

STATE OF MINNESOTA
COUNTY OF CROW WING

TAX COURT
SMALL CLAIMS DIVISION

Kurt W. Martin,
Appellant,

**ORDER GRANTING
COMMISSIONER’S MOTION FOR
SUMMARY JUDGMENT**

vs.

Commissioner of Revenue,
Appellee.

Docket No. 9499-S

Filed: April 25, 2022

This matter came before the Honorable Wendy S. Tien, Judge of the Minnesota Tax Court, on the parties’ cross-motions for summary judgment.

Appellant Kurt W. Martin is self-represented.

Daniel Braunschweig, Appeals Officer, represents appellee Commissioner of Revenue.

Mr. Martin appeals from a Tax Order of the Commissioner of Revenue (the “Commissioner”) denying his application for a sales tax refund. Mr. Martin appeals from the portion of the Tax Order determining that a credit card surcharge is subject to sales and use tax pursuant to Minnesota Statutes section 297A.62, when the existence and amount of that surcharge is disclosed to lodging customers as a separate amount.

The court, having considered the arguments of the parties, and upon all of the files, records, and proceedings herein, now makes the following:

ORDER FOR JUDGMENT

1. The Commissioner’s motion for summary judgment is granted.
2. Mr. Martin’s motion for summary judgment is denied.

IT IS SO ORDERED. THIS IS A FINAL ORDER PURSUANT TO MINNESOTA STATUTES SECTION 271.21, SUBDIVISION 8. LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Wendy S. Tien, Chief Judge
MINNESOTA TAX COURT

Dated: April 25, 2022

MEMORANDUM

I. FACTUAL BACKGROUND

The facts of this case are fully stipulated and the parties have each moved for summary judgment.¹ Mr. Martin, a sole proprietor, operates real properties as vacation rentals.² He markets these vacation properties through third parties, such as Vacation Rentals by Owner (VRBO), AirBnB, and directly via referrals (collectively, “third-party marketers”).³ The third-party marketers collect the appropriate sales tax(es) directly on bookings placed through their online marketing websites.⁴ Mr. Martin collects sales tax on bookings made directly with him⁵ and accepts credit card as a method of payment for goods and services.⁶ If a customer chooses the

¹ Comm’r’s Not. Mot. & Mot. Summ. J. (filed Jan. 31, 2022); Appellant’s Not. Mot. & Mot. Summ. J. (filed Feb. 1, 2022).

² Jt. Stip. Facts ¶ 1 (filed Feb. 2, 2022).

³ Jt. Stip. ¶ 2. “Third-party marketers” is a convenience term for the sake of brevity and carries no legal meaning as used here.

⁴ Jt. Stip. ¶ 3.

⁵ Jt. Stip. ¶ 4.

⁶ Jt. Stip. ¶ 5.

option to pay with a credit card, this payment is subject to a 4 percent surcharge.⁷

On or about November 1, 2019, Mr. Martin received a direct booking from a prospective customer (“Customer A1”) for the week of July 4-11, 2020.⁸ Customer A1 remitted a portion of the balance due on or about March 3, 2020 via credit card (including the 4 percent credit card surcharge) and finalized the reservation.⁹ On or about April 15, 2020, Customer A1 made a request to cancel the reservation, citing concerns stemming from the COVID-19 pandemic, despite the rental agreement’s no cancellations, no refunds clause.¹⁰ Mr. Martin was able to re-rent Customer A1’s reservation period and issued a refund on or about June 24, 2020.¹¹

As the sales tax reporting and refund periods were different and Mr. Martin had little taxable sales in the refund period, the refund to Customer A1 created what the Commissioner termed a “negative return,” indicating a sales tax refund was due to Mr. Martin.¹² In response to this “negative return,” the Commissioner sent correspondence requesting additional information to process the return, with which Mr. Martin complied.¹³

Relevant to this appeal, the Commissioner found that Mr. Martin had failed to collect and remit sales tax on a credit card surcharge and cleaning fee unrelated to the Customer A1 transaction.¹⁴ Mr. Martin disputed the auditor’s findings relating to the credit card surcharge,

⁷ Jt. Stip. ¶ 6.

