STATE OF MINNESOTA

IN SUPREME COURT

A20-0241

Tax Court — Gildea, C.J.

Menard, Inc.,

Relator,

vs. — Filed: February 24, 2021
Office of Appellate Courts

Commissioner of Revenue,

Respondent.

---

Lynn S. Linné, Masha M. Yevzelman, Fredrickson & Byron, P.A., Minneapolis, Minnesota; and

Brian R. Harris, Akerman LLP, Tampa, Florida, for relator.

Keith Ellison, Attorney General, Kristine K. Nogosek, Mawerdi Hamid, Assistant Attorneys General, Saint Paul, Minnesota, for respondent.

---

S Y L L A B U S

Because there is no debt owed to relator, and relator's revenue sharing agreement with a credit card lender does not make relator a guarantor of cardholder debt, relator is not entitled to an offset of sales tax liability under Minn. Stat. § 297A.81, subd. 1 (2020).

Affirmed.

## O P I N I O N

GILDEA, Chief Justice.

The question presented in this appeal is whether Menard, Inc., is entitled to an offset on its sales tax liability under Minn. Stat. § 297A.81 (2020). This statute allows a taxpayer to reduce current tax liabilities by the amount of sales taxes attributable to uncollectible debts owed to the taxpayer. Menard claimed a sales tax offset based on uncollectible debts that resulted from customer purchases made on Menard's private label credit card offered by Capital One, N.A. The Commissioner of Revenue audited Menard's sales tax returns and determined that Menard was not entitled to claim an offset. Accordingly, the Commissioner assessed additional sales tax. Menard appealed the assessment, and the tax court concluded that Menard is not eligible for a sales tax offset because unpaid debts from customer transactions made on Menard's private label credit card were owed to Capital One, not Menard. *Menard, Inc. v. Comm'r of Revenue*, Nos. 8922-R & 8960-R, 2019 WL 7426213, at *4 (Minn. T.C. Dec. 20, 2019). Because we conclude that these unpaid customer transactions are not debts owed to Menard and that Menard is not a guarantor of the cardholders' debts, we affirm.

## FACTS

The facts are undisputed. Menard operates home improvement retail stores at locations in several midwestern states, including Minnesota. In 2013, Menard entered into an agreement with Capital One, under which Capital One agreed to issue a private label credit card branded with Menard's name to Menard's retail customers. Under this agreement, Menard offered the private label credit cards to its customers, while Capital

One established the criteria and procedures to process applications for credit. Capital One retained the sole authority to reject or accept customer credit applications and had the exclusive right to determine the amount of credit to extend to approved customers. Capital One also owned the cardholders' accounts (including each cardholder's individual indebtedness), was responsible for collecting all amounts due on cardholder accounts, and was entitled to receive all payments made by cardholders. Menard and Capital One acknowledged in their agreement that they were "independent contractors."

Consistent with the Menard and Capital One agreement, when a customer made purchases from Menard using the private label credit card, the customer became indebted to Capital One for the entire amount charged on the account, including Minnesota sales tax imposed on the purchase price. On a daily basis, Menard provided Capital One with data on sales made using that card, including the purchase amount and associated sales tax. Then, Capital One reimbursed Menard for the purchase price and applicable sales tax for each transaction, less an agreed-upon discount fee.[1] Menard then reported and paid the sales tax to the Minnesota Department of Revenue.

In addition to the provisions governing daily settlement of individual customer transactions made using the Capital One credit cards, Capital One agreed to pay compensation to Menard. Specifically, Capital One agreed to share financing income with Menard, composed of interest charges on account balances and late fee charges. Menard agreed to accept a share of the net losses incurred in the program, i.e., a portion representing

[1] In this daily settlement process, Menard could report credits issued to customers due to returns, and Capital One could report chargebacks made on customer accounts.

charged-off account balances and bankruptcy write-offs, net of certain recoveries that Capital One made. Capital One calculated the compensation it owed to Menard by reducing Menard's share of the financing income by Menard's share of the net program losses.

Capital One deducted delinquent account receivable balances on its federal income tax returns as bad debts under I.R.C. § 166(a)(1). Menard did not. Rather than claiming a bad debt deduction under section 166, Menard claimed a deduction on its federal tax returns for its share of the net program losses on the "other deductions" line.

