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THE TAX COURT COMMITTEE ON OPINIONS

ABDUL M. MOMOH-OARE, Plaintiff, v. DIRECTOR, DIVISION OF TAXATION, Defendant.	TAX COURT OF NEW JERSEY DOCKET NO. 013111-2016 **Approved for Publication In the New Jersey Tax Court Reports**

Decided: January 28, 2019

Abdul M. Momoh-Oare for plaintiff (Pro se).

Steven J. Colby for defendant (Gurbir S. Grewal, Attorney General of New Jersey, attorney).

GILMORE, J.T.C.

This opinion addresses the parties' cross-motions for summary judgment in the above captioned matter, wherein plaintiff seeks a refund of sales tax paid on his February 17, 2016 purchase of a 2016 Toyota 4Runner. For the reasons stated herein, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment denying plaintiff's refund claim and dismissing the complaint is granted.

FINDINGS OF FACT AND PROCEDURAL HISTORY

The court makes the following factual findings pursuant to R. 1:7-4.

During all time periods relevant herein, plaintiff, Abdul M. Momoh-Oare ("Taxpayer"), was a resident of Union, New Jersey. On February 17, 2016, Taxpayer finalized the purchase of a new 2016 Toyota 4Runner from Hudson Toyota in Jersey City, New Jersey, for a total amount

of $48,782.23, including New Jersey sales tax in the amount of $3,128.93. The sales invoice for the transaction was issued in Taxpayer's name, and the purchase was paid in full without financing. No certificate of exemption from sales tax was presented or filed by Taxpayer in connection with this purchase.

Taxpayer purchased the vehicle for the express purpose of shipping same to an individual in Nigeria. In his discovery responses, Taxpayer asserts that he is not a car dealer and does not buy cars for resale, but that he "buy[s] cars (new/used) for [his] overseas family members and friends at their request and they pay for the buying and the shipment." Upon finalization of the purchase, the dealership required Taxpayer to remove the vehicle from their lot.

Taxpayer was unable to immediately transport the vehicle to a shipping terminal, as he had not yet received the necessary Certificate of Title. Instead, Taxpayer hired a motor carriage to transport the vehicle from the dealership to his residence for storage pending issuance of the Certificate of Title. The vehicle remained at Taxpayer's residence, undriven, until he received the Certificate of Title, issued in his name, one month later, in late March 2016. Taxpayer then caused the vehicle to be delivered by motor carriage to the Bayonne Auto Terminal, after receiving United States Customs clearance for international shipment of the vehicle. On April 4, 2016, the vessel transporting the vehicle to Nigeria departed.

On April 20, 2016, Taxpayer filed with defendant, Director, Division of Taxation ("Division"), a claim for refund of sales tax paid, utilizing Form A-3730-UEZ, "Sales & Use Tax Claim for Refund – Urban Enterprise Zone Businesses," in the amount of $3,128.91.[1] On June 10, 2016, Taxpayer contacted the Division regarding his claim, resulting in his receipt of an email

[1] The discrepancy between the $3,128.93 listed on Taxpayer's sales invoice for purchase of the vehicle, and the $3,128.91 listed by Taxpayer on Form A-3730-UEZ was not explained.

from the Division directing him to complete Form A-3730, "Claim For Refund – Business Taxes Only." Taxpayer completed and electronically filed Form A-3730 that same day.

On or about August 29, 2016, Taxpayer's claim for refund of sales tax paid was denied. The August 29, 2016 letter of denial stated that, "[t]he refund is being denied since the vehicle was not delivered to shipyard for exporting from the dealership. Taxpayer took possession of vehicle and it was picked up from residence for exportation." On September 19, 2016, Taxpayer timely filed a complaint with the Tax Court challenging the denial of his refund claim. After discovery was completed, the subject motion and cross-motion for summary judgment were filed.

Although none of Taxpayer's initial pleadings explicitly challenged the constitutionality of imposition of New Jersey sales tax in this matter, Taxpayer's brief asserted that "[t]here are no sale [sic] taxes for goods, items, vehicles, machineries, etc., for exports and no regulations permitting accessing [sic] and collections of sales tax on exports." Given the dictates of R. 4:5-7, requiring that all pleadings be liberally construed in the interests of justice, the court construed Taxpayer's complaint and brief as raising the issue, and invited the parties to submit supplemental briefs on the applicability of Art. I, § 10, cl. 2 of the United States Constitution, commonly known as the Import-Export Clause. Both parties submitted additional briefing addressing the issue, but declined further oral argument.

In light of the above, the questions presented to the court are: (1) whether the underlying transaction was subject to sales tax under New Jersey law: and if so, (2) whether the imposition of such a tax is unconstitutional under the Import-Export Clause of the United States Constitution, Art. I, § 10, cl. 2?

