

TAX COURT OF NEW JERSEY



Kathi F. Fiamingo
Judge

120 High Street
Mount Holly, NJ 08060
(609) 288-9500 Ext 38303

**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE TAX COURT
COMMITTEE ON OPINIONS**

November 15, 2017

Zachary T. Gladney, Esq. (Pro Hac Vice)
Steven L. Penaro
Alston & Bird
90 Park Avenue
New York, NY 10016

Ramanjit K. Chawla
Deputy Attorney General
Division of Law
R.J. Hughes Justice Complex
P.O. Box 106
25 Market Street
Trenton, New Jersey 08625-0106

Re: Spencer Gifts, LLC v. Director, Division of Taxation
Docket No. 012530-2015
Spirit Halloween Superstores, Inc. v. Director, Division of Taxation
Docket No. 012526-2015

Dear Counsel:

This letter constitutes the court's opinion with respect to plaintiff's motion for partial summary judgment and defendant's cross motion for partial summary judgment. For the reasons explained more fully below, both motions are denied.

I. Finding of Facts and Procedural History

The court makes the following findings of fact based on the submissions of the parties.

II. Legal Issues and Analysis

Spencer Gifts, LLC and Spirit Halloween Superstores, Inc. (“Plaintiffs”) operated retail stores throughout the United States during the years 2008 through 2012, the years under review. Both plaintiffs maintain a “home office” in Egg Harbor Township, New Jersey.

During the years under review plaintiffs purchased store advertising signs and other printed materials from a New Jersey vendor. The invoices for the materials purchased by plaintiff identify the “ship to” address as plaintiffs’ New Jersey home address. The vendor charged plaintiffs sales tax during the years in question on each of the orders and remitted the same.

Plaintiffs filed a claim for refund of a portion of the sales tax charged alleging that despite the identification of the New Jersey address on the invoices from the New Jersey vendor, a large portion of the materials purchased were shipped directly by the vendor to plaintiffs’ out of state locations. The Director denied the refund claims, determining that plaintiffs failed to prove that the transactions were exempt or excluded from tax and that the vendor correctly collected and remitted the tax.

Plaintiffs filed a timely protest which was ultimately denied. A final determination was issued May 27, 2015. Plaintiffs timely filed complaints in the Tax Court contesting the Director’s determinations.

Plaintiffs filed a joint motion for partial summary judgment. Defendant filed a cross motion for partial summary judgment.

A. Summary Judgment

Summary judgment should be granted 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 challenged and the moving party is entitled to a judgment or order as

a matter of law.” R. 4:46-2(c). In Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995), our Supreme Court established the standard for summary judgment as follows:

[W]hen deciding a motion for summary judgment under Rule 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

“The express import of the Brill decision was to ‘encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.’” Township of Howell v. Monmouth Cnty. Bd. of Taxation, 18 N.J. Tax 149, 153 (Tax 1999) (quoting Brill, supra, 142 N.J. at 541).

“[T]he determination [of] whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Ibid. at 523.

B. Standard of Review

The review of this matter begins with the presumption that determinations made by the Director are valid. See Campo Jersey, Inc. v. Director, Div. of Taxation, 390 N.J. Super. 366, 383 (App. Div.), certif. denied, 190 N.J. 395 (2007); L&L Oil Service, Inc. v. Director, Div. of Taxation, 340 N.J. Super. 173, 183 (App. Div. 2001); Atlantic City Transp. Co. v. Director, Div. of Taxation, 12 N.J. 130, 146 (1953). “New Jersey Courts generally defer to the interpretation that an agency gives to a statute [when] that agency is charged with enforc[ement.]” Koch v. Director, Div. of Taxation, 157 N.J. 1, 8 (1999) (citing Smith v. Director, Div. of Taxation 108 N.J. 19, 25

(1987)). Determinations by the Director are afforded a presumption of correctness because “[c]ourts have recognized the Director’s expertise in the highly specialized and technical area of taxation.” Aetna Burglar & Fire Alarm Co. v. Director, Div. of Taxation, 16 N.J. Tax 584, 589 (Tax 1997) (citing Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 327 (1984)). The Supreme Court has directed courts to accord “great respect” to the Director’s application of tax statutes, “so long as it is not plainly unreasonable.” Metromedia, supra, 97 N.J. at 327. However, where the interpretation of an administrative agency is plainly at odds with a statute, that interpretation will not be upheld. See Oberhand v. Director, Div. of Taxation, 193 N.J. 558, 568 (2008) (citing GE Solid State v. Director, Div. of Taxation, 132 N.J. 298, 306 (1993)).

C. Discussion

In arguing for partial summary judgment, plaintiff submits an unauthenticated and uncertified letter allegedly from the New Jersey vendor to the effect that the identification of plaintiffs’ New Jersey address as the “ship to” address on each invoice does not represent the destination of the materials sold and that “typically” the materials were picked up by Fed Ex for delivery both in state and out of state. Plaintiffs also submit an affidavit of Susan Derose, identified as the Senior Manager of Advertising Planning and Production of Spencer Gifts attesting to the fact that during the years under review, plaintiffs operated more than 1100 business locations throughout the United States and that only “3.1 to 3.5 percent of Spencer Gifts’ business locations and 6.5 to 7.3 percent of Spirit Halloween’s business locations” were physically located in New Jersey. Further, Ms. DeRose avers that the identification of the New Jersey business location on the invoices as the “ship to” address is inaccurate and that in fact the materials purchased were shipped directly to plaintiffs’ business locations throughout the United States in overall proportion to those business locations. The affidavit refers to documents allegedly provided to the Division

of Taxation which are alleged to support this position but which were not attached to the affidavit or otherwise provided to the court.

