STATE OF MINNESOTA TAX COURT

COUNTY OF RAMSEY REGULAR DIVISION

William Schwartz & Sons, Inc.,

Appellant,

vs.

Commissioner of Revenue,

Appellee.

ORDER

Docket No. 7702

Dated: January 27, 2006

The Honorable Sheryl A. Ramstad, Judge of the Minnesota Tax Court, heard cross motions for summary judgment, on November 22, 2005, at the Minnesota Tax Court, 210 Minnesota Judicial Center, St. Paul, Minnesota.

Neal J. Shapiro, Attorney at Law, represented the Appellant.

Barry Greller, Assistant Attorney General, represented the Appellee Commissioner of Revenue.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

1. Appellant's Motion for summary judgment is hereby denied.
2. Appellee's Motion for summary judgment is hereby granted.

IT IS SO ORDERED. THIS IS A FINAL ORDER. LET JUDGMENT BE ENTERED ACCORDINGLY. A STAY OF FIFTEEN DAYS IS HEREBY ORDERED.

BY THE COURT,

Sheryl A. Ramstad, Judge
MINNESOTA TAX COURT

DATED: January 27, 2006

Memorandum

Background

This matter comes before the Court on cross motions for summary judgment[1] on an appeal from the Commissioner of Revenue's ("Commissioner") Order dated July 28, 2004, affirming an assessment of additional sales and use tax, penalty, and interest against William Schwartz & Sons, Inc. ("Appellant") for the tax period January 1, 2000, through March 31, 2003.[2] Appellant filed its timely appeal to the Minnesota Tax Court on August 3, 2004. On June 9, 2005, during a pretrial telephone conference call, the parties agreed to submit this matter for decision on cross motions for summary judgment.

[1] Made pursuant to Minn. R. 8610.0070 (2005) and Minn. R. Civ. P. 56.
[2] Subsequent to the assessment and prior to the Order, Schwartz paid a portion of the assessment, in the amount of $17,940.72, which payment and amount is not disputed and is reflected as a credit in the Order.

Procedural Matters

On December 30, 2003, following an audit, the Commissioner issued a Sales and Use Tax Audit Report to Appellant for the period January 1, 2000, through March 31, 2003. Included with the Audit Report was a Notice of Change in Sales and Use Tax, which assessed additional tax of $77,797.48, penalty of $1,236.39, and interest of $9,749.02, totaling $88,782.89.

On January 21, 2004, Appellant filed an administrative appeal with the Commissioner. [3] On February 4, 2004, Appellant paid the portion of the additional tax, which it does not dispute, in the amount of $17,940.72, not including penalty or interest. On July 28, 2004, the Commissioner issued a Notice of Determination on Appeal, affirming the amount of tax and penalty assessed by the prior notice, crediting the payment received, and updating the interest amount. Appellant appealed to this Court on August 3, 2004; the amount of tax in dispute is $64,076.85.

Facts

Appellant is a Minnesota corporation in the business of operating gravel pits, where it crushes rock for sale, as well as excavating, installing septic systems and selling aggregate materials that are delivered and either dumped in a pile or spread. Affidavit of Julie A. Arnt ("Arnt Aff.") ¶ 2. Among the items it sells are aggregate, sandy loam, riprap, rock, black dirt, and related materials

[3] The administrative appeal refers to the schedules in issue as "schedules C & G totaling a tax adjustment of $59,856.76." Return, item no. 6. The correct reference to the final version of the Audit Report, as issued on December 30, 2003, is to Schedules A & B, which assessed an additional tax of $64,076.85. Affidavit of Karen L. Barrett ("Barrett Affidavit") ¶ 3. When the crushing sales made to the City of Hibbing ($4,233.09) are subtracted from the tax amount assessed on Schedules A & B, the result is approximately equal to the amount of the disputed tax adjustment referred to in the administrative appeal.

which are used for landscaping, erosion control, and septic systems. Affidavit of Robert J. Schwartz ("Schwartz Aff.") ¶2, ¶3. Appellant makes two different kinds of sales: 1) sales delivered to the lots of purchasers, such as paving companies or landscapers, who will deliver the material to the site where it is to be spread and 2) sales delivered to the site where the material is to be spread. Schwartz Aff. ¶5. In general, the sales at issue were made either to the owner of the property, or to a construction company, a city or county government, a landscaping contractor, a cemetery, or a sewer company. Arnt Aff. ¶ 2.

