Commissioner of Revenue, 299 N.W.2d 138 (1980). This Court went on to conclude that "A classification that satisfies the equal protection clause will satisfy the due process clause of the fifth amendment." Citing Weinberger v. Salfi, 422 U.S. 749, 770, 95 S.Ct. 2457, 2469, 45 L.Ed.2d 522 (1975).

The Double Taxation argument comes in because the Tax Court has made the determination of tax amounts against Mr. Schober to be equal to the total amounts that Mr. Schober paid at retail as an end user of construction materials. However, if the Court would have found where Mr. Schober had marked-up his materials on his invoices beyond what his cost was at retail; and, showed where Mr. Schober asked for reimbursement of the sales tax figured on the marked-up price, then Mr. Schober's Double Taxation violation argument fails. Then, the Tax Court would be only assessing Mr. Schober on the additional tax for which Mr. Schober collected on his marked-up price.

However, regarding material purchases, this is not the Commissioner's method for the Notice of Determination of tax

liability against Mr. Schober. Ergo, the Double Taxation violation exists.

The Commissioner has assessed Mr. Schober a sales tax the second time, strictly based upon his invoice amounts; not upon what he has collected from his clients. The Tax Court never acknowledged that Mr. Schober operates on a "cash basis" of accounting, nor inquired if Mr. Schober had received payment from all clients for which the Notice of Determination was based upon.

Furthermore, the Tax Court never reasoned if any invoices had amounts in excess to the "paid at retail" sale tax.

Mr. Schober still contends that the Notice of Determination assesses a sales tax upon him directly a second time. Mr. Schober claims this to be a true 'evil of double taxation:' the same sales tax purpose required to be paid, a second time, by the same person, by the same tax department, and on the same materials. Federated Mutual Implement & Hardware Insurance Co. v. Commissioner of Internal Revenue, 266 F.2d 66 (1959). This Court went on to conclude that "A classification that satisfies the equal protection clause will satisfy the due process clause of the fifth amendment."

Citing Weinberger v. Salfi, 422 U.S. 749, 770, 95 S.Ct. 2457, 2469, 45 L.Ed.2d 522 (1975).

**2. THE COMMISSIONER DOES NOT HAVE AUTHORITY UNDER LAW TO COLLECT A TAX THAT IS NOT PROVIDED FOR UNDER LEGISLATIVE INTENT OR ENACTMENT.**

"...When reviewing mix questions of law and fact, we correct erroneous applications of law... and review such conclusion under an abuse of discretion standard." Porch v. Gen. Motors Acceptance Corp., 642 N.W.2d 473, 477 (Minn. App. 2002)

The Commissioner has held that the erroneous tax listed on Mr. Schober's invoices is due to the Department of Revenue as a retail sale. The Tax Court upheld the Commissioner's Determination. Here again, Mr. Schober made improvements at the owners request on their Real Property dwellings. (Minn. Stat. § 272.03 Definitions. Subd 1. Real Property).

Mr. Schober's invoices followed the installation of building materials and labor to install them, thus, can not be deemed by the Tax Court as a "retail sale." Therefore, the erroneous labor tax, penalties, and interest should not be included as a part of Mr.

Schober's tax liability, especially considering all clients have been reimbursed for the erroneous tax by Mr. Schober.

Black's Law Dictionary (Sixth Edition) defines Erroneous or illegal tax as: One levied without statutory authority, or upon property not subject to taxation. The Tax Court has only cited the statute regarding such an erroneous tax collected by a purchaser under representation of chapter 297A.[4] (Fn.4) (FOFCOL.7).

Mr. Schober's contention has been that repayment to his clients (payer) was best suited to the reimbursement of the erroneous sales tax. This Court affirms Mr. Schober's direction of reimbursement in a similar erroneous tax case which was stated in Acton Construction Co. et. al. v. Commissioner of Revenue, 1985 WL 6191, Dck. No. 4310 (Minn. Tax Ct. June 19, 1985.) ("..., but it appears to us that the real party in interest in this refund should be the party that ultimately paid the sales tax").