When reporting its sales tax liability to the Minnesota Department of Revenue, Menard claimed an offset against its current sales tax liability based on its share of the net program losses that Capital One calculated under the agreement's compensation formula.[2] The Commissioner audited Menard and disallowed the sales tax offsets, concluding that the net program losses did not represent bad debts owed to Menard, but instead were based on bad debts owed to Capital One. This determination resulted in the Commissioner assessing additional sales tax and interest for the period of January 1, 2014 to March 31, 2016.

---

[2] In reporting its sales tax liability to the Department of Revenue, Menard claimed an offset for the full amount of the bad debt claimed by Capital One under section 166, rather than the portion of the monthly compensation that represented Menard's share of the net program losses under the parties' agreement. On appeal, Menard acknowledges that it seeks to offset its Minnesota sales tax liability only by the portion of the net program losses that Capital One used to calculate Menard's monthly compensation under the terms of the revenue sharing agreement.

Menard appealed the Commissioner's assessment to the tax court, and Menard and the Commissioner each moved for summary judgment. The tax court granted the Commissioner's motion for summary judgment and denied Menard's motion for summary judgment. *Menard, Inc. v. Comm'r of Revenue*, Nos. 8922-R & 8960-R, 2019 WL 7426213, at *1 (Minn. T.C. Dec. 20, 2019). The tax court concluded that no uncollectible debt was owed to the taxpayer, Menard, and therefore Menard was not entitled to offset its sales tax liability under Minn. Stat. § 297A.81, subd. 1. 2019 WL 7426213, at *4–5.[3] Menard appeals from this decision.

## ANALYSIS

This appeal comes to us from a final order of the tax court. We review a final decision of the tax court to determine whether the court lacked jurisdiction, whether the court's order is not justified by the evidence or does not conform to the law, or whether any other error of law was committed. Minn. Stat. § 271.10, subd. 1 (2020). We review conclusions of law, including statutory interpretation, de novo and review factual findings for clear error. *Antonello v. Comm'r of Revenue*, 884 N.W.2d 640, 643–44 (Minn. 2016).

---

[3] Menard asserted before the tax court that it was entitled to claim a sales tax offset because Menard and Capital One *collectively* served as the taxpayer entitled to claim that offset. *Menard*, 2019 WL 7426213, at *4–5. The tax court rejected this argument based on the definition of "taxpayer" in Minn. Stat. § 289A.02, subd. 3 (2020). 2019 WL 7426213, at *4–5. Menard does not assert the collective taxpayer argument on appeal.

After concluding that Menard's collective taxpayer theory failed, the tax court did not address the Commissioner's argument that Menard was not eligible to write off the net program losses as bad debt under section 166. 2019 WL 7426213, at *6 ("Because we agree with the Commissioner that Menard is not entitled to a sales tax *offset* under the plain meaning of Minn. Stat. § 297A.81, subd. 1, and because she offers the Section 166 argument in the alternative, we decline to address it.").

The Commissioner's tax assessments are presumed to be valid and correct, and the taxpayer bears the burden of demonstrating otherwise. *YAM Special Holdings, Inc. v. Comm'r of Revenue*, 947 N.W.2d 438, 441 (Minn. 2020).

Menard argues that it is entitled to offset its Minnesota sales tax liability by the amount of the net program losses Capital One used to calculate the program compensation owed to Menard. Menard contends that by agreeing to reduce its share of the income generated from the credit card program by a portion of the net program losses, Menard acted as a guarantor of the bad debts of Capital One on cardholders' accounts. Then, Menard asserts that a "guarantor" can claim a bad debt deduction under federal law, *see* Treas. Reg. § 1.166-9(a). Finally, Menard contends that because it is eligible to claim a bad debt deduction under I.R.C. § 166 as a guarantor, it is entitled to claim an offset of its Minnesota sales tax liability for that same debt.

The Commissioner disagrees, asserting that Capital One was the sole owner of the cardholder accounts and the indebtedness associated with those accounts. Accordingly, no debts on those accounts are owed to Menard. The Commissioner also contends that the formula used to calculate Menard's compensation under its agreement with Capital One did not transfer to Menard any of Capital One's ownership rights in and responsibility for cardholder debts, or impose a guaranty obligation on Menard. Those terms simply established payment obligations between the contracting parties that operated to reduce Menard's share of the profits from the card program. Thus, the Commissioner asserts, Menard's offset claim was properly denied.