In all sales, Appellant attempts to ascertain where the material is to be deposited in advance or to arrange for someone to be at the delivery location to designate where the materials are to be deposited at the time of delivery. Where sales were made for delivery other than to the location where the materials were to be spread, Appellant collected sales tax. Schwartz Aff. ¶6-8.

The Commissioner audited Appellant's business for sales and use tax. Arnt Aff. ¶3. During the audit, the auditor reviewed sales invoices and identified sales of aggregate that appeared to constitute sales of tangible personal property because they did not indicate that Appellant was incorporating the aggregate into real property, as no spreading or sprinkling instructions appeared. Arnt Aff. ¶ 4. Most of the invoices the auditor reviewed had a slip attached that indicated the customer's dumping instructions. Some of these slips gave instructions to "dump by" or "dump on" existing piles, "dump by" or "dump on" a stake or a cone, or "dump in front of", "dump in back of" or "dump beside" a building or by some

other mark. Id. The auditor did not include invoices for slips or contracts indicating spreading or sprinkling, or directing leveling of the aggregate. Id.

As part of the audit, the auditor provided a representative of Appellant with a list of the sales that did not indicate any spreading or sprinkling and requested further information. After the representative marked the sales where spreading was involved and also sales where a portion of the aggregate was spread, these were removed from the assessed amount although Appellant's records provided no verification that spreading was part of the sales. Id. However, tax was assessed on the remaining sales where the auditor did not find sufficient evidence that the aggregate material sold was incorporated or installed into real property by Appellant.

Also during the audit, Appellant back-billed certain customers whose transactions were included in a proposed assessment the auditor had prepared. Arnt Aff. ¶ 5. With respect to these customers, Appellant collected the applicable sales tax from some, received documentation from others who had already paid the applicable use tax on the purchases, or was informed that the customer would not pay the tax because Appellant's sales quotation was to have included all taxes associated with the purchase. Id. Following the audit, Appellant remitted to the Department of Revenue certain taxes collected and made its own payment of $17,940.72, comprised of the sales tax of $12,354.82 collected from back-billed customers, tax of $4,233.09 for two crushing sales made to the City of Hibbing, and $1,352.81 for use tax owed. Barrett Aff. ¶ 4.

Appellant contests the Commissioner's Order on the ground that sales of aggregate materials delivered to its customers' project sites constituted an improvement to real property (a "construction contract") and were therefore not subject to sales tax. The parties agree that none of the sales included in the assessment included any spreading or sprinkling by Appellant.

Issue

The issue in this case is whether Appellant's sale and delivery of aggregate which is dumped on a purchaser's property, but which is in no way incorporated or installed into real property by Appellant, is a taxable retail sale of tangible personal property so that Appellant is liable for payment of the sales tax. For the reasons set forth below, we find that the transaction is a retail sale and thus, subject to sales tax.

Summary Judgment Standard

Summary judgment is appropriate where it is determined that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law.[4] Both parties agree and we find that there are no material facts in dispute and that this matter is ripe for summary judgment.

Statutes

In general, the sales tax is imposed on "retail sales as defined in [Minn. Stat. §] 297A.61, subd. 4" of tangible personal property. Minn. Stat. §§ 297A.61,

[4] Minn. R. Civ. P. 56.03. Accord, DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997) (summary judgment permits the court to dispose of an action if there is no genuine issue as to any material fact).

subd. 3(b) (1); 297A.62, subd. (1). A taxable "retail sale" of tangible personal property consisting of building materials[5] is defined as follows:

> A sale of building materials, supplies, and equipment to owners, contractors, subcontractors, or builders for the erection of buildings or the alteration, repair, or improvement of real property is a retail sale in whatever quantity sold, whether the sale is for purposes of resale in the form of real property or otherwise.

Minn. Stat. § 297A.61, subd. 4(d).

Under this statute, where building materials are sold for the "improvement of real property," the sale is treated as a retail sale, and it is not relevant "whether the sale is for purposes of resale in the form of real property or otherwise." Minn. Stat. § 297A.61, subd. 4(d). In other words, where the buyer is going to install or incorporate the tangible personal property into real property, the seller is deemed to have made a retail sale. As such, the retail sale is subject to sales tax.