⁸ Jt. Stip. ¶ 7.

⁹ Jt. Stip. ¶ 8.

¹⁰ Jt. Stip. ¶ 9.

¹¹ Jt. Stip. ¶ 10.

¹² Jt. Stip. ¶ 11.

¹³ Jt. Stip. ¶ 11.

¹⁴ Jt. Stip. ¶ 14 (discussing auditor’s report findings).

contending the surcharge should be exempt from sales tax under Minn. Stat. § 297A.61, subd. 7(b)(2) (2021).¹⁵

The Commissioner issued a Tax Order dated September 25, 2020 (the “Commissioner’s Order”) allowing the negative return, but with adjustments to taxable sales in the amount of \$96 relating to the credit card surcharge, sale of fuel, and cleaning fee.¹⁶ Of this amount, \$32.08 in taxable sales related to the credit card surcharge, for a tax amount of \$2.37.¹⁷ In denying the sales tax refund relating to the credit card surcharge, the Commissioner relied on the definition of “sales price” in Minnesota Statutes section 297A.61, subdivision 7(a),¹⁸ as well as subdivisions 7(a)(2)-(3).¹⁹ On September 29, 2020, Mr. Martin filed an Administrative Appeal with the Commissioner.²⁰ In a letter dated September 15, 2021, the Commissioner issued a preliminary determination affirming the adjustments made in the Tax Order dated September 25, 2020.²¹ On September 27, 2021, Mr. Martin filed this Notice of Appeal.²²

II. APPLICABLE LAW

A. Summary Judgment

Summary judgment is to be granted “if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Minn. R. Civ. P.

¹⁵ Jt. Stip. ¶ 15.

¹⁶ Jt. Stip. ¶ 19.

¹⁷ Jt. Stip. ¶ 19.

¹⁸ Jt. Stip. ¶ 16.

¹⁹ Jt. Stip. ¶¶ 17-18.

²⁰ Jt. Stip. ¶ 20.

²¹ Jt. Stip. ¶ 21.

²² Appellant’s Not. Appeal (filed Sept. 27, 2021); Jt. Stip. ¶ 22. The Commissioner dismissed the administrative appeal without issuing a Notice of Determination on Administrative Appeal, by letter dated September 29, 2021. Jt. Stip. ¶ 23.

56.01; *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 189-90 (Minn. 2019). The purpose of summary judgment is to secure the just, speedy, and inexpensive determination of an action “by allowing a court to dispose of an action on the merits if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

The court’s function in ruling on a motion for summary judgment is to determine whether there is an issue of fact to be tried. *Anderson v. Twin City Rapid Transit Co.*, 250 Minn. 167, 186, 84 N.W.2d 593, 605 (1957). A party asserting that there is no genuine issue as to any material fact must support the assertion by:

- (1) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
- (2) showing that the materials cited do not establish the absence or presence of a genuine issue for trial, or that an adverse party cannot produce admissible evidence to support the fact.

Minn. R. Civ. P. 56.03(a).

In considering a motion for summary judgment, “all inferences from circumstantial evidence and all doubts must be resolved against the movant, without undertaking to determine credibility.” *Forsblad v. Jepson*, 292 Minn. 458, 459-60, 195 N.W.2d 429, 430 (1972); *see also O’Malley v. Ulland Bros.*, 549 N.W.2d 889, 897 (Minn. 1996) (“All inferences must be drawn in favor of the nonmoving party.”). “[I]f any doubt exists as to the existence of a genuine issue as to a material fact, the doubt must be resolved in favor of finding that the fact issue exists.” *Rathbun v. W. T. Grant Co.*, 300 Minn. 223, 230, 219 N.W.2d 641, 646 (1974). A fact dispute is material, for summary judgment purposes, “if its resolution will affect the outcome of a case.” *O’Malley*, 549 N.W.2d at 892. “The substantive law identifies which facts are material.” *Bond v. Comm’r*

of Revenue, 691 N.W.2d 831, 836 (Minn. 2005). Upon determining a genuine issue of material fact exists, the court is not to engage in judicial factfinding by resolving factual disputes in the context of summary judgment. *J.E.B. v. Danks*, 785 N.W.2d 741, 747-48 (Minn. 2010).

