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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

Mala Sundar
JUDGE

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Re: Premier Netcomm Solutions, L.L.C. v. Director, Div. of Taxation
Docket No. 016307-2012

Dear Counsel:

In its previous letter opinion issued October 25, 2016, this court held that services performed in connection with prewritten computer software were not taxable prior to October 2005 because the law making prewritten computer software taxable as "tangible personal property," (even if delivered electronically) was enacted in October 2005. Defendant ("Taxation") contends via the instant timely motion for reconsideration that the court erred in so concluding because the newly enacted law simply enumerated what was always taxable, therefore, the court must affirm that portion of Taxation's sales tax assessment for the period January 2004 to October 2005. Plaintiff did not oppose the motion.

For the reasons stated below, the court grants the motion and reverses its decision and conclusion as requested by Taxation.

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A. Standards for Reconsideration

A motion for reconsideration must "state with specificity the basis upon which it is made, including a statement of the matter or controlling decisions which counsel believes the court has overlooked or as to which it has erred." R. 4:49-2. Dissatisfaction with the court's decision is an inappropriate ground for reconsideration. Palumbo v. Township of Old Bridge, 243 N.J. Super. 142, 147 n.3 (App. Div. 1990) (observing that "[w]e . . . disapprove of the excessive use of motions for reconsideration . . . [which are being] made with increasing frequency when essentially there is little more than disagreement with the Court's decision. Motions for reconsideration were never meant to be a substitute for the filing of a timely appeal").

A reconsideration motion will be granted "only for those cases which fall into that narrow corridor in which either the Court has expressed its decision based upon a palpably incorrect or irrational basis, or it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence . . . ." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The movant must "initially" show that the trial court "acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process." Ibid. However, a court may, "in the interest of justice" consider any "evidence" that the litigant claims is "new or additional . . . which it could not have provided" during the initial hearing. Ibid.

B. The Underlying Opinion

In its opinion, the court first observed that under the scheme of the Sales & Use Tax Act ("S&U Act"), all sales of tangible personal property are taxed unless specifically exempt, while only sales of specifically enumerated services are subject to tax.

The court then addressed the taxability of sale of services relating to computer software. For periods prior to October 2005, the court held that "prior to 2005, sales of or receipts from

enumerated services upon prewritten computer software were not taxable." In so concluding the court relied largely on the new definition of "tangible personal property" which until 2005 was defined entirely as "[c]orporeal personal property of any nature including energy," and was later amended to include "prewritten computer software, including prewritten computer software delivered electronically." N.J.S.A. 54:32B-2(g).

The court also relied upon Taxation's regulations in this connection. It cited to 46 N.J.R. 690(a) (April 24, 2014) which noted that "[h]istorically, the law did not impose sales tax on services performed on software in the electronic state" since it was "deemed to be intangible." Those regulations noted that since the S&U Act "was amended to include 'prewritten computer software' within the definition of 'tangible personal property,'" the "servicing, installing, or maintaining software" whether done at the buyer's location or the provider's remote location, were now taxable. Id. The court also cited to Taxation's publications in this regard such as Technical Bulletin 51(R) (March 13, 2007); Technical Bulletin 51(R) (July 5, 2011); Technical Bulletin 72 (July 3, 2013), all of which were available online.

Since Taxation did not provide any documents, and further since Taxation itself had characterized plaintiff's business as providing the services of information technology ("IT") solutions such as upgrades, installations, repairs, and maintenance to prewritten computer software,[1] (which plaintiff did not refute), the court concluded that what was "historically" untaxed for being "deemed to be intangible" only became taxable when New Jersey explicitly deemed it to

[1] Plaintiff provided the following services: remote or onsite network access support (network connectivity, internet access; software updates); consulting design and implementation of IT and telephone related projects; remote or onsite trouble shooting (network connectivity, internet access); remote training; onsite visits for installation or replacing network-related equipment (switches, firewalls, router) or to implement new/major policies, projects; software needs (purchases, installation, updates, licenses); data backup; maintenance and repair services; remote monitoring of client's network by using a Remote Security Guard System or RSGS; telecommunication services (reviewing bills, checking phone system, voicemail).

be tangible under the 2005 amendments. Therefore, the court ruled that as a matter of law, sales tax on plaintiff's receipts for 2004 and for the first three quarters of 2005 was improper.[2]