However, a distinction is made where the seller also installs or incorporates the tangible personal property into real property. Minnesota Statute Section 297A.61, subd. 4(f) provides that:

> A sale of shrubbery, plants, sod, trees, and similar items to a person who provides for installation of the items is a retail sale and not a sale for resale since a sale of shrubbery, plants, sod, trees, and similar items that includes installation is a contract for the improvement of real property.

Minn. Stat. § 297A.61, subd. 4(f).

[5] The term "building materials" refers to property intended to become part of a new building or improvement to real estate. Minn. R. 8130.1200. Contractors and subcontractors are required to collect and remit sales tax on sales of building materials only to the extent that the contractor delivers the building materials to the job site without any requirement that [the contractor] installs [the] tangible personal property." Minn. R. 8130.1200, subpt. 2C.

Thus, where the buyer installs items to real property, the seller is deemed to have made a retail sale. By negative implication, where the seller is the installer, the seller has entered into a "contract for the improvement of real property," rather than one for the retail sale of tangible personal property, and the transaction is not subject to sales tax.

This distinction between a retail sale and a contract for the improvement of real property is paramount in connection with determining whether the sales of aggregate included in the assessment issued to Appellant are subject to sales tax. If Appellant installs the aggregate on the real estate, then it is not required to collect and remit sales tax; if Appellant merely delivers the aggregate to the buyer, however, it is required to collect and remit sales tax. The question then becomes whether Appellant installs the aggregate or not.

Finally, Minn. Stat. § 297A.665 provides that all gross receipts are presumed to be subject to tax and the seller bears the burden of proving that a sale is not a taxable retail sale.

Analysis

Here, the Commissioner argues that Appellant's mere sale and delivery of aggregate which was dumped on a purchaser's property, but which is in no way involved any activity by Appellant that could reasonably be characterized as installation of the aggregate, was a taxable retail sale of tangible personal property so that Appellant was liable for sales tax. Because Appellant delivered and dumped the aggregate at a location specified by its customer from which the customer could install the aggregate, the Commissioner contends that the sales

in issue were merely retail sales of truck loads of aggregate and not contracts for the improvement of real property. In support of this position, the Commissioner relies in part upon Department of Revenue fact sheets issued during most of the time periods covered by the assessment. Specifically, Minnesota Department of Revenue Sales Tax Fact Sheet ("Fact Sheet") 128 "Contractors," as revised both in May 2000 and February 2001[6] contains the following language dealing with sales of gravel and similar materials:

> **Sales of gravel, crushed rock, sand, or dirt**
>
> Sales of gravel or similar materials are an improvement to real property if the sales contract requires you to **deliver and spread** the gravel in such a way that no further leveling is required by the purchaser. This includes situations where the gravel is leveled while being unloaded from the back of a moving truck without the use of any other equipment. Charges for gravel in these situations are not taxable to your customer.
>
> You must pay sales or use tax on gravel you buy to improve real property. If you own a gravel pit and use the gravel for improving real property, no use tax is due.
>
> If gravel is merely dumped in a pile, or if the contract **does not require you to level the gravel**, the sale is a sale of tangible personal property and you must charge sales tax. You can buy the gravel exempt for resale by giving your Supplier a Resale Exemption Certificate, Form ST-5.

Barrett Aff., Ex. A at p. 3 & Ex. B at p. 3 (emphasis in original).

Because the purchaser, not the seller, was required to spread or compact the aggregate material delivered by Appellant, the Commissioner claims the sales cannot be considered "an improvement to real property" and should have been treated as taxable retail sales. Further, the Commissioner points out that

[6] A previous version of the fact sheet, as revised in 1996 and in effect during the first four months of the audit period, is substantially the same.

the Fact Sheet language requires the seller to charge sales tax where the gravel material is merely dumped in a pile, or if the contract does not require the seller to level it. Since it is undisputed that Appellant simply dumped the aggregate material in a pile at the project site, the Commissioner claims that the sale is a sale of tangible property.

