STATE OF MINNESOTA TAX COURT

COUNTY OF BROWN REGULAR DIVISION

New Ulm Country Club,

Appellant,

vs.

Commissioner of Revenue,

Appellee.

ORDER on SUMMARY JUDGMENT

Docket No. 8113

Dated: July 22, 2010

The Honorable Sheryl A. Ramstad, Judge of the Minnesota Tax Court, heard cross-motions for summary judgment on May 21, 2010, via telephone conference call.

Matthew C. Berger, Attorney at Law, represented the Appellant.

Rita Coyle De Meules, Assistant Attorney General, represented the Appellee.

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

The Commissioner's Order dated April 22, 2009, is hereby affirmed.

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

BY THE COURT,

Sheryl A. Ramstad, Judge
MINNESOTA TAX COURT

DATED: July 22, 2010

Memorandum

Background

Before the Court is an appeal from the Commissioner of Revenue's ("Commissioner") Notice of Determination on Appeal dated April 22, 2009, upholding the Minnesota Department of Revenue's assessment of Minnesota sales tax (among other assessments) on Appellant New Ulm Country Club's default gratuities for the tax periods from January 1, 2003, through June 30, 2006. The parties have filed a Stipulation of Facts, as well as cross-motions for summary judgment.

Facts

Appellant New Ulm Country Club ("the Club") is a Minnesota corporation located in Brown County, Minnesota, that owns in part and operates a semi-private golf club located in the City of New Ulm. As part of its regular operations, the Club provides food and beverage services, employing bartenders, wait staff and other employees to provide such services.

Member and social members (collectively, “members”) of the Club can pay for food and beverage services purchased from the Club by one of four methods: (i) cash, (ii) check, (iii) charge to a personal credit card, or (iv) charge to a club-member account. Members who pay for purchases with cash, by check, or by charge to a personal credit card can decide whether to leave a gratuity for the server that provided food and beverage services to the member and, if so, the amount of that gratuity. Any such gratuities are paid to the individual server or servers that waited on the member.

If members charge food and beverage services to a personal club account, the Club adds a 15% gratuity to the charge. The only time the Club does not include a 15% gratuity is when the member leaves a cash tip for the server that waited on the member or the member reviews the charges and enters a tip amount on the bill. The Club introduced this gratuity policy in 1994 and has explained it to members as an “automatic gratuity.” A member may modify the amount of the automatic gratuity, including by leaving no amount at all, but to do so, the member must review the charges at the time incurred. Members thereafter receive a monthly statement that itemizes each charge on the member’s club account and the tip, if any, associated with that charge. The Club distributes all club-imposed gratuities to Club employees according to job titles and number of hours worked. The Club does not retain any part of the gratuities that are charged to club accounts.

The Minnesota Department of Revenue audited the Club in mid-2006. During his review of the Club’s records, the auditor found that all Club-imposed

gratuities are recorded in the Club's records, are deposited in the Club's accounts and are identified on the Club's income statements. On October 20, 2006, the Department of Revenue issued a Notice of Change in Sales and Use Tax assessing Minnesota sales and use tax on several items, including the Club-imposed gratuities, for the period from January 1, 2003, through June 30, 2006. The Club paid the assessment ($27,082.48 for additional sales and use tax plus $2,491.34 in interest for a total amount of $29,573.82) and then filed an administrative appeal with the Commissioner. The Department's assessment was upheld in the Notice of Determination on Appeal dated April 22, 2009. Of the total $29,573.82 additional liability assessed by the Department, $8,142.56 is attributable to sales tax and interest (through April, 2009) associated with the Club-imposed gratuities for which sales tax had not been collected.

Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law."[1] To meet its burden, the moving party needs to show there is an absence of evidence to support the nonmoving party's case.

In this case, the material facts are not disputed, and the question of whether the default 15% gratuities are includable in the amount subject to sales tax is a question of law. Accordingly, summary judgment is appropriate here.

[1] Minn. R. Civ. P. 56.03.

Burden of Proof

The Commissioner's orders are presumed correct and valid.[2] The taxpayer bears the burden of demonstrating that the challenged Order is incorrect.[3] In addition, all gross receipts are presumed to be subject to tax.[4] Thus, the taxpayer bears the burden of demonstrating that the Club-imposed gratuity charges are exempt from Minnesota's sales tax.[5]

Issue

The issue in this appeal involves whether gratuities that the Club imposes automatically when a member charges food and beverage purchases to a member account are subject to Minnesota's sales tax.

Analysis

The Club seeks to recover the $8,142.56 in sales tax that the Department assessed against it, arguing that the automatic gratuity is discretionary with members, and that these amounts are not part of the consideration that members pay for food and beverage services provided by the Club. In addition, the Club contends that it is entitled to recover the sales tax assessed because other states do not impose sales tax on seller-imposed charges. The Commissioner's position is that the Club's 15% automatic club-imposed charges are subject to Minnesota's sales tax because they are part of the gross receipts from retail sales the Club receives from its members.

---

[2] Minn. Stat. § 271.06, subd. 6 (2008); Lifer v. Commissioner of Revenue, Docket No. 7417 (Minn. Tax Ct. Sep. 5, 2002).
[3] Wybierala v. Commissioner of Revenue, 587 N.W.2d 832, 835 (Minn. 1998).
[4] Minn. Stat. § 297A665 (2008).
[5] Home & Garden Party, Inc. v. Commissioner of Revenue, Docket No. 7924 (Minn. Tax Ct. Nov. 24, 2008).