C. Reconsideration

Taxation argues that the court erred in its construction of the prospective applicability of the definition of "tangible personal property." It complains that the court should not have raised the issue when plaintiff never had any quarrel in this regard, and that having raised the issue sua sponte, the court should not have decided the same without giving Taxation an opportunity to explain the retroactive applicability of the definition relative to prewritten computer software. It contends that the statute was amended merely to conform to the Streamlined Sales and Use Tax Agreement ("SSUTA"), which required member States to use common definitions, one of which was pre-written computer software. Thus, per Taxation, the inclusion of this term in the definition of "tangible personal property" in the S&U Act was not a new tax on prewritten computer software.

Taxation further contended that the court erred in relying upon the regulatory language because prior to their promulgation there were two documents which notified the public that sales of, and services related to, prewritten computer software were taxable. Taxation produced two documents after a "search" of its records in this connection: (1) Technical Bulletin 51, issued January 20, 2004; and (2) Notice (Revised 10/18/05). Technical Bulletin 51 distinguished software sold on a tangible disc, CDs or other storage media (including pre-written software and modified software if the invoice did not separately state a fee for customizing the software, but excluding "custom" software created for the exclusive use of the buyer) which was taxable, from software sold and electronically transferred or downloaded in certain circumstances, which was deemed intangible and thus not taxable. Services were similarly categorized with installation and

[2] The court had also invalidated a portion of Taxation's assessment relating to plaintiff's out-of-state charges. Taxation does not request reconsideration of this portion of the ruling.

maintenance of tangible software being taxable services. Id. The Bulletin identified nontaxable maintenance contracts as those involving "updates by electronic means, with absolutely no delivery of CDs, discs, or other tangible storage media to the customer, or only the provision of training, consultation, or of advice, help and customer support via telephone or online . . . ." Id.

The Notice dated 10/18/05 announced that New Jersey became a member of the SSUTA and summarized the consequent changes to the S&U Act. Taxation noted that the SSUTA required each member State to adopt uniform definitions, however, a State could tax or exempt "all products within a definition." Id. Taxation also stated that "many terms were not previously defined in New Jersey law, so a new statutory definition may result in changes to the taxability of specific products." Id. Pre-written computer software was one such new definition. Taxation noted that the SSUTA "definitions" of software "do not result in any significant change in the taxability of software, which is set forth in Technical Bulletin 51 (TB-51)," for which it provided the web link as http://www.state.nj.us.treasury/taxation/publtb.shtml. Id.

Before addressing the substance of the motion, the court makes the following observations in connection with Taxation's concerns: The retroactive or prospective applicability of a statute is a question of law as to which the court can, sua sponte, raise the issue at any time, without a request by the parties. Nor does the court need to defer to the parties' construction or interpretation of the same. Second, when the court raised the issue of the retroactive applicability of the 2014 regulations and the October 2005 amendment to the definition of "tangible personal property" during oral argument of the summary judgment motions, Taxation's response was simply that all sales and services are taxable until proven by the seller to the contrary under N.J.S.A. 54:32B-12(b).[3] Never did it allude or cite to, nor provide a copy of the 2004 Bulletin, which was evidently

[3] This statute states that "[f]or the purpose of the proper administration of" the S&U Act, "and to prevent evasion of the tax hereby imposed . . . it shall be presumed that all receipts for property or services of any type mentioned in"

available to Taxation,[4] or October 18, 2005 Notice. It did not, at all, discuss its regulations in this regard, or the impact of their withdrawal in 2003. See infra. As a movant for summary judgment, Taxation must be fully prepared to address any legal issues.

Turning to the substantive grounds for reconsideration, Taxation is correct that the purpose of the October 1, 2005 amendments the S&U Tax Act was to make changes in conformance with the SSUTA.[5] However, this fact alone does not dictate whether the amendments taxed pre-written computer software prospectively or retroactively. For instance, in Campo Jersey, Inc. v. Director, Div. of Taxation, 390 N.J. Super. 366 (App. Div.), certif. denied, 190 N.J. 395 (2007), the Appellate Division declined to apply the SSUTA retroactively. There the issue was whether Taxation reasonably construed the term "premises" in connection with sales tax on sale of certain food items. That term was in the pre-2005 version of N.J.S.A. 54:32B-3(c), and was removed from the re-written subsection (which also provided for a new definition of "prepared foods" and exclusions of certain items from this definition). The court observed as follows:

> At the outset, we note that the 2005 version of the governing statute, N.J.S.A. 54:32B-3, was enacted several years after [taxpayers'] audit periods. L. 2005, c. 126, §2 (effective October1, 2005). It conforms the sales and use tax to the [SSUTA] that some other states have enacted. S. Budget & Approp. Comm.,

N.J.S.A. 54:32B-3(a) or (b) or (c), "are subject to tax until the contrary is established, and the burden of proving that any such receipt . . . is not taxable . . . shall be upon the person required to collect tax or the customer."

