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THE TAX COURT COMMITTEE ON OPINIONS

DICK GREENFIELD DODGE, INC.	:	**TAX COURT OF NEW JERSEY**
	:	**DOCKET NO: 010644-2012**
Plaintiff,	:	
vs.	:	
	:	
DIRECTOR, DIVISION OF TAXATION	:	
	:	
Defendant.	:	

Decided: April 28, 2016

David J. Kenny, Esq., for plaintiff
(Hartsough Kenny Chase & Sullivan, P.A., attorneys)

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(John J. Hoffman, Acting Attorney General
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CIMINO, J.T.C.

The seller in this matter, plaintiff Dick Greenfield Dodge, provided printed invoices to customers which overstated the amount of sales tax owed to the State. For the invoices in question, the seller alleges that a discount that was applied on the invoices includes not only a discount for the purchase, but also a discount for the sales tax. However, no discount for the sales tax is explicitly and separately indicated on the written invoice.

When making returns to the Director, the seller did not remit the amount explicitly set forth as sales tax on the printed invoice. Instead, the seller remitted a lesser amount calculated by taking the difference of the sales tax amount printed on the invoice less the sales tax included as part of a discount.

Thus, the issue in this matter is whether the amount of sales tax indicated on a written sales invoice as being collected from the customer must be remitted to the Director regardless of any unprinted sales tax reduction included in a discount.

This matter comes before this Court on cross-motions for summary judgment. Our Supreme Court has indicated that summary judgment provides a prompt, business-like and appropriate method of disposing of litigation in which material facts are not in dispute. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 530 (1994). Additionally, cross motions for summary judgment demonstrate to the court the ripeness of the matter for adjudication. Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 177 (App. Div. 2008).

The seller is a new car dealership, which like many car dealerships, has a service department. The seller underwent a sales and use tax audit in 2010 covering the period of April 2005 through March 2009, a four year period. The parties agreed

to utilize October 2008 as a sample period. Thus, the result of the examination of October 2008 would be multiplied by 48 and applied to the entire four year audit period.

In reviewing nearly 1,300 repair invoices for the sample period, the director's auditor flagged discrepancies on certain invoices in which the amount indicated as being collected for sales tax differed from the amount posted in the seller's internal sales ledger. For the invoices in question, the amount of sales tax indicated as being collected is in excess of what was actually due and owing to the State if calculated correctly.

If the seller had merely remitted the overpayment this case would have been more akin to the situation faced in either Kawa v. Wakefern Food Corp., 24 N.J. Tax 444 (App. Div. 2009), certif. den., 200 N.J. 369, or New Cingular Wireless PCS, LLC v. Director, Div. of Taxation, 28 N.J. Tax 1 (Tax 2014). In Kawa, the seller supermarket charged sales tax on the full purchase price instead of the discounted price resulting from in-store coupons. Id., at 446-47. In New Cingular, the seller charged sales tax for internet service which is not taxable under New Jersey law. Id., at 3. However, in both matters, there was not any dispute that the overcollected sales tax was remitted to the State. Kawa, supra, 24 N.J. Tax at 447. New Cingular, supra, 28 N.J. Tax at 2-3.

Customers would bring their vehicles to seller for service and parts. The seller alleges that before the service commenced, the customer was provided a cost estimate of the total charges. The estimate also indicated the amount of sales tax that would be owing on the total charges.[1]

When the work was completed, the seller provided an invoice with total charges, the sales tax on the total charges, and a discount.[2] However the sales tax indicated as being collected was not reduced to reflect the discount.

Seller did not remit the full amount indicated on the written invoice as being collected for sales tax to the State. Instead, for each invoice, the seller posted a journal entry in its ledger in which it allocated the discount between a parts and service discount, and a sales tax discount. The seller now contends that the discounted sales tax portion does not have to be remitted to the State since it was allegedly never collected despite an indication on the written invoice to the contrary.

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[1] Seller has not provided any of these estimates. For purposes of summary judgment it is assumed these estimates were provided.