APPLICABLE LAW

I. Summary Judgment Standard

A motion for summary judgment should be granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In determining whether a genuine issue of material fact exists, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). When the undisputed facts of a matter dictate that "one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Ibid. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

In the present matter, the material facts are undisputed, allowing the court to make a determination of the underlying issues as a matter of law.

II. Presumption of Validity, Burden of Proof, and Constitutional Issues

Generally, "[d]eterminations by the Director [of the Division of Taxation] are afforded a presumption of correctness, because 'courts have recognized the Director's expertise in the highly specialized and technical area of taxation.' Nevertheless, courts remain the final authority with respect to statutory construction and have no obligation to summarily approve of the Director's administrative interpretations." Gray v. Dir., Div. of Taxation, 28 N.J. Tax 28, 35 (Tax 2014) (quoting Aetna Burglar & Fire Alarm Co. v. Dir., Div. of Taxation, 16 N.J. Tax 584, 589 (Tax 1997)).

Regarding imposition of sales tax, the New Jersey Sales and Use Tax Act ("Act"), N.J.S.A. 54:32B-1 to -55, explicitly places the burden of proof upon the party challenging imposition of the tax:

> For the purpose of the proper administration of this act and to prevent evasion of the tax hereby imposed . . . it shall be presumed that all receipts for property and services of any type mentioned in subsections (a), (b), (c), and (f) of section 3 [C.54:32B-3] . . . are subject to tax until the contrary is established, and the burden of proving that any such receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer.
>
> [N.J.S.A. 54:32B-12.]

Further, "tax exemptions are to be strictly construed against those seeking exemptions." Cosmair, Inc. v. Dir., Div. of Taxation, 109 N.J. 562, 569-70 (1988) (citing Fairlawn Shopper, Inc. v. Dir., Div. of Taxation, 98 N.J. 64, 73 (1984)); see also Princeton Univ. Press v. Princeton Borough, 35 N.J. 209, 214 (1961)).

Finally, the court is mindful of the admonition that "[c]ourts should not reach a constitutional question unless its resolution is imperative to the disposition of litigation." Randolph Town Ctr., L.P. v. Morris County, 186 N.J. 78, 80 (2006) (citing In re New Jersey Am. Water Co., Inc., 169 N.J. 181, 197 (2001)). "In accordance with that principle, courts routinely consider factual issues and statutory questions first . . . ." Committee to Recall Robert Menendez From the Office of U.S. Senator v. Wells, 204 N.J. 79, 96 (2010). As such, the court will not reach the constitutional question unless it first determines that the underlying transaction is taxable under the Act.

III. State Law Exemptions from Sales Tax for Sales of Motor Vehicles

A. Legal Authorities

The Act provides that "[t]here is imposed and there shall be paid a tax of 7% on or before December 21, 2016 . . . upon: (a) The receipts from every retail sale of tangible personal property . . . except as otherwise provided . . . ." N.J.S.A. 54:32B-3(a).[2] The Act further authorizes and

[2] "'Retail sale' means any sale, lease, or rental for any purpose, other than for resale, sublease, or subrent." N.J.S.A. 54:32B-2(e).

empowers the Division "[t]o make, adopt and amend rules and regulations appropriate to the carrying out of this act and the purposes thereof . . . ." N.J.S.A. 54:32B-24. In accordance with such authority, the regulations provide that "[t]he receipts from every retail sale of any motor vehicle, except as otherwise provided in the [Act] are subject to the sales or use tax." N.J.A.C. 18:24-7.2.

The sole exemption under the Act specific to motor vehicles provides that:

> Receipts from any sale of a motor vehicle . . . shall not be subject to the retail sales tax imposed under subsection (a) of section 3, despite the taking of physical possession by the purchaser within this State, provided that the purchaser, at the time of taking delivery:
> (1) is a nonresident of this State,
> (2) has no permanent place of abode in this State,
> (3) is not engaged in carrying on in this State any employment, trade, business or profession in which the motor vehicle . . . will be used in this State,
> (4) prior to taking delivery, furnishes to the seller: any affidavit, statement or additional evidence, documentary or otherwise, which the director may require to assure proper administration of the tax imposed upon subsection (a) of section 3, and
> (5) will not house, moor, base or otherwise place the aircraft, boat or other vessel in this State for use on other than a transient basis or for repairs at any time within 12 months from the date of purchase. In the event that any of the conditions specified in this subsection (a) have not been met, the exemption herein granted shall not be applicable and the purchaser shall be liable for the payment of the sales tax.
>
> [N.J.S.A. 54:32B-10(a).]