The method employed by Mr. Schober to reimburse his clients is the same method allowed by this Court in a Vendor/

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[4] Minn. Stat. § 289A.31 Subd.7(e)

Purchaser case in Lakeside, Ltd., a Minnesota Corporation v. Commissioner of Revenue, 1985 W.L. 6190, Dck No. 4033 (Minn. Tax Ct. June 19, 1985) ("If a vendor has collected from a purchaser and remitted to the state a tax on a transaction which is not subject to the tax imposed by this chapter, the tax shall be refundable to the vendor only if and to the extent that it will be credited to amounts due to the vendor by the purchaser or returned to the purchaser by the vendor."). In the above cited case is provided another situation for which a sales tax was charged that was not subject to the tax imposed by this chapter (297A).

Furthermore, under Minn. Stat. § 289.50 Claims for Refund statute, subd. 2(a) and Contractors Fact Sheet #128 (rev. 3/07), it is the client must make application for refund from the contractor for such erroneous tax not under the representation of Minn. Stat. § 297A. No client has made such a request (T.34.), nor will they have to: Mr. Schober has reimbursed all clients by means of work, cash payment, or credit applied to their owing balances. Consequently, the Commissioner has no authority to intervene in Mr. Schober's business.

All of the reimbursement was made to Mr. Schober's clients prior to the Commissioner's Notice of Determination dated April 18, 2007.

Mr. Schober should have had to only reimburse to his clients directly. If not, then the Duplicate Taxation comes to surface. Once the Department of Revenue collects the erroneous sales tax, they inherently have assessed a 'Duplicate Taxation' upon the real property owner. (Applt's Pre-Trial Brief at 15). It should be said that Mr. Schober is not arguing that the statute is unconstitutional but the application of law as the Commissioner applies it to Mr. Schober.

### 3. MR. SCHOBER WAS PREJUDICED BY THE INTRODUCTION OF EVIDENCE OF HIS 'DEPARTMENT OF REVENUE' CRIMINAL PROCEEDINGS RUNNING SIMULTANEOUSLY WITH THE 'DEPARTMENT OF REVENUE' TAX COURT PROCEEDINGS

The dilemma here was that if the sales tax on the vehicle was established, then the record for the excise tax charges (4) were also established for pending prosecution.

The criminal conviction had been vacated but charges were still pending in the same jurisdiction of origin as the tax court issues. The Commissioner of Revenue was aware of the pending charges through communication with the county.

Mr. Schober appealed the vehicle issues because it was domiciled immediately at the dealership to the State of Oregon (Mr. Schober's previous residence). When brought back into the State of Minnesota under the states' reciprocity agreement in the year 2005, no sales tax was due.

Mr. Schober conceded at start of trial to the tax liability, penalties, negligence fee, and interest on the motor vehicle to protect him from self-incrimination while under oath.

The Commissioner of Revenue indicated the residency concession 'would cut down on the testimony considerably.'

Consequently, the pending criminal charges were dismissed within days of the decision of the tax court. Having known this previous to the trial, Mr. Schober would have promulgated the vehicle issue and not conceded. Most importantly, the pending criminal matters would not have been introduced to the tax court regarding issues of credibility that Mr. Schober had to overcome.

**3a. MR. SCHOBER'S CREDIBILITY WAS UNDERMINED BY THE INTRODUCTION OF THE DEPARTMENT OF REVENUE'S SIMULTANEOUS CRIMINAL MATTER.**

The argument continues that this Notice of Determination is a matter of "Form over Substance." The Commissioner stated that Mr. Schober should have hidden the tax, or stated the tax as "information only." Ultimately, the result would have been the same cost to the client. In Bemidji Community Hospital v. Commission of Revenue, Dkt No. 3284, 1982 WL 1492 (Minn.Tax Ct. June 16, 1982 the recognized principle that a court can disregard form and consider

substance where a good-faith effort should not be thwarted by a technicality. It is a well settled principle of tax law that substance is controlling over form. Burr Oaks Corporation v. Commissioner, 365 Fed. 2d 24, Bartz v. Commissioner, Tax Court Docket No. 1971, entered November 30, 1976. (Appellant's Pre-Trial Brief, pg.9).