[2] Seller's papers were not perfectly clear as to when the discount was applied. At oral argument it was clarified the discount was applied after the work was completed. Since the discount is reflected on the invoices provided during the audit and with the motion papers, it follows that the invoices were generated after the work was completed. Parenthetically, if the invoices provided were merely estimates not reflecting the seller's actual sales, the seller would have been providing inaccurate information during the audit.

To support this argument, the seller points to the allocation of the discount between a discount for service and parts and a discount for sales tax. This allocation was calculated prior to the printed invoice being presented to the customer. Further, the seller asserts the sales tax discount is actually coded onto the printed invoice. However, the sales tax discount is coded in such a format which would not be decipherable unless one had an intimate knowledge of seller's accounting system and accounting codes.

The seller provides sample invoices in support of its position. Visually, the relevant portion of a printed invoice essentially appears as follows:

709 4405 215A 308

Labor Amount	22.01
Parts Amount	73.94
Gas, Oil, Lube	0.00
Sublet Amount	0.00
Misc. Charges	3.00
Total Charges	98.95
Discount	47.13
Sales Tax	6.93
Please Pay This Amount	58.75

The "Labor Amount", "Parts Amount" and "Misc. Charges" is the undiscounted price of the service and parts. Adding these items together yields the "Total Charges" which is the price before the discount is applied. In the example above, the total charges are $98.95. The "Sales Tax" for the sample invoice, and

the other invoices in question, is seven percent of the "Total Charges." Thus, for the example above, "Sales Tax" is $6.93, or 7% of the "Total Charges" of $98.95.

In our sample invoice, the customer received a discount from the "Total Charges." The "Discount" is indicated as $47.13. Yet, the sales tax indicated on the invoice is for the full amount instead of the full amount less any discount. To be clear, the invoices in question provided to the customers indicate a sales tax based upon the undiscounted price instead of any lesser discounted price actually paid by the customer. While the amount of sales tax is based upon the sales price, sales price does not include discounts that are not reimbursed by a third party (such as a manufacturer).[3] Burger King Corp. v. Dir. 9 N.J. Tax 251, (Tax 1987), aff'd, 224 N.J. Super. 628 (App. Div. 1988); N.J.A.C. 18:24-1.4(f) (effective Feb. 5, 1990, since repealed); N.J.S.A. 54:32B-2(oo)(2)(A) (effective Oct. 1, 2005); N.J.A.C. 18:24-1.2.

Seller asserts that the "Discount" includes two components. One component is a discount from the "Total Charges." The other component is a discount from the "Sales Tax." Further, the seller argues that the breakdown between the "Total Charges" discount and the "Sales Tax" discount is reflected on the

[3] Seller indicated that there were not any third party discounts.

invoices. For the example invoice, the codes "709 4405" and "215A 308" appear to the upper left of the invoice totals. Seller asserts that "709" refers to a "Total Charges" discount, and "4405" is the amount of the discount or $44.05. Likewise, seller asserts that "215A" refers to a "Sales Tax" discount, and "308" is the sales tax discount or $3.08. Adding $44.05 and $3.08 does yield the explicitly printed "Discount" of $47.13. And, the "215A" "sales tax" discount of $3.08 is seven percent of the "709" "Total Charges" discount of $44.05. Seller asserts these amounts reflect the journal entries in its ledger.

As stated, the example invoice explicitly indicates "Sales Tax 6.93" which is seven percent of the stated "Total Charges" (before any discount) of $98.95. For the example invoice, the seller argues that it is only responsible to remit a sales tax amount consisting of the difference of the explicitly stated "Sales Tax" of $6.93 less the "215A" tax discount of $3.08, for the net amount of $3.85.[4]

The discrepancies were only a few dollars per invoice. However, the amount adds up quickly. For the October 2008

[4] The director presents invoices to demonstrate that the seller did not consistently apply the discount. In some invoices, the internal sales tax discount was in excess of seven percent of the parts and service discount. In other invoices, the printed "Sales Tax" actually reflects the correct amount to be collected on a price which reflects the "Total Charges" less the "Discount."

sample period, the difference in the sales tax on the invoices indicated as collected from customers versus the amount actually remitted to the State as a result of the "215A" sales tax discount journal entries resulted in a discrepancy of $969.11. Multiplied over a period of 48 months, the Director found that $46,517.28 was due and issued an assessment. The seller paid the assessment and now seeks a refund. The matter comes before this court pursuant to N.J.S.A. 54:32B-21.