Summary judgment is a suitable vehicle for addressing the application of law to undisputed facts. *DLH*, 566 N.W.2d at 69; *Anderson v. Christopherson*, 816 N.W.2d 626, 630 (Minn. 2012); *see also Harris v. Cnty. of Hennepin*, 679 N.W.2d 728, 731 (Minn. 2004) (noting application of law to stipulated facts is a legal issue).

B. Statutory Interpretation

“The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (2021). The court interprets statutory text according to its plain meaning. *Shire v. Rosemount, Inc.*, 875 N.W.2d 289, 292 (Minn. 2016); *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 649 (Minn. 2012). The plain meaning of statutory text shall be given effect when it is clear and unambiguous. Minn. Stat. § 645.16 (stating “[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit”); *Hutchinson Tech., Inc. v. Comm’r of Revenue*, 698 N.W.2d 1, 8 (Minn. 2005). Accordingly, when a statute is clearly worded, the court shall not consider legislative history or canons of construction. *See Hutchinson Tech.*, 698 N.W.2d at 8.

“The first step in statutory interpretation is to determine whether the statute’s language, on its face, is ambiguous.” *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017); Minn. Stat. § 645.16. “Ambiguity arises only if the text is ‘subject to more than one reasonable interpretation.’ ” *Sheridan v. Comm’r of Revenue*, 963 N.W.2d 712, 717 (Minn. 2021) (quoting *State v. Townsend*, 941 N.W.2d 108, 110 (Minn. 2020)) (finding that Minnesota Const., art. X, § 5 is ambiguous). To determine whether a statute is ambiguous, the court shall read and construe a statute as a whole,

rather than in isolation. *Sheridan*, 963 N.W.2d at 718 (citing *State v. Riggs*, 865 N.W.2d 679, 683 (Minn. 2015)) (noting the application of the whole-statute canon when determining whether a statute is ambiguous in the first instance). The court shall “interpret each section in light of the surrounding sections to avoid conflicting interpretations.” *KSTP-TV v. Ramsey Cnty.*, 806 N.W.2d 785, 788 (Minn. 2011) (quoting *Am. Fam. Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000)); see *McLane Minn., Inc. v. Comm’r of Revenue*, 773 N.W.2d 289, 297 (Minn. 2009) (rejecting “piecemeal” interpretation of words as used throughout a statute).

If a statute is ambiguous, the court may then turn to related statutes, which are “enacted at two different points in time in the legislative process” and which are thus not the “same statute.” *Sheridan*, 963 N.W.2d at 718 (quoting *State v. Prigge*, 907 N.W.2d 635, 639-40 (Minn. 2018) (distinguishing between the “related-statutes canon,” which applies only “after a determination of ambiguity,” and the “whole-statute canon,” which “does not require ambiguity before it may be applied”). If “the legislature’s intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and [we] apply the statute’s plain meaning.” *State v. Stay*, 935 N.W.2d 428, 430 (Minn. 2019) (alteration in original) (quoting *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001)).

C. Sales Price

Minnesota imposes a sales tax “on the gross receipts from retail sales.” Minn. Stat. § 297A.62, subd. 1 (2021). All gross receipts are presumed subject to sales tax. Minn. Stat. § 297A.665(a)(1) (2021). A “retail sale” includes the granting of a license to use real property in a specific facility. Minn. Stat. § 297A.61, subd. 3(g)(2). “ ‘Gross receipts’ means the total amount received, in money ... for all sales at retail as measured by the sales price.” Minn. Stat. § 297A.61, subd. 8. “Sales price” is defined in relevant part as:

[T]he 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, without any deduction for the following:

(1) the seller's cost of the property sold;

(2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expenses of the seller...

....

(b) Sales price does not include:

....

(2) interest, financing, and carrying charges from credit extended on the sale of personal property or services, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser[.]