A.

Before turning to Menard's specific arguments, we review the tax laws that are relevant to this appeal.

Minnesota imposes a tax "on the gross receipts from retail sales." Minn. Stat. § 297A.62, subd. 1 (2020). Retailers collect the sales tax from the purchaser at the time of the sale, and remit the taxes to the Minnesota Department of Revenue. Minn. Stat. § 297A.66, subd. 2 (2020); Minn. Stat. § 297A.77, subds. 1, 3 (2020); *see* Minn. Stat. § 289A.11 (2020) (stating the filing requirements for sales tax returns). A refund may be claimed for an "overpayment" of a tax. Minn. Stat. § 289A.50, subd. 1 (2020). In the case of sales tax paid to the State for a purchase made on credit that is later not paid and becomes uncollectible, the retailer may offset the uncollectible debt against a current tax liability. Specifically, a taxpayer is allowed to:

> offset against the [sales and use] taxes payable . . . the amount of taxes imposed by this chapter previously paid as a result of any transaction the consideration for which became a debt owed to the taxpayer that became uncollectible during the reporting period, but only in proportion to the portion of the debt that became uncollectible. Section 289A.40, subdivision 2, applies to an offset under this section.

Minn. Stat. § 297A.81, subd. 1.

Minnesota Statutes section 289A.40, subdivision 2 (2020), referred to in section 297A.81, provides in relevant part:

> A claim relating to an overpayment of taxes under chapter 297A must be filed within 3-1/2 years from the date when the bad debt was (1) written off as uncollectible in the taxpayer's books and records, and (2) either eligible to be deducted for federal income tax purposes or would have been eligible for a bad debt deduction for federal income tax purposes if the taxpayer were required to file a federal income tax return, or within one year from the date

> the taxpayer's federal income tax return is timely filed claiming the bad debt deduction, whichever period is later. The refund or credit is limited to the amount of overpayment attributable to the loss. "Bad debt" for purposes of this subdivision, has the same meaning as that term is used in United States Code, title 26, section 166 . . . .

Thus, under section 289A.40, subdivision 2, the party claiming an offset against a current sales tax liability based on a claimed debt must write off the debt as uncollectible, and the debt must be eligible for deduction under I.R.C. § 166 as a bad debt.

Section 166 of the Internal Revenue Code allows a deduction for "any debt which becomes worthless within the taxable year." I.R.C. § 166(a)(1). The debt must be "owed to the taxpayer." Treas. Reg. § 1.166-1(a). Only a bona fide debt, which is a debt that "arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money," qualifies as a bad debt under section 166. Treas. Reg. § 1.166-1(c). A guarantor that makes a payment in discharge of a debt obligation can treat that payment "as a business debt becoming worthless in the taxable year in which the payment was made," making the payment deductible under section 166. Treas. Reg. § 1.166-9(a); *see also id.* § 1.166-9(d) (identifying three criteria required for a payment discharging all or part of a guaranty agreement to qualify as a "worthless debt").

With this overview in mind, we turn to Menard's argument that it is eligible to claim an offset of its Minnesota sales tax liability under section 297A.81.

B.

We begin with the language of Minnesota's statute. Under section 297A.81, a current sales tax liability can be offset against a sales tax liability "previously paid as a result of any transaction the consideration for which became a debt owed to the taxpayer

that became uncollectible." The parties agree that the language of this provision is plain and unambiguous as applied here. We also agree and so apply the plain meaning of this statute to the transactions at issue. *See Walgreens Specialty Pharmacy, LLC v. Comm'r of Revenue*, 916 N.W.2d 529, 533 (Minn. 2018) (applying "the statute according to its plain meaning").