This provision, as well as more general statutory exemptions, are collectively set forth by regulation, which provides in relevant part as follows:

> Sales of motor vehicles specifically exempted
> . . . .
> (b) Any sale of a motor vehicle to a nonresident of this State is not subject to tax, provided such nonresident, at the time of delivery, has no permanent place of abode in this State, is not engaged in carrying on in this State any employment, trade, business, or profession in which the motor vehicle will be used in this state, and furnishes to

> the seller, prior to delivery, proof supporting his or her claim from exemption. For the purposes of this section:
> 1. Any person who maintains a place of abode in New Jersey is a resident individual.
> . . . .
> (c) Any sale of a motor vehicle to be used exclusively for lease or rental is purchased for resale and is not subject to tax at the time of purchase.
>
> [N.J.A.C. 18:24-7.8.][3]

Subsection (b) of the above cited regulation correlates directly to the exemption provided under N.J.S.A. 54:32B-10. Subsection (c) of the regulation correlates directly to the Act's applicability to every "retail sale of tangible personal property," and the Act's explicit exclusion of resales from the definition of "retail sale." N.J.S.A. 54:32B-3(a); N.J.S.A. 54:32B-2(e).

Finally, under the Act all sales are deemed taxable retail sales, unless:

> a seller shall have taken from the purchaser a certificate, signed by the purchaser if in paper form, and bearing the purchaser's name and address and the number of the purchaser's registration certificate, to the effect that the property or service was purchased for resale or was otherwise exempt pursuant to the provisions of the "Sales and Use Tax Act," P.L.1966, c.30 (C.54:32B-1 et seq.), or the purchaser, prior to taking delivery, furnishes to the seller any affidavit, statement or additional evidence, documentary or otherwise, which the director may require demonstrating that the purchaser is an exempt organization described in section 9(b)(1) [C.54:32B-9], the sale shall be deemed a taxable retail sale.
>
> [N.J.S.A. 54:32B-12.]

B. <u>Legal Analysis</u>

Taxpayer's claim for exemption in this matter is based entirely upon the belief that export of the vehicle to Nigeria exempts the purchase from taxation under the Act. In his brief, Taxpayer

[3] The regulation also provides exemptions for certain entities, as well as for certain renting, leasing, licensing, or interchanging of trucks, tractors, trailers, or semitrailers in subsections (a) and (d), which are not relevant to this matter. Additionally, N.J.A.C. 18:24-7.9 sets forth specific transfers of motor vehicles which are not considered retail sales, and thus are not subject to tax, none of which are relevant to this matter.

asserts that "[t]here are no sale [sic] taxes for goods, items, vehicles, machineries, etc., for exports and no regulations permitting accessing and collections of sales tax on exports." Further, in his reply brief, Taxpayer asserts that "Sales and Use taxes are only imposed and collected on goods, including motor vehicles that are used domestically within the State of New Jersey, USA and therefore, plaintiff's motion for summary judgment should be granted." However, Taxpayer cites no legal authority in support of these contentions, which appear to have no basis under New Jersey law.

In opposition to Taxpayer's motion, and in support of its cross-motion for summary judgment, the Division asserts that Taxpayer's purchase was not exempt from taxation under the Act because: (1) he did not present an exemption certificate to the seller, Hudson Toyota, at his time of purchase of the vehicle; and (2) the vehicle achieved taxable situs in New Jersey as a result of Taxpayer's storage of the vehicle at his residential address pending export.

However, to the extent the Division's denial of Taxpayer's claim is founded upon storage of the vehicle at Taxpayer's residence as establishing taxable situs, the court finds such reliance is misplaced. While establishment of taxable situs through in-state storage of the vehicle could be relevant in either a use tax matter, or an in-state purchase by a non-resident of New Jersey, this is a sales tax matter involving a New Jersey resident's in-state purchase and titling of a vehicle, and the consequent collection of sales tax by the car dealer at the time of sale. As such, the only question under New Jersey law is whether Taxpayer's purchase of the vehicle qualifies for an exemption from imposition of sales tax under the Act or regulations, or is otherwise a non-taxable event.

The only sales tax exemption under the Act specific to retail sales of motor vehicles is set forth in N.J.S.A. 54:32B-10, which is explicitly limited to non-resident purchasers. As Taxpayer is a resident of the State of New Jersey, he cannot qualify for this exemption. See, N.J.S.A.

54:32B-10; N.J.A.C. 18:24-7.8(b). While Taxpayer purchased the vehicle on behalf of a non-resident to whom he had the vehicle shipped, the vehicle was purchased, and title was issued, in Taxpayer's name.