The Tax Court issues were in-part 'form v. substance'. Mr. Schober's invoices regardless of form would have rendered same total amount the client would have paid. The Commissioner of Revenue stated the form was incorrect and the sales tax should be paid to them with penalties and interest. When a Form v. Substance argument is raised before a tribunal, substance is viewed most favorable when good faith is showed.

The Tax Court upheld the Commissioner's determination.

Mr. Schober is adamant that when 'credibility' or 'good faith' is tainted by a criminal record, it is too overwhelming to overcome by a written (brief) presentation. This is especially so when the credibility or good faith is so closely married to the same criminal matters initiated by the same government agency.

Post-Conviction Relief had been granted from the same jurisdiction of origin as the tax court issues: the guilty plea withdrawn and conviction vacated. Subsequently, the charges were dismissed in the best interest of justice within days of the Tax Court's decision. Had these facts been known, more-likely-than-not a different outcome would have resulted in the Tax Court decision.

**4. MR. SCHOBER WAS NOT REQUIRED TO PAY SALES TAX ON THE PURCHASE OF A MOTOR VEHICLE THAT WAS PURCHASED THROUGH A MINNESOTA DEALERSHIP, THEN IMMEDIATELY DOMICILED IN A FOREIGN STATE THROUGH THE STATES' RECIPROCITY AGREEMENT.**

The Ford F-250 was domiciled in Oregon under a reciprocity agreement with Minnesota. (Minn. Stat. § 168.181, subd.3. Vehicle in foreign state and owned by Minnesotan.). It clearly states:

> The provisions of this section shall be operative as to motor vehicles actually domiciled in a foreign state,... and legally licensed in that state,... and owned by a Minnesota resident.

The Ford F-250 was purchase in June 2000 with 36,250 miles on the odometer. The vehicle visited the State of Minnesota for the first time in October of 2000 (mileage 41,361); then, again,

February 2001 (mileage 49,381); November 2001 (mileage 59,291); and December 2002 (mileage 84,040). These dates indicated oil changes made under a Preventive Maintenance Schedule in Minnesota during those visits as the Commissioner's exhibits would have shown.

The vehicle was purchased in June, 2000, and first visited the State of Minnesota in October 2000. If the vehicle had become registered in Minnesota at that time, it was past the 90 days of out-of-state requirement that would not have required a sales tax to be assessed upon registering the vehicle.

The motor vehicle insurance was issued from a State Farm Agency in Wasco County, Oregon.

It is clear that the Commissioner's argument for assessment of a sales tax upon Mr. Schober five years after the purchase of the Ford F-250 is far reaching effort to collect an unwarranted tax.

## CONCLUSION

Relator Schober respectfully requests that the decision of the Tax Court be reversed in accord with the arguments put forth by Schober with respect to the reduction of his tax liability, interest, and penalties assessed by the Commissioner of Revenue. It is further requested that the concession of the sales tax on the Ford F-250 be withdrawn and he be allowed to renew his objection of Commissioner's liability assessment; or, under this Court's jurisdiction vacate the sales tax liability in the interest of justice.

Relator Schober is entitled to his time based fees and costs to be paid by the Respondent and be directed to do so by order. Relator Schober will petition this Court, pursuant to Rule 139.06 of the Minnesota Rules of Civil Appellate Procedure, for fees and cost incurred both before the Minnesota Tax Court and before this Court.

Respectfully submitted this 28th day of August, 2009.

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## CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirement of Minn. R. Civ. App. P. 132.01 subds, 1 and 3, for a brief produced with a proportional font. The length of the brief is 6,830 words and 864 lines. This brief was prepared using Microsoft Word.

Dated this 28th day of August, 2009.

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