Minn. Stat. §297A.61, subd. 7(a)(1)-(3) & (b)(2).

In other words, Minnesota law describes the sales price of an item in two ways: first, by describing the items that are included—including those that cannot be deducted from the sales price—and second, by describing the items that are not included. *See Interstate Traffic Signs, Inc. v. Comm'r of Revenue*, 845 N.W.2d 550, 552, 553-54 (Minn. 2014) (describing the determination of “sales price” as first requiring a determination of the consideration for the transaction, and second whether an exemption applies; noting that “[s]ubdivision 7(a) [] lists specific costs or charges that cannot be deducted when determining the sales price”).

The statutory definition of “sales price” expressly contemplates that the seller might not retain some of the consideration from the purchaser. The statute expressly prohibits deduction from sales price for the seller's costs and expenses associated with the property sold, Minn. Stat. § 297A.61, subd. 7(a)(1); for “any other expenses of the seller,” including the cost of the materials used, labor or service cost, taxes imposed on the seller, and explicitly, interest. Minn. Stat. §

297A.61, subd. 7(a)(2). Although the statute also refers to interest and certain other charges as an exclusion from the definition of “sales price,” the exclusion is limited to “interest, financing, and carrying charges from credit extended on the sale of personal property or services, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser.” Minn. Stat. § 297A.61, subd. 7(b)(2). The definition of “sales price” is “broad,” *Interstate*, 845 N.W.2d at 554, and there is no requirement an item be enumerated in the definition of “sales price” to be included in its meaning. *Id.* (holding that pick-up charges were included in the sales price even though not specifically listed in the statute).

The Commissioner’s tax order is prima facie valid. Minn. Stat. § 271.06, subd. 6 (2021) (“[T]he order of ... the appropriate unit of government in every case shall be prima facie valid.”). “[A] prima facie case simply means one that prevails in the absence of evidence invalidating it.” *S. Minn. Beet Sugar Coop v. Cnty. of Renville*, 737 N.W.2d 545, 558 (Minn. 2007) (quoting *Tousignant v. St. Louis Cnty.*, 615 N.W.2d 53, 59 (Minn. 2000)). An appellant has the burden of overcoming prima facie validity. *Id.* Furthermore, “the burden of proving that a sale is not a taxable retail sale is on the seller.” Minn. Stat. § 297A.665(b) (2021).

III. ANALYSIS

The parties agree that credit card bookings for Mr. Martin’s lodging services, made through third-party marketers, are subject to a 4 percent surcharge.²³ Mr. Martin describes this surcharge as such: “[w]hen an individual or entity utilizes a credit card to purchase goods and services, they are accepting the terms of the card holder agreement which details the transaction(s) as a finance agreement.”²⁴ He describes the corresponding fees under the finance agreement as “initial finance

²³ Jt. Stip. ¶ 6.

²⁴ Appellant’s Mem. Supp. Mot. Summ. J. 3 (filed Feb. 1, 2022).

charges and carrying fees” or a “credit card surcharge.”²⁵ Mr. Martin contends that, because he perceives no benefit to absorbing the credit card surcharge, he passes that cost on to the customer and itemizes or “separately state[s]” it when communicating the total purchase price to a customer.²⁶

The Commissioner does not dispute Mr. Martin’s factual contention that he itemizes the amount (whether a dollar amount or a percentage figure) attributable to his obligation under a card holder agreement, when communicating the purchase amount for a rental,²⁷ nor does the Commissioner dispute Mr. Martin’s factual characterization of the existence or amount of the fee.²⁸ Rather, the Commissioner contends the fee is a cost Mr. Martin incurs,²⁹ and not an extension of credit as required for exclusion under Minnesota Statutes section 297A.61, subdivision 7(b)(2).³⁰

For the reasons stated below, the Commissioner’s motion is granted. Mr. Martin’s motion is denied.

²⁵ Appellant’s Mem. Supp. 3.

²⁶ Appellant’s Mem. Supp. 3.