Appellant relies upon a later version of Fact Sheet 128 issued in April of 2003 ("2003 Fact Sheet") to support its position that the sales in question are not subject to sales tax because Appellant is a contractor-retailer whose deliveries were deposited substantially in place. The version favored by Appellant states that a sale is not taxable if the materials are "deposited substantially in place [which] means deposited on the project site directly or through spreaders where it can be spread from or compacted at the location where it was deposited." The 2003 Fact Sheet provides the following:

> **Sales of aggregate and gravel, crushed rock, sand or dirt**
>
> **Construction contract:** Sales of aggregate, gravel or similar materials are an improvement to real property if the sales contract requires both the delivery and depositing substantially in place of the materials. Deposited substantially in place means deposited on the project site directly or through spreaders where it can be spread from or compacted at the location where it is deposited. Charges for materials in these situations are not taxable to the customer.
>
> The contractor must pay sales or use tax on these materials used to improve real property. If the contractor owns a gravel pit and uses his/her own gravel for improving real property, no use tax is due.
>
> **Retail sale:** If the aggregate material is merely dumped in a pile, or if the contract does not require the hauler to deposit the aggregate material substantially in place, it is a sale

> of tangible personal property and the contractor must charge sales tax on both the material and the delivery charges.

Department of Revenue Fact Sheet 128 (Apr. 2003).

Appellant argues that the version it relies upon should be applied because it was adopted in 2003 and is therefore the Commissioner's most current interpretation of the relevant statutes and regulations. Further, Appellant points out that because it is a contractor-retailer whose deliveries were deposited substantially in place, the transactions do not constitute retail sales so as to require Appellant to charge sales tax.

In this case, it is undisputed that the sales on which the Commissioner assessed tax involved no spreading, sprinkling or other form of installation by Appellant. Appellant merely delivered and dumped the aggregate at a location specified by the purchaser from which the purchaser could spread or install the aggregate. Hence, the purchaser, not Appellant, was responsible for any spreading or compacting or installation of aggregate as to the sales in issue. The parties also agree that sales tax is imposed on retail sales, which include building materials sold to owners and contractors, such as the aggregate sold by Appellant. Further, they agree that a distinction is made where the seller also installs or incorporates the tangible personal property into real property which is not subject to sales tax. In short, the parties agree that where the buyer of building materials (whether an owner, contractor or otherwise) is going to perform the installation of those items to real property, the seller is deemed to have made a retail sale and must collect sales tax from the buyer. By the same reasoning,

where the seller is also the installer, the parties have entered into a contract for the improvement of real estate which is not subject to sales tax. Thus, the sole question raised by this Appeal is whether Appellant's mere sale and delivery of aggregate which is dumped on a purchaser's property, albeit at a place specified by the purchaser, is a taxable retail sale of tangible personal property so that Appellant is liable for the sales tax. For the reasons set forth below, we find that it is.

There are several problems with Appellant's argument that it is exempt from sales tax as a contractor-retailer whose deliveries were deposited substantially in place, relying upon language in Fact Sheet 128 issued by the Commissioner in April 2003. First of all, the 2003 Fact Sheet was issued after the last tax period covered by the assessment under appeal. More importantly, Appellant has quoted the language "deposited substantially in place" out of context. Since the earlier versions relied upon by the Commissioner state that if material "is merely dumped in a pile…, the sale is a sale of tangible personal property….", it is necessary to distinguish material "merely dumped in a pile" from material "deposited substantially in place." The most obvious reading of the 2003 Fact Sheet, as contrasted with the earlier versions relied upon by the Commissioner, is that the phrase "deposited substantially in place" was introduced to replace the previous requirement that the contractor actually spread the material "in such a way that no further leveling is required by the purchaser." See Fact Sheet No. 128 (rev. May 2000 and Feb. 2001). What has changed is the requirement that the contractor actually level the material, not that

it be deposited where it is to be used. For example, where a dump truck deposited a load of gravel in a pile on the side of a road, it would be a taxable sale of gravel. But where the dump truck released the gravel by driving over the road, gradually distributing it over the length of the road in the process of unloading it, the gravel would be deposited substantially in place and not taxable, even though some further leveling might be required by the purchaser. Hence, the 2003 Fact Sheet still provides that a taxable event occurs when the aggregate is deposited on the real estate where it is to come to rest but where the aggregate is distributed in the process of unloading it, it would not be taxable. Since Appellant merely dumped the aggregate in a pile, albeit at the precise location where the customer wanted the material to be dumped, the disputed sales were not an improvement to real property and should have been treated as taxable retail sales.