The Sales and Use Tax Act was enacted as a revenue raising measure and was intended to be broadly read. Atlantic City Showboat v. Director, Division of Taxation, 26 N.J. Tax 234, 251 (Tax 2012), aff'd, 28 N.J. Tax 335 (App. Div. 2013), certif. den., 217 N.J. 303 (2014). The sales tax is on the customer, not the seller who merely collects it. Campo Jersey v. Dir., Div. of Tax'n, 390 N.J. Super. 366, 382, 23 N.J. Tax 370, 385 (App. Div. 2007), certif. den., 190 N.J. 395.

"The tax shall be paid to the person required to collect it as trustee for and on account of the State." N.J.S.A. 54:32B-12(a). "Person required to collect tax" includes every seller of tangible personal property and certain services. N.J.S.A. 54:32B-2(w). "This is not a tax imposed on the vendor but on the vendor's customer, and as such is what is commonly called a trust fund tax." Yilmaz Inc. v. Director, 22 N.J. Tax 204, 231 (Tax 2005), aff'd, 390 N.J. Super. 435, 23 N.J. Tax 361 (App.

Div. 2007), certif. den., 192 N.J. 69. Likewise, "[t]he Sales and Use Tax Act, N.J.S.A. 54:32B-1 to -29, squarely places on the vendor the obligation of establishing that it correctly reports its collection of tax." Id., at 230.

"Every person required to collect the tax shall collect the tax from the customer when collecting the price. . ." N.J.S.A. 54:32B-12(a). Returns must be periodically filed with the Director as to the tax collected. N.J.S.A. 54:32B-17(a). Moreover, "[e]very person required to file a return under this act shall, at the time of filing such return, pay to the director the taxes imposed by this act as well as all other moneys collected by such person acting or purporting to act under the provisions of this act." N.J.S.A. 54:32B-18 (emphasis added). In other words, a seller must "remit all monies collected under authority of the statute, whether correctly or incorrectly, intentionally or negligently, to the State." Kawa, supra, N.J. Tax at 449-50. Sellers are "obligated to pay over all collected sales tax monies to the Director with their returns, even potentially overpaid taxes. . . ." Id., at 450. By remitting all tax collected, a seller has no incentive to over-collect sales tax for its own benefit. See, Id. at 450.

Here, the seller claims it did not collect the full tax indicated on the invoice since it provided a discount that included a reduction in sales tax.

"If the customer is given any sales slip, invoice or receipt or other statement or memorandum of the price . . ., the tax shall be stated, charged and shown separately on the first of such documents given to him." N.J.S.A. 54:32B-12(a). ("Section 12(a)"). Such statement of the tax must use the word "tax."[5] N.J.S.A. 54:32B-25. The seller is required to retain "a true copy of each sales slip, invoice receipt, statement or memorandum upon which [Section 12(a)] requires that the tax be stated separately." N.J.S.A. 54:32B-16. Said records must be kept for four years. Id. Here, the seller indicated on the printed invoices that a certain amount of tax was collected, yet did not remit the full amount indicated to the Director. The seller now argues that it was not required to remit the full amount indicated on the face of the invoice since the correct amount of tax to be collected was less, and that the lesser amount was allegedly charged to the customer through application of the discount.

Section 12(a) is not be read in isolation. Statutes need to read in context with related provisions to give sense to the

[5] Seller's hypertechnical argument that it disclosed the tax discount (as a 215A accounting code) is quickly dispatched by the statutory requirement to identify the amount through use of the word "tax." The court further finds that even a reasonably sophisticated consumer would not be able to decipher the "709" and "215A" codes. It was unclear whether the "709" and "215A" codes even appeared on the copy of the invoice given to the customers. For the purposes of summary judgment it is assumed so.

legislation as a whole. Petrilli v. Pastorelle, 206 N.J. 193 (2011). Section 14(d) of the act provides that:

> No person required to collect any tax imposed by this act shall advertise or hold out to any person or to the public in general, in any manner, directly or indirectly, that the tax is not considered as an element in the price . . . , or that he will pay the tax, that the tax will not be separately charged and stated to the customer or that the tax will be refunded to the customer.
> [N.J.S.A. 54:32B-14(d).]