²⁷ Comm’r’s Mem. Law Opp’n Appellant’s Mot. Summ. J. 1 (filed Feb. 8, 2022).

²⁸ Comm’r’s Mem. Opp’n 1. Again, the facts in this cross-motion are fully stipulated.

²⁹ Comm’r’s Mem. Opp’n 1 (contending “the undisputed facts show that when Appellant accepts a credit card as payment, he incurs a credit card processing fee and imposes a 4% surcharge on the sale to cover the card processing fees he incurs”).

³⁰ Comm’r’s Mem. Opp’n 1 (contending “Appellant cannot show that he extended any credit to the purchaser; it was the credit card company that extended credit”). Mr. Martin does not appear to contend he extended credit to his customers. Appellant’s Reply Mem. 2-3 (filed Feb. 10, 2022) (acknowledging that, “[a]s it pertains to the credit card surcharge product, the third party credit card processor fee(s) would be a *cost* of goods or services sold. However, neither is a ‘cost or expense’ of the lodging product”). Accordingly, no genuine issue of material fact exists. Rather, the parties dispute the legal effect of undisputed facts.

A. Statutory Interpretation: Section 297A.61, subdivision 7(b)(2)

Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *DLH*, 566 N.W.2d at 69. On the stipulated facts presented, the Commissioner is entitled to summary judgment. By Mr. Martin’s own description in the stipulated facts, the credit card surcharge, whether characterized as a surcharge, initial finance charges or as credit card carrying fees, is an “expense[] of the seller,” within the meaning of Minnesota Statutes section 297A.61, subdivision 7(a)(2). Accordingly, it cannot be deducted from the sales price for purposes of sales and use tax unless it falls within one of the exceptions in subdivision 7(b). As the parties do not contend that either subdivision 7(b)(1) or (b)(3) applies, the court will review subdivision 7(b)(2).

The plain meaning of section 297A.61, subdivision 7(b)(2) shall be given effect when it is clear and unambiguous. Minn. Stat. § 645.16; *Hutchinson Tech.*, 698 N.W.2d at 8. If “the legislature’s intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and [we] apply the statute’s plain meaning.” *Stay*, 935 N.W.2d at 430 (alteration in original). The first step in statutory interpretation is to determine whether subdivision 7(b)(2), on its face, is ambiguous. *See Thonesavanh*, 904 N.W.2d at 435; Minn. Stat. § 645.16. The court will read the statute “as a whole,” *Prigge*, 907 N.W.2d at 638, and give effect to all its provisions. Minn. Stat. § 645.16. Ambiguity arises only if the text is “subject to more than one reasonable interpretation,” *Sheridan*, 963 N.W.2d at 717 (quoting *Townsend*, 941 N.W.2d at 110), based on “the plain language of the legislative enactment itself, including relevant dictionary definitions of undefined phrases and other sections of the same legislative enactment.” *Id.* at 717.

Subdivision 7(b)(2) provides an exception from “sales price” for “interest, financing, and carrying charges from credit extended on the sale of personal property or services, if the amount

is separately stated on the invoice, bill of sale, or similar document given to the purchaser.” Minn. Stat. § 297A.61 subd. 7(b)(2). The parties disagree whether the plain language of subdivision 7(b)(2), authorizes a seller to exempt interest from the sales price on the grounds it is “separately stated,” or in other words, explicitly itemized.³¹ Although Mr. Martin has focused on the requirement that such interest, financing, or carrying charges be “separately stated,” resolution of this dispute actually requires this court to address the requirement that the charges be from credit extended on the sale of personal property or services.