In opposition to plaintiffs' motion the Director correctly indicates that the letter from the New Jersey vendor is unauthenticated hearsay and unreliable evidence. The Director further notes that despite the DeRose affidavit plaintiffs have failed to produce any cogent evidence supporting their claimed right to a refund.

In support of its own motion for partial summary judgment the Director argues that all of the parties concede that the invoices for the materials produced by plaintiffs to the Director all reflect a "ship to" address in New Jersey. The Director further avers that plaintiffs have failed to produce competent proof otherwise. Thus, the Director maintains that the denial of refund was proper and summary judgment should be granted.

The court concludes that plaintiffs have failed to present any credible or reliable proofs to support their motion for partial summary judgment. The letter from the vendor is unreliable evidence. Counsel's certification that the exhibit is a true and correct copy of a letter from the vendor does not overcome its inherent unreliability as hearsay. While the DeRose affidavit claims a denial of the delivery of all of the materials purchased to the New Jersey location, it is replete with hearsay statements and references to documents and evidence not produced to the court. Viewing the evidence presented in a light most favorable to the defendant it is clear that plaintiffs have failed to demonstrate their entitlement to partial summary judgment in this matter.

On the other hand, plaintiffs do not deny that the invoices identify the "ship to" address as the New Jersey location of the plaintiffs. Thus, the Director maintains that they have demonstrated that there is no genuine issue of material fact in dispute and that partial summary judgment must be granted to Director. The Director's argument ignores the plaintiffs' clear denial that the

invoices accurately reflect the delivery destination of the materials. While plaintiffs have not carried their burden to prove entitlement to partial summary judgment, the proofs presented are sufficient to demonstrate that there is a genuine issue of material fact in dispute.

The court notes that in the Director's pleading in support of the cross motion for partial summary judgment, the Director argued that the delivery destination of the materials is not determinative of the imposition of sales tax in this matter. The Director instead argues that even if plaintiffs are successful in demonstrating that the New Jersey vendor shipped the materials to plaintiffs' out of state locations, the delivery of those materials to Fed Ex in New Jersey constitutes the passage of title such that the imposition of New Jersey sales tax is proper. Media Graphics, Inc. v. Dir., Division of Taxation, 7 N.J. Tax 23, aff'd, 8 N.J. Tax 321 (App. Div. 1986).

In response, plaintiff argues that the 2005 amendments to the Sale and Use Tax Act to conform it to the Streamlined Sales and Use Tax Agreement, and particularly the sourcing rules of N.J.S.A. 54:32B-3.1 "superseded" the decision in Media Graphics. Specifically plaintiff refers to N.J.S.A. 54:32B-3.1(a)(2) which provides that "(i)f the product is not received by the purchaser at a business location of the seller, than the sale shall be sourced to the location where receipt by the purchaser . . . occurs, including the location indicated by instructions for delivery to the purchaser . . . , known to the seller" and N.J.S.A. 54:32B-3.1(e) which provides that "(t)he terms 'receive' and 'receipt' do not include possession by a shipping company on behalf of the purchaser." If correct, the acceptance in New Jersey by Fed Ex of the materials for delivery to out of state locations does not constitute the passage of title such that the sales tax may be imposed.

The Director did not file a reply to plaintiff's opposition to address this position. At oral argument, the Director indicated that they maintained their position but did not address the plaintiff's position relative to the effect of the Streamlined Sales and Use Tax Agreement.

In its notice announcing the enacting of the revisions to the Sale and Use Tax Act to conform to the Streamlined Sale and Use Tax Agreement, the Division of Taxation stated, in part:

Sourcing: The definition of "sale" is any transfer of title or possession, for consideration. New Jersey is a destination state, so whether a sale of property is subject to New Jersey sales or use tax is generally based upon where delivery occurs. The new law provides specific sourcing rules which determine the location where the sale, lease or rental is deemed to occur for purposes of applying each state's sales and use tax. In addition to general sourcing rules for sale transactions, there are additional rules for lease and rentals of tangible personal property; of motor vehicles, trucks and certain aircraft; and for sales, lease and rentals of transportation equipment. Sales continue to be sourced based on the location where delivery is taken by the purchaser. (N.J.S.A. 54:32B-3.1; 3.2; 3.3; 3.4)

[<http://www.nj.gov/treasury/taxation/pdf/ssutanotice.pdf>]

Furthermore, the New Jersey Sales Tax Guide, Bulletin S&U-4, Rev. 7/17, issued by the New Jersey Division of Taxation provides as follows: "In general, every New Jersey business selling taxable items or services must collect and remit New Jersey Sales Tax when sales are completed by delivery to a New Jersey location or performance of the service in this State." (Emphasis added), at 21, <http://www.state.nj.us/treasury/taxation/pdf/pubs/sales/su4.pdf>. The introductory provisions of that Bulletin provide that "This document is designed to provide guidance to taxpayers . . ." Id. at 1.

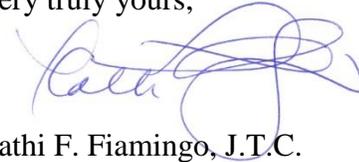
In light of the foregoing and without more, the court is unable to conclude that the Director is entitled to partial summary judgment as a result of the delivery of the material to Fed Ex alone.

III. Conclusion

For the reasons set forth above, plaintiff's motion for partial summary judgment is denied.

The Director's cross motion for partial summary judgment is also denied.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Kathi F. Fiamingo', with a large, stylized flourish at the end.

Kathi F. Fiamingo, J.T.C.