[4] When the court accessed this web address during writing its prior opinion, and as of the date of this opinion, Technical Bulletin 51 was not listed. The only listed Bulletin on software was 51(R) (the "R" presumably indicating a "revised" or "replaced" version). Notably, Technical Bulletin 51(R) nowhere cites to, or references Technical Bulletin 51.

[5] The SSUTA is a multi-state agreement adopted in November 12, 2002 (amended November 19, 2003 and November 16, 2004). Amended versions of the SSUTA can be found at http://www.streamlinedsalestax.org/. The goals were uniformity in the state and local tax bases, uniformity of major tax base definitions, and uniform sourcing rules. Id. at §102. New Jersey was authorized to become a member by L. 2001, c. 431. New Jersey became a signatory of the SSUTA in 2005. The Legislature noted that the dual purpose of SSUTA was "1) a uniform sales and use tax administration system to reduce the burden of tax compliance for all sellers and all types of commerce and 2) a sales tax law simplification and uniformity system." Senate Budget & Approp. Comm., Statement to Senate No. 1958 (July 1, 2005). One of the "key features" of the SSUTA was to provide "[u]niform definitions within tax laws." Ibid. Although the "participating state" would "use the common definition for key items in the tax base" without deviation, the Legislature would "still choose what is taxable or exempt in [its] state." Ibid.

> Statement to S. 1958 (July 1, 2005); A. Budget Comm., Statement to A. Comm. Sub. for A. 3473 (June 29, 2005).
> . . .
>
> No one seriously argues that the 2005 version applies to the matter at hand. Indeed, while a change in the judicial interpretation of statutory language is ordinarily applied retroactively . . . the presumption is that new statutes are applied prospectively . . . . . Nowhere is it indicated that the Legislature intended the [2005] enactment to apply retroactively, such as the Legislature's identification of a class of taxpayers in need of relief, or of an inequity among otherwise similarly situated taxpayers. See S. Budget & Approp. Comm., Statement to S. 1958, supra (no such indication); A. Budget Comm., Statement to A. Comm. Sub. for A. 3473, supra (same). As such, we decline to apply the 2005 version of N.J.S.A. 54:32B-3 retroactively.
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> [390 N.J. Super. at 378] (citations and quotation omitted).

Cf. N.J.S.A. 54:32B-28.2 ("Notwithstanding the provisions of" the 2005 law "to the contrary, the definition of 'lease or rental' . . . shall be applied only prospectively . . . and shall have no retroactive impact on existing leases or rentals [or] on the treatment of sale-leaseback transactions entered into before the date of enactment of" the 2005 law. Cf. also 40 N.J.R. 1777(a) (April 7, 2008) ("the law, for the first time, included definitions of terms related to computers and software;" and "N.J.A.C. 18:24-5.3, the provision regarding purchases of materials and supplies by contractors, . . . , has been amended to include some examples . . . for clarification and to assist contractors, their suppliers, and their customers, and not because of any change in the law").

The court is therefore not convinced that the Legislature automatically intended a retroactive effect when it included "prewritten computer software, including prewritten computer software delivered electronically," in the definition of "tangible personal property." Therefore, and in keeping with Campo, supra, the court will examine whether the sales of, and services related to, prewritten computer software were taxable pre-October 2005.