The plain language of the statute sets forth three requirements for the exception, all of which must be met. First, the item in question must be interest, financing, or carrying charges. Second, the item in question must be “from credit extended on the sale of personal property or services.” Third, the item in question must be “separately stated.” Minn. Stat. § 297A.61, subd. 7(b)(2). Reading section 297A.61, subdivision 7(b)(2), as a whole, the exclusion for items of interest, financing, or carrying charges does not simply apply to “separately stated” items. Plainly, the exclusion only refers to such items if they also are “from credit extended on the sale of personal property or services.” Minn. Stat. § 297A.61, subd. 7(b)(2); *see also Sheridan*, 963 N.W.2d at 718 (referencing the application of the whole-statute canon when determining whether a statute is ambiguous in the first instance); *Riggs*, 865 N.W.2d at 683 (applying the whole-statute canon). The only reasonable interpretation is that such items must also be associated with the extension of credit on the sale of personal property, or in other words, from the seller’s financing of a sale. Mr. Martin’s interpretation of subdivision 7(b)(2) is not reasonable, as it requires the court to ignore the requirement that the item be “from credit extended on the sale of personal property or

³¹ Appellant’s Reply Mem. 2-3; Comm’r’s Mem. Opp’n 1.

services,” and thus is not based on the “plain language of the legislative enactment itself.” *Sheridan*, 963 N.W.2d at 717.

Because an item of interest, financing, or carrying charges that does not meet all three requirements in subdivision 7(b)(2) cannot be excluded from the “sales price,” it is included in the “sales price.” *Interstate*, 845 N.W.2d at 554. The gross receipts from sales of lodging, as measured by the sales price, are thus presumed to be taxable. Minn. Stat. § 297A.62, subd. 1; Minn. Stat. § 297A.61, subds. 3(g)(2), 8; Minn. Stat. § 297A.665(a)(1).

B. Application to Stipulated Facts

Mr. Martin characterizes his obligations under the credit card holder agreement as a financing or carrying charge,³² and as the Commissioner does not dispute that characterization, the court accepts it for purposes of summary judgment. Mr. Martin characterizes the credit card surcharge “as a income product, not a cost or expense,” based on the rental agreement between him and the rental customer.³³ The question is not, however, whether Mr. Martin has sought to recover his credit card surcharge expenses by having the customer pay such expenses.³⁴ Rather, the question is whether the credit card surcharge is in the first place an “expense[] of the seller,” which is generally not deductible from the sales price. Minn. Stat § 297A.61, subd. 7(a)(2). Plainly the credit card surcharge is an expense of the seller; Mr. Martin notes that the seller is ordinarily responsible for those charges.³⁵

³² Appellant’s Mem. Supp. 3.

³³ Appellant’s Reply Mem. 2 (citing Return & Answer, Ex. 10a, at 6 (filed Nov. 23, 2021) (Martin Rentals Sales Journal)). Mr. Martin also contends it is not a cost or expense of the “lodging product.” *Id.* at 2-3.

³⁴ Appellant’s Mem. Supp. 3 (stating “the purchaser pays those initial finance charges and carrying fees in what we term a credit card surcharge” as part of Mr. Martin’s acceptance of credit cards).

³⁵ Appellant’s Mem. Supp. 3.

Because the credit card surcharge is an expense of the seller, and generally not deductible from the sales price, the second question accordingly is whether it is nonetheless excluded from the sales price for any of the reasons stated in Minnesota Statutes section, subdivision 7(b)(2). The parties both agree that Mr. Martin separately states the credit card surcharge as a 4 percent amount.³⁶ For the exclusion under Minnesota Statutes section 297A.61, subdivision 7(b), to apply, however it is not sufficient to separately state or itemize the amounts attributed to that item. To be exempt from sales and use tax, they must be “from credit extended on the sale of personal property or services.” Minn. Stat. § 297A.61, subd. 7(b)(2).

Mr. Martin admits that the items at issue in this appeal are not “from credit extended” on the sale of personal property or services.³⁷ As the record demonstrates by Mr. Martin’s own admission that the items in question are not from the extension of credit, they are not excluded from the sales price, even though they are separately stated.

The Commissioner’s summary judgment motion is granted. Mr. Martin’s summary judgment motion is denied.

W.S.T.

³⁶ Jt. Stip ¶¶ 6, 8.

³⁷ Appellant’s Reply Mem. 2-3. Rather, he argues that, “[a]s it pertains to the credit card surcharge product, the third party credit card processor fee(s) would be a *cost* of goods or services sold.” Appellant’s Reply Mem. 2-3.