The facts in this matter, including Taxpayer's own admissions in certified answers to interrogatories, make clear that Taxpayer's purchase of the vehicle constituted a taxable, "retail sale," and not a sale for resale. As such, the undisputed facts do not support any statutory or regulatory basis upon which to find that Taxpayer's purchase was either exempt from taxation under the Act or otherwise qualified as a non-taxable sale.[4] Thus, the court will address whether imposition of tax under the Act violates the Import-Export Clause under Art. I, § 10, cl. 2 of the United States Constitution.

IV. Import-Export Clause of the United States Constitution, Art. I, § 10, cl. 2

The Import-Export clause of the United States Constitution provides that:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.
>
> [U.S. Const., art. I, § 10, cl. 2.]

Taxpayer's argument, in essence, is that because he purchased the vehicle with the sole intent of exporting it to Nigeria, any sales tax imposed upon his purchase constitutes an impermissible tax upon an export. In support of this contention, Taxpayer relies upon the Import-Export Clause as applied in Kosydar v. National Cash Register Co., 417 U.S. 62, 63 (1974), and

[4] Based on the evidence presented, there is no basis for finding an applicable exemption or that the underlying transaction was a sale for resale. Accordingly, the court need not address whether a refund claim for a transaction otherwise qualifying as exempt or as a resale would nonetheless be precluded by Taxpayer's failure to provide seller with a certificate of exemption or a certificate of resale in accordance with N.J.S.A. 54:32B-12.

Coe v. Errol, 116 U.S. 517, 525 (1886), as well as the Export Clause under the United States Constitution, art. I, § 9, cl. 5.

The court finds that the Export Clause, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State," is inapplicable, as it serves as a prohibition against taxation of exports by the United States, not by the individual States themselves. U.S. Const., art. I, § 9, cl. 5. Further, any analogous case law regarding the Export Clause is inapposite, as the United States Supreme Court no longer interprets the two clauses in parallel. United States v. IBM, 517 U.S. 843, 851-853 (1996).

The court further notes that the Kosydar and Coe matters relied upon by Taxpayer predate the United States Supreme Court's decision in Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976). In Michelin Tire Corp., the Court modified its prior Import-Export Clause jurisprudence with regard to imports, permitting non-discriminatory taxes that do not violate the specific concerns the Import-Export Clause was intended to alleviate:

> The Framers of the Constitution thus sought to alleviate three main concerns . . . : [1] the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and [3] harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.
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> [Id. at 285-286.]

In Department of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734 (1978), the Court extended this reasoning to exports, determining that:

> the Michelin approach should apply to taxation involving exports as well as imports. The prohibition on the taxation of exports is

> contained in the same Clause as that regarding imports. The export-tax ban vindicates two of the three policies identified in Michelin. It precludes state disruption of the United States foreign policy. It does not serve to protect federal revenues, however, because the Constitution forbids federal taxation of exports. U.S. Const., art. I, § 9, cl. 5; But it does avoid friction and trade barriers among the States. As a result, any tax relating to exports can be tested for its conformance with the first and third policies. If the constitutional interests are not disturbed, the tax should not be considered an "Impost or Duty" any more than should a tax related to imports.
>
> [Id. at 758.]

Thus, the Court's approach has moved away from the simple categorization of goods as imports or exports and instead, conducts "a functional analysis of the nature of the tax to examine whether it offends any of the three policy considerations that underlie the presence of the constitutional clause." Holt Hauling & Warehousing System, Inc. v. Dir., Div. of Taxation, 9 N.J. Tax 446, 450 (Tax 1987). As the instant matter involves only an export, the court will apply only the first and third policies, neither of which reveal any constitutional infirmity to imposition of sales tax.

As to the first policy, exclusive federal regulation of foreign commerce, the court agrees with the Division that imposition of sales tax in this matter has no impact on, nor relation to, foreign commerce. While the court accepts that Taxpayer purchased the vehicle with the sole purpose of exporting it to Nigeria, the sales tax imposed had nothing to do with his shipment of the vehicle to Nigeria. Rather, the tax was nothing more than a non-discriminatory sales tax on the purchase of a motor vehicle in New Jersey, by a New Jersey resident, from a New Jersey automobile dealer.

As to the third policy, preservation of harmony among the inland and seaboard states, the court again agrees with the Division that there is no constitutional violation. The tax imposed in this matter was not a tax upon goods passing through New Jersey to reach its port of export, or a

tax by which New Jersey otherwise unfairly benefits from its status as a seaboard state. It is simply a tax upon the purchase of personal property which took place in New Jersey, between a New Jersey resident and a New Jersey automobile dealer.

As such, the court finds that imposition of the tax on the Taxpayer under the Act does not offend the Import-Export Clause of the United States Constitution, art. I, § 10, cl. 2.

CONCLUSION

Accordingly, Taxpayer's motion for summary judgment is denied, and the Division's cross-motion for summary judgment denying Taxpayer's refund claim and dismissing the complaint is granted.