Menard previously paid the sales tax owed from transactions with customers who made purchases using a Capital One card, and the consideration for each transaction was the price Menard charged. *See* Minn. Stat. § 297A.61, subd. 7 (2020) (defining "sales price" as "the total amount of consideration, including . . . credit" for which goods are sold); *U.S. Sprint Commc'ns Co. v. Comm'r of Revenue*, 578 N.W.2d 752, 754 (Minn. 1998) (defining "consideration" in the context of sales tax liability). Under the terms of its agreement with Capital One, Menard was made whole by Capital One within a matter of days after each transaction, including for the sales tax liability imposed on each transaction. Accordingly, there was no debt owed to Menard at that point; Capital One owned the customer accounts including the customer indebtedness, had the sole right to all sums paid by customers on those accounts, and was solely responsible for collection on those accounts. *See, e.g.*, *Circuit City Stores, Inc. v. Dir. of Revenue*, 438 S.W.3d 397, 403 (Mo. 2014) (noting that the retailer received payments "immediately from the banks" and thus "sustained no losses in remitting the sales taxes to the state"); *Sears, Roebuck & Co. v. Roberts*, No. M2014-02567-COA-R3-CV, 2016 WL 2866141, at *6 (Tenn. Ct. App. May 11, 2016) (noting that the bank paid the retailer the sales price and tax, and stating

that the retailer was "fully compensated" even though some customers did not pay the bank).

Based on the terms of its agreement with Capital One, and in light of the plain language of section 297A.81, we cannot conclude that Menard paid sales tax on a "transaction the consideration for which became a debt owed to" Menard. Rather, Menard paid sales tax on transactions for which it was made whole and for which any resulting debt was thereafter owned by Capital One.

But, Menard contends, Capital One's ownership of the account indebtedness and collection responsibilities are not the relevant focus. Rather, Menard argues that the focus must be on Menard's portion of the net program losses. Specifically, Menard argues, by agreeing to share with Capital One a portion of the net program losses that are attributable to cardholders' accounts, Menard essentially guaranteed a portion of cardholders' debts. As a guarantor, Menard reasons, it was "eligible" to take a bad debt deduction under section 166 for its share of the net program losses, *see* Minn. Stat. § 289A.40, subd. 2 (stating that a bad debt must be "eligible" to be deducted), and in turn, it is entitled to claim a offset on its Minnesota sales tax liability in that the same amount, under Minn. Stat. § 297A.81, subd. 1.[4]

[4] Menard asks us to determine its eligibility for a section 166 deduction while acknowledging that it did not, in fact, take a deduction under section 166. Menard admits that Capital One deducted the full amount of cardholder account debt under section 166 on its income tax returns and that Capital One did not reduce the amount of the claimed deduction by the amount Menard claims it is eligible to deduct under section 166.

If a taxpayer agrees to act as a guarantor of a debt obligation, or in a manner essentially equivalent to a guarantor, the guarantor's payment is deductible under section 166. Treas. Reg. § 1.166-9(a). We have said that a guaranty is "an undertaking or promise to pay on the part of one person that is collateral to a primary obligation and that binds the guarantor to performance in the case of the default of the one primarily bound." *Baker v. Citizens State Bank of St. Louis Park*, 349 N.W.2d 552, 557 (Minn. 1984). The guarantor agrees to perform the debtor's obligation, not to create a new obligation between the guarantor and the creditor. *See Schmidt v. McKenzie*, 9 N.W.2d 1, 3–4 (Minn. 1943). We construe a guaranty in the same way as any other contract, looking to the intent of the parties as evidenced by the words used in the contract and the parties' conduct. *See Am. Tobacco Co. v. Chalfen,* 108 N.W.2d 702, 704 (Minn. 1961).

Menard argues that it is "essentially equivalent to a guarantor," Treas. Reg. § 1.166-9(a), because it agreed to accept a portion of the net program losses. We disagree. The parties' agreement does not state that Menard guaranteed any portion of the cardholders' debt, and the record makes clear that the intent of the parties was not to create a guaranty agreement.

The agreement allowed Menard to share in the profitability of the credit card program using a formula that took into account both net profits and net losses. Using a formula to calculate the share of the economic benefits and risks of the credit card program does not evidence an intent for Menard to guarantee cardholders' debts. To the contrary, the plain terms of the agreement required "Capital One [to] provide revolving credit financing" to Menard's customers, stated that the account agreement was "between the

Cardholder and Capital One," and stated that the cardholders' indebtedness was "ow[ed] to Capital One by Cardholders."[5] These terms show that Menard intended for Capital One to "deal with [Menard's] customers as debtors." *Home Depot USA, Inc. v. Levin*, 905 N.E.2d 630, 633 (Ohio 2009) (explaining that the "essence of the transaction" between the retailer and the bank was for the bank to "act as lender to Home Depot's customers" and concluding that the retailer "no more bears the economic burden of customer default" under a private label credit card agreement "than it does on an ordinary credit card deal"); *see also Sears, Roebuck & Co.*, 2016 WL 2866141, at * 6 ("The risk that [a] private label credit card program will be less profitable than anticipated does not qualify as a bad debt.").