In its reconsideration motion, Taxation points to only the 2004 Technical Bulletin 51 and the Notice of 10/18/05. Yet the court's research shows that prior to 2003, Taxation's regulations

governing data processing services, N.J.A.C. 18:24-25.1 (pre-repeal), clearly addressed software, and were mostly consistent with the provisions of the 2005 Bulletins, the 2008 proposed regulations, and the 2014 final regulations. For instance, if "the preparation or selection of the customer's use requires an analysis of the program for the customer's requirements by the vendor," the software was deemed non-taxable intangible personal property. N.J.A.C. 18:24-25.2(b)(2)(i) (pre-repeal). Also deemed intangible, thus non-taxable, was software that required the vendor to adapt it for use "in a specific environment," such as, where a "prewritten sort program" generally usable in all computers required additional "instructions . . . which specify the particular computer model in which the program will be utilized." N.J.A.C. 18:24-25.2(b)(2)(ii) (pre-repeal). Software included "Systems programs," "application programs," "pre-written programs (canned)," and "custom programs." N.J.A.C. 18:24-25.2(b)(2)(iii) (pre-repeal). "Software, whether placed on cards, tape, disc pack or other machine readable media, or entered into a computer directly," was not taxable. N.J.A.C. 18:24-25.2(b)(2)(iv) (pre-repeal). However, if a company leased a computer "with nontaxable application programs," and received a monthly invoice with "one charge," then the "entire monthly charge" was taxable. N.J.A.C. 18:24-25.2(b)(2)(iv), Example 3 (pre-repeal). Similarly, "prepackaged programs for use with home television games or other personal computer equipment" sold in retail and usable without modifications or need to adapt to a buyer's requirements, were taxable. N.J.A.C. 18:24-25.2(b)(2)(iv), Example 5 (pre-repeal). "Consulting services" or "technical instruction[s]" were nontaxable. N.J.A.C. 18:24-25.2(b)(3)(ii) (pre-repeal). Data transmitted electronically to an out-of-State location was nontaxable. N.J.A.C. 18:24-25.2(b)(4) (pre-repeal).

However, in 2003, Taxation proposed to delete the regulations on software. See 35 N.J.R. 2165(a) (May 19, 2003). This was because they were "substantially unrelated to the subject area

of the rule regulating the treatment of sales of data processing services," and also because they were "extremely outdated in light of changes in the way software is marketed, and many taxpayers and practitioners have found it confusing and difficult to interpret and to apply." Ibid. Taxation aimed to "clear[] the way for . . . a more appropriate modern rule regarding the sales tax treatment of software sales," and to "propose a new rule governing software sales, replacing the old, confusing and outdated subsection, which has not been a helpful guide to [Taxation's] policy regarding software sales for many years." Ibid. In August 2003, Taxation issued final regulations which deleted the provisions on software from N.J.A.C. 18:24-25.2(b). See 35 N.J.R. 3848(a) (Aug 18, 2003). See also 40 N.J.R. 6832(a) (Dec 1 2008) (deletion of regulations on "data processing services" proper since they "do not fall within any of the categories or services enumerated as taxable," under N.J.S.A. 54:32B-3, and as they "contained substantial information regarding the treatment of software and many people found the subchapter confusing").

Thereafter, regulations addressing software were proposed only in 2008, 40 N.J.R. 1777(a), supra, and finalized only in 2014.[6] Thus, there were no regulations addressing the taxability or otherwise of sales of, and services related to, software (i.e., whether software was taxable tangible property or nontaxable intangible property) from 2003. The issue is then whether the public had any notice or knowledge of taxability of prewritten computer software, at least until October 2005 when the S&U law incorporating the SSUTA was in place.

Such notice was provided by Technical Bulletin 51 produced here in support of the reconsideration motion. Courts have considered bulletins issued by Taxation as "guidance." See

[6] There was no mention of, or reference to any Technical Bulletin or the 10/18/05 Notice in the introductory or explanatory paragraphs, or responses to taxpayer comments, in Taxation's regulations proposed in 2008 and finalized thereafter addressing computer software. Taxation is therefore mistaken in its argument that the court "completely overlooked" the two documents now produced, and erred in relying on the language in its regulations, especially where Technical Bulletin 51 was, and still is, unavailable electronically.