Read in conjunction with section 12(a) which requires the tax to be stated separately on the invoice, section 14(d) drives home the point that a seller cannot represent that the tax will not be separately stated or will be refunded to the customer. "Normally, sales tax charges must be stated, charged and shown separately." Trump Plaza Associates v. Director, Div. of Taxation, 25 N.J. Tax 555, 559 (App. Div. 2010). Here, the seller argues that the discount provided to the customer includes a sales tax discount even though the invoice does not state otherwise. This is exactly the type of practice which is in derogation of sections 12(a) and 14(d).

Seller alleges that it initially provided a written "estimate" to the customer in which the tax on the full undiscounted price was calculated correctly. Thereafter, the discount was applied and shown on the invoice, but the sales tax indicated on the estimate was not changed to reflect the

discount. Seller argues that it satisfied the statutory requirement since the estimate constituted the first document provided and Section 12(a) of the Act only requires the first document to provide the sales tax amount. See N.J.S.A. 54:32B-12(a). Seller's argument is flawed in a number of respects.

To constitute a sales slip, invoice, receipt or other statement or memorandum such documentation must reflect both the "price" which constitutes the demand for payment, and what was "paid or payable." Id.

First, the estimate does not reflect the "price" for which seller sought payment. Both by statute and regulation, sales price does not include discounts provided by the seller. Likewise, it is undisputed the price on the estimate is not what the seller sought from its customers.

Second, the estimate does not constitute what was "paid or payable" by the customers. For the transactions in question, it is undisputed that the discounts reduced what was paid or payable by the customers. It is assumed that for the transactions in question, the seller provided estimates.[6] By requiring the sales tax disclosure on the first sales document provided merely provides the convenience of not having to recapitulate the sales tax each time a statement is sent to a

[6] Notably, the sample invoices provided each had a customer signature waiving their right to an estimate.

customer. For example, if someone buys an item on time payable in installments, the seller does not have to indicate the sales tax with each installment statement. Rather, the seller is only required to spell out the sales tax on the initial or first document provided to the customer.

The seller argues that any indication of sales tax due, even if incorrect, inoculates the seller from having to disclose the correct amount of sales tax collected. Certainly implicit in the law which requires disclosure of the sales tax is the requirement of an accurate disclosure. To claim that a flawed disclosure would suffice is absurd. Reisman v. Great American Recreation, Inc. 266 N.J. Super. 87, 95-96 (App. Div. 1993). The purpose of the law is to inform customers, the actual taxpayers, how much the seller is collecting.

To allow sellers which overstate sales tax due to keep the amount overstated would lead to mischief. Requiring a seller to remit all tax collected even if too much, removes the incentive to overcollect the tax. See, Kawa, supra, N.J. Tax at 450.

As already stated, the sales tax is a trust fund tax and the seller acts as trustee for the State. In other words, the seller is acting as a governmental tax collector. Great Adventure, Inc. v. Director, 9 N.J. Tax 480, 487 (Tax 1988)(seller is "statutory agent of the State"). As a collector of sales taxes, the seller is required to register with the

Director prior to collecting the tax. N.J.S.A. 54:32B-15(a). A governmental entity is required to turn square corners in its dealing with the taxpaying public. F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-427 (1985). Likewise, a seller who is a tax collector on behalf of the State is required to turn square corners in its dealings with the taxpaying public. As such, the seller does not merely stand in the shoes of a private litigant and must exercise its governmental responsibilities conscientiously and in good faith. Id., at 426-27. Such turning of square corners is legislatively confirmed in section 18 of the act which requires that all amounts which the seller, as a tax collector, collects must flow through the seller directly to the State regardless of whether the amount collected constitutes an overpayment. Kawa, supra, 24 N.J. Tax at 449-50; N.J.S.A. 54:32B-18.

As to overcollections, any tax "erroneously, illegally or unconstitutionally collected" can be refunded by the director to the customer who actually paid the tax. N.J.S.A. 54:32B-20(a). Likewise, a seller does not face consumer fraud liability when it overcollects a tax so long as all sums are remitted directly to the State. Kawa, supra, 24 N.J. Tax at 451.