The conduct of the parties also demonstrates that they did not intend for Menard to act essentially as a guarantor for cardholders' debt. If Menard were a guarantor for cardholder debt and if Menard's share of the net program losses paid that debt, then Capital One had no debt to deduct. *See, e.g.*, *Baker Hughes, Inc. v. United States*, 943 F.3d 255, 260 (5th Cir. 2019) (explaining that "a guarantor can claim a bad-debt deduction only if the creditor could have claimed such a deduction *were it not for the guarantor's payment of the underlying debt*" (emphasis added)). In other words, Capital One could no longer

---

[5] Under the revenue sharing agreement, Menard's net loss share is adjusted to reflect any recoveries after an account was originally written off. Thus, if Capital One received payment from a cardholder after Menard paid its share of the net losses, Capital One would reimburse Menard accordingly. Menard argues that this evidences an intent to create a guaranty because, it contends, the cardholders' indebtedness is now owed to Menard and the fact that Capital One is collecting that debt from the cardholders instead of Menard is inconsequential. We disagree. These adjustments are necessary for the purpose of accurately reporting and measuring the overall performance of the program and do not evidence an intent to create a guaranty agreement or transfer cardholder indebtedness between Menard and Capital One.

claim a bad debt deduction because Menard's payment of that debt—in the form of a net payment calculated under the agreed-upon formula—would have satisfied the debtors' obligation. But Capital One continued efforts to collect *all* defaulted payments from account holders and did not deduct from the amount it attempted to collect any amount covered by Menard. Instead, Capital One deducted the total amount of the defaulted accounts as bad debts under section 166 on its income tax returns, without any indication that it reduced that amount by Menard's share of the net program losses.

Finally, in arguing that we should reverse the tax court, Menard relies on *Lowe's Home Centers, LLC v. Department of Revenue*, 455 P.3d 659 (Wash. 2020). The *Lowe's* court considered an argument similar to that presented here: whether Lowe's was entitled to a refund of sales tax based on losses attributable to a private label credit card program. *Id.* at 661. The terms of Lowe's agreement with the banks that offered the private label credit cards made Lowe's "responsible for Net Write-Offs," which were defined as "bad debt guarantees." *Id.* Additionally, the contract required the banks to subtract amounts received from Lowe's from the amounts the banks could collect from the cardholders. *Id.* Lowe's also claimed bad debt deductions, under section 166, on its federal income returns for the repayments made to the banks; the banks did not. 455 P.3d at 661. Based on these facts, the Washington Supreme Court found that Lowe's guaranteed a portion of the cardholders' defaults. *Id.* at 667.

The agreement between Menard and Capital One is materially different from the agreement at issue in *Lowe's*. *See also id*. at 665, 667 (distinguishing a case in which the retailer "was promptly paid in full, including sales tax, and was not the party who wrote

off the" debt as uncollectible and noting the lender was "completely responsible for all its bad debt"). Unlike Lowe's, the formula used to calculate Menard's share of program income and losses is not a "bad debt guaranty"; that formula simply establishes "Menards Compensation and Reporting."[6] Also in contrast to *Lowe's*, Capital One still continued its efforts to collect amounts owed by delinquent account holders and did not deduct from the amount it attempted to collect any amount received from Menard per the revenue sharing agreement. Capital One, at all times, held the right to seek repayment of the debt.

We conclude that Menard was not a guarantor and did not essentially act as a guarantor of the account holders' debts. Menard was, therefore, not owed an uncollectible debt that could be used to offset sales taxes owed to the State of Minnesota under Minn. Stat. § 297A.81, subd. 1.

## CONCLUSION

For the foregoing reasons, we affirm the decision of the tax court.

Affirmed.

---

[6] Nor is there any concern that the State retains sales taxes to which it is not entitled. *See Sears, Roebuck & Co.*, 2016 WL 2866141, at *6 (rejecting the argument that the state was unjustly enriched because "Sears was fully compensated" by the lender and "was not required to reimburse" the lender for cardholders' debts; although the program was less profitable than anticipated, allowing the retailer to claim a refund for an "indirect economic loss" would unjustly enrich the retailer, not the state).