Tozour Energy Sys. v. Director, Div. of Taxation, 23 N.J. Tax 341 (Tax 2007). However, a Bulletin will not be considered persuasive if it announces a new policy but with retroactive effect. Residuary Trust v. Director, Div. of Taxation, 28 N.J. Tax 541, 547-548 (App. Div. 2015) (it is "fundamentally unfair . . . to announce in [Taxation's] official publication that, under a certain set of facts, . . . income will not be taxed, and then retroactively apply a different standard years later" and "an agency may not spring upon the regulated community a new policy, never before announced, and apply it retroactively," because "in the field of taxation . . . trusts, businesses, individuals and others must be able to reliably engage in tax planning and, to do so, they must know what the rules are") (citations omitted).[7]

Here, and also because there was no challenge to whether software itself (as opposed to the computer or other physical tangible device that contains or uses the software program) was taxable, the court agrees with Taxation that the 2004 Bulletin provided guidance to the public as to when software is taxable as tangible property (prewritten or modified prewritten without a breakdown of charges for modification) and when it is deemed intangible, thus, nontaxable. In this regard, the 2004 Bulletin did not deviate substantively from the pre-2003 regulations. The court's research also does not indicate any case law invalidating those regulations, or a portion of the same. Nor was the Bulletin substantively different from the post-2005 regulations (or Bulletins) as to the taxability or otherwise of computer software, and services related to the same. For instance, the 2008 proposed regulations explained almost the same instances of taxability as the 1998 regulations and Technical Bulletin 51, thus:

> New Subchapter 25 . . . explain[s] the taxability of prewritten software. It also explains in N.J.A.C. 18:24-25.3 that the development of custom software is treated

[7] Technical Bulletin 51 notes at the end of the document that it is "informational" and is "designed to provide guidance on a topic of interest to taxpayers and describe changes to the law, regulations, or Division policies." While "accurate as of the date issued . . . subsequent changes in the Tax Law or its interpretation may affect the accuracy of a Technical Bulletin," and the bulletin "does not cover every situation and is not intended to replace the law or change its meaning."

> as a nontaxable service transaction and that the purchase of such custom-designed software, by the customer for whom it was created, is treated as the purchase of a nontaxable service. N.J.A.C. 18:24-25.4 explains the treatment of modified software, which is treated as a sale of prewritten software, which is taxable, but separately stated, commercially reasonable fees for the service of modifying it are not taxable. N.J.A.C. 18:24-25.5 explains the taxability of sales of electronically transmitted prewritten software and the scope of the exemption of such sales for business use. This rule also explains certain situations that are not deemed to be the electronic transmission of software and are therefore not subject to the business-use exemption. N.J.A.C. 18:24-25.6 discusses the treatment of software-related services and maintenance contracts . . . .
>
> [40 N.J.R. 1777(a), supra] .

See also Notice (10/18/05) (stating that the SSUTA "definitions" of software "do not result in any significant change in the taxability of software . . . set forth in Technical Bulletin 51 (TCB-51)." Although the court was unable to access Technical Bulletin 51 using the provided link, it was able to access the Notice electronically.[8] Therefore, Taxation is correct that the court did not consider the available existing evidence (the Notice), which would have alerted the court of the existence of Technical Bulletin 51. In this regard it should be noted that N.J.S.A. 54:32B-28.1 which required Taxation to "make a reasonable effort to: provide sellers with as much advance notice as practicable . . . [and] notify sellers of legislative changes in the tax base and amendments to sales and use tax rules and regulations," also warned that the "failure of a seller to receive notice or failure of the State to provide notice . . . shall not relieve the seller of its obligation to collect sales or use taxes."

It is therefore proper, and in the interest of justice, that this court reconsiders its previous decision in light of the "probative, competent evidence" found in the prior version of Technical Bulletin 51 and Notice dated 10/18/05. The court finds that prior to the October 2005 amendments specifically enumerating prewritten software as tangible personal property, Taxation had advised

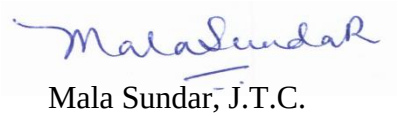
[8] http://www.nj.gov/treasury/taxation/streamnotices.shtml (last visited January 8, 2017).

taxpayers on the taxability or otherwise of prewritten software, and of the taxability of the maintenance and installation services in this regard. The court thus reverses that portion of its prior opinion of October 25, 2016 invalidating Taxation's sales tax assessment from January 2004 to October 2005 as being improper due to the inclusion of "prewritten computer software" in the definition of "tangible personal property" in N.J.S.A. 54:32B-2(g) in October 2005.

Conclusion

For the foregoing reasons, this court grants Taxation's motion for reconsideration. An order in conformance with this opinion will be issued and uploaded.

Very Truly Yours,



Mala Sundar, J.T.C.