Overall, the requirement that a seller, as a de facto tax collector, turn over all sums which it informed customer would

be collected satisfies a number of important policy considerations.

First and foremost, the taxpaying public must have confidence in a system in which the government relies upon private third parties to collect a tax. Confidence in government depends to a large extent on confidence in the honesty and integrity of those acting on behalf of the government. See, In re Opinion 569, 103 N.J. 325, 331 (1986). The sales tax is a broad based tax that applies to and is paid by everyone from children buying candy to adults buying alcohol, and from a homeless individual buying a cup of coffee to a corporate executive buying a luxury automobile. It is imperative that all consumers have faith and confidence in those sellers entrusted to collect sales tax on behalf of the State. Condoning the use of written documents that do not accurately reflect the tax paid undermines confidence in our system of revenue collection and ultimately government in general.

Second, accepting a seller's claim that the printed invoices do not reflect reality can lead to mischief. For example, every time a seller who failed to collect sales tax is audited, all the seller would have to do is claim the sales tax was included in the total price and thus reduce a seller's liability by approximately seven percent. For example, if the seller provided an invoice for an untaxed item sold for $10,000,

the sales tax that would be due is 7% or $700.00. If the seller could argue that the sales tax is included in the price, the base price would be $9346 and the sales tax would be $654. In other words, the seller would get a discount on his liability.

Third, from a competitive standpoint, including the sales tax discount with a parts and service discount misleadingly inflates the discount which the seller is providing the customer. The amount may not seem like much. However, some retail businesses such as supermarkets operate on a 1-3 percent profit margin. Hanover 3201 Realty, LLC v. Village Supermarkets, Inc., 806 F.3d 162, 175 (3rd Cir. 2015) (supermarket industry notorious for low profit margins); United States v. VISA U.S.A., 163 F. Supp. 2d 322, 337 (S.D.N.Y. 2001) (3 percent margin); Publix Supermarkets, Inc. v. United States, 26 Cl. Ct. 161, 176 n. 18 (1992) (1 percent margin). Shifting a portion of the price into the "sales tax" skews the market by allowing a retailer to hide part of the total price to a customer within the sales tax. One seller should not gain an advantage over others because of improper tax reporting.

Fourth, the Director is not required to go on a searching inquiry to determine if individual customers understood that some amount other than what was explicitly stated was collected. Allowing a seller to allege that each customer knew the correct amount of tax was collected despite a written invoice indicating

otherwise would introduce an administrative and adjudicatory quagmire into the determination of the amount of tax due. Moreover, a seller cannot be allowed to claim that it subjectively acted in good faith in order to overcome the written invoice requirement. Section 14(d) precludes the defensive assertion that customers were told or understood something contradictory to the amount stated on the invoice. Allowing extrinsic proof of anything other than what was stated on the invoice as being collected for taxes would hinder efficient administration of the act by allowing a seller to interpose factual hurdles to the ultimate collection of the tax due. See, Fort Lee Borough v. Director, 12 N.J. Tax 299, 317-318 (Tax 1992) (aim of efficient tax administration). It is the seller's ultimate responsibility as the collector of the tax to properly report sales tax. The Director is entitled to rely upon the statement of the tax collected indicated on an invoice issued per Section 12(a) of the act.

Fifth, the amount of a separately stated sales tax is used in the administration of other tax laws. For example, sales taxes which are separately stated can constitute a deduction for federal income tax purposes. I.R.C. § 164(a), (b)(5)(G). While individual transactions may appear small, the cumulative effect is greater, especially in the case of larger individual transactions. The bottom line is that by inflating the amount

of a separately stated sales tax and then refunding same as part of an unstated discount, creates the opportunity for divergent reporting of other taxes.

Overall, the seller in this case as a tax collector on behalf of the State must fulfill its statutory duty to remit all sales tax printed invoices as being collected from customers. To allow anything less runs counter to the explicit direction provided by the legislature in dealing with this issue. The seller's motion for summary judgment is denied and the director's motion granted.

/s/Mark Cimino, J.T.C.