Furthermore, even if Appellant's interpretation of the 2003 Fact Sheet was correct, it could not change the underlying law governing the application of sales tax to sales of tangible personal property. "[W]hen a statute is clear on its face, there is no need to look further for aids in its interpretation." Northwestern Bell Telephone Co. v. Commissioner of Revenue, Dckt. No. 3803 (Minn. Tax Ct. Aug. 11, 1986). We cannot write a provision into law even if there exists contrary administrative interpretations. Mankato Citizens Telephone Co. v. Commissioner of Taxation, 275 Minn. 107, 145 N.W.2d 313 (1966). The Minnesota Supreme Court has stated that "these instructions have no legal effect." Commissioner of Revenue v. Richardson, 302 N.W.2d 23, 26 (Minn. 1981). This Court has

previously rejected the argument that the Commissioner must be bound by his instructions where they conflict with the law passed by the legislature. "Instructions are merely a guide to the taxpayer. If they are incorrect, they must be corrected when the error is called to the Commissioner's attention." Birkel v. Commissioner of Revenue, Dckt. No. 5514 (Minn. Tax Ct. Oct. 15, 1990).

Under Minn. Stat. § 297A.61, subd. 4(f), where the buyer installs the aggregate, the seller is deemed to have made a taxable sale. But where the seller installs it, the transaction is not subject to tax. Although no prior cases have clearly considered the installation of aggregate materials, the Supreme Court has considered what constitutes a retail sale in the context of materials delivered to a construction site. In Sterling Custom Homes Corp. v. Commissioner of Revenue, 391 N.W.2d 523 (Minn. 1986), the Court determined that Sterling's sales to contractors of prefabricated custom home component packages were retail sales subject to sales tax on the value of the packages sold. Although Sterling's employee remained at the building site and maintained a limited supervisory role over affixing the components, it was the builder who was responsible for erection and completion of the house. Similarly, in this case, Appellant delivered the aggregate as directed by the purchaser, but the purchaser was responsible for spreading or installing it. Like Sterling, Appellant simply supplied the materials to the site. Further, in Duluth Steel Fabricators, Inc. v. Commissioner of Taxation, 306 Minn. 567, 237 N.W.2d 625 (1975), the Court decided that a fabricator of structural steel was a supplier of materials so that the sale of such materials constituted a retail sale subject to sales tax. Again, the Court focused upon which

party performed or was responsible for the performance of the actual work of construction which resulted in a completed improvement to real estate.

This Court reviewed a somewhat analogous situation—the installation of cement—in Economy Ready Mix of Evelyth, Inc. v. Commissioner of Revenue, Dckt. No. 6700 (Minn. Tax Ct. Nov. 26, 1996). In that case, we noted the general rule that under a previous version of the current sales tax statute, where a contractor installs building materials to real estate, it is not required to collect and remit sales tax (although it may be liable for use tax on any materials it purchased), but "[i]f the contractor merely delivers the Building Materials to the job site, however, the contractor is required to collect and remit sales tax." Id. The Court then considered the application of this rule to a situation where the contractor delivered a batch of wet cement to a homeowner's property and also poured the cement into forms prepared by the homeowner, leveled the cement through a process called screeding, removed imperfections with a float, and then broomed the cement to make it less slippery. The homeowner eventually removed the forms after the concrete had cured. Despite all these additional activities beyond mere delivery, we held that the contractor did not "install" the cement and that the "incidental services" provided in addition to delivery did not convert a retail sale into an improvement to real property. Id. Cf. County of Hennepin v. State of Minnesota, 263 N.W.2d 639, 641-42 (Minn. 1978) (sale of raw steel to contractor who both fabricated and installed it into building taxable as retail sale.)

Here, Appellant makes no claim that it performs any incidental services which might convert its sale of aggregate materials into installation of the aggregate to real property. The only distinction between the sales it concedes are taxable--where it makes delivery to a contractor--and the ones it claims are not taxable—where it delivers to the property where the material will be used—is based upon the location of delivery, not upon any services which can reasonably be viewed as installation. Under these circumstances, Appellant did not install the aggregate material in dispute regardless of the place to which it delivered them. As a result, the sales in question were retail in nature and subject to sales tax.

Conclusion

Since no material facts are in dispute, this case is ripe for summary judgment as to whether Appellant's aggregate sales were for installation and, therefore, a construction contract not subject to sales tax. Appellant has not met its burden of establishing that the sales are not taxable. Rather, the sales at issue were for the delivery of aggregate to a location specified by the buyer, where the buyer could install the aggregate. Under Minn. Stat. § 297A.61, subd. 4(f), these were retail sales subject to taxation.

For the foregoing reasons, we grant the Commissioner's Motion for Summary Judgment and deny Appellant's Motion for Summary Judgment.

S.A.R.