Minnesota imposes sales tax on the "gross receipts from retail sales," and all gross receipts are presumed subject to that tax.[6] The statute defines "gross receipts" as "the total amount received, in money or by barter or exchange, for all sales at retail as measured by the sales price."[7] The sales price is "the measure subject to sales tax, and means the total amount of consideration, including cash, credit, personal property and services for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise[.]" [8] Labor costs, seller expenses, and seller-imposed charges necessary to complete the sale are all part of the taxable sales price.[9] The only permitted deductions from the total consideration are discounts; separately stated interest or finance (including "carrying" charges); and, separately stated taxes.[10]

Both parties agree that whether the Club's automatic gratuities are subject to sales tax turns upon one question–do the automatic gratuities constitute consideration? The Club claims that because the automatic 15% gratuity charged to members' accounts is not a mandatory condition of the purchase, it is not consideration for food and beverage services charged by members to their accounts. The Commissioner argues that since the automatic gratuities are part of the total amounts that the Club receives for food and beverage services, and the Club records these automatic charges as receipts and as the Club's income,

[6] Minn. Stat. § 297A.62, subd. 1 (2004); Minn. Stat. § 297A.665 (a) (2004).
[7] Minn. Stat. § 297A.61, subd. 8 (2006).
[8] Minn. Stat. § 297A.61, subd. 7(a).
[9] Id., subd. 7(a).
[10] Id., subd. 7(b).

these charges are also part of the total consideration for the Club's food and beverage services.

The Minnesota Supreme Court has defined "consideration" as one party's voluntary assumption of an obligation on the condition of an act or forbearance by the other party.[11] It has found the term neither unclear nor ambiguous, stating that "it is a legal term of art that has been applied by this court for over a hundred years."[12] "Consideration may consist of either a benefit accruing to a party or a detriment suffered by another party."[13] St. Paul Hilton Hotel v. Commissioner of Taxation[14] is persuasive precedent on the issues here. The parties in St. Paul Hilton disagreed about the taxable nature of seller-imposed charges on food and beverage services. This Court rejected the taxpayer's argument that a mandatory service charge in the amount of 12% of the meal charge, which was separately stated and added to the customer's bill and then apportioned among waiters, waitresses, banquet captains and managers, and sales employees who booked the banquet, was not part of the taxable receipts. In finding that the mandatory service charges were part of the sale and constituted gross receipts in a transaction for food and beverage services, the Minnesota Supreme Court upheld this Court's decision.[15]

---

[11] U.S. Sprint Communications Co. Ltd. v. Commissioner of Revenue, 578 N.W.2d 752, 754 (Minn. 1998).
[12] Id.
[13] C & D Investments v. Beaudoin, 364 N.W.2d 850, 853 (Minn. App. 1985), rev. denied , (Minn. June 14, 1985).
[14] 298 Minn. 202, 214 N.W.2d 351 (Minn. 1974).
[15] Further, the Supreme Court expressly rejected the distinction relied upon by the Club in this case, stating "[t]he purported distinction between discretionary [charges] and mandatory "service charges" squares neither with the [sales price definition] nor familiar customary meaning in the market place…[A] percentage of the bill…is for all practical purposes as much an expected "fee"

Here, Club members agree to pay an automatic charge, in addition to the charges for the purchased food and beverage services, in exchange for the Club's agreement to allow members to incur charges and leave without reviewing or signing the bill for those charges. Something of value—food and beverage services, as well as the right to pay for those purchases at a later time merely by virtue of the purchaser's membership in the Club—has passed between the parties. The Club does not allow charges to member accounts without the automatic charge unless the member leaves a tip in cash or reviews the incurred charges to decide on a tip. The amount ultimately collected, and the Club's later distribution of these collected charges, confirms that the Club's automatic charge represents part of the consideration paid in exchange for the Club food and beverage service. There is no provision in Chapter 297A that exempts the Club's automatic charges. As such, the automatic gratuity is part of the consideration paid for the food and beverage services sold to Club members and, therefore, is subject to taxation.

Regardless of the result that may have been reached by other states, under Minnesota law the Commissioner correctly assessed sales tax on the Club's mandatory gratuities and the Club cannot show that it is entitled to any exemption from that tax.[16]

---

for service as it is a 'present' expressing appreciation for being served." St. Paul Hilton Hotel, 298 Minn. at 204-05, 214 N.W.2d 351 at 353-54.

[16] See Minnesota Twins P'shp v. Commissioner of Revenue, 587 N.W.2d 287, 289 (Minn. 1998) (noting that taxpayer bears the burden of "proving that a sale is not a sale at retail and thus exempt from the tax.); Custom Ag Service of Montevideo, Inc. v. Commissioner of Revenue, 728 N.W.2d 910, 915-16 (Minn. 2007) (noting in a use tax case that "when we analyze a case that implicates the use tax…we first apply [a test] to determine whether [the use tax applies]…. [W]e then [consider statutory exemptions] to determine whether that property, as used by the taxpayer, is tax exempt"); Great Lakes Gas Transmission L.P. v. Commissioner of Revenue, 638 N.W.2d

Conclusion

Seller-imposed charges in the form of a mandatory gratuity were part of the Club's "gross receipts" that are subject to sales tax. The Commissioner's Order is, therefore, affirmed.

S. A. R.

435, 438 (Minn. 2002) (noting that first issue was whether consumption of compressor fuel "constitutes a taxable event.")