[Cite as *PNC Bank v. Creative Cabinet Sys., Inc.*, 2015-Ohio-2787.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
DARKE COUNTY

PNC BANK, N.A.	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2014-CA-16
v.	:	T.C. NO. 12CV134
CREATIVE CABINET SYSTEMS, INC. et al.	:	(Civil Appeal from Common Pleas Court)
Defendants-Appellees	:	
idX DAYTON, LLC	:	
Defendant-Appellant	:	
JOHN SNYDER, Receiver	:	
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 10th day of July, 2015.

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FROELICH, P.J.

{¶ 1} idX Dayton appeals from a judgment of the Darke County Court of Common Pleas, which ordered that approximately $227,000 of purchase money held in escrow be disbursed to the Receiver for Creative Cabinet Systems, Inc. After disbursement, the money would be relayed to PNC Bank, Creative Cabinet's secured creditor. For the following reasons, the trial court's judgment will be reversed and the case remanded for further proceedings consistent with this opinion.

I. Background

{¶ 2} Creative Cabinet Systems, Inc., executed separate promissory notes in favor of Provident Bank and National City Bank and gave the banks a security interest in all of its property. The notes were amended several times, resulting in a revolving note for $4 million and a term note for $600,000. Creative Cabinet defaulted on the loans, and PNC Bank, the successor in interest to both banks, filed an action against Creative Cabinet to recover the amount still owed. Creative Cabinet confessed judgment. On March 6, 2012, the trial court entered judgment in favor of PNC on the notes.

{¶ 3} At PNC's request, the trial court subsequently established a receivership for the preservation and eventual sale of Creative Cabinet's assets and appointed a receiver. The Receiver soon found a buyer, idX Dayton, LLC, and at the end of August 2012, they entered into an "Asset Purchase Agreement." On September 28, 2012, the trial court approved the sale of the receivership assets to idX Dayton, and on October 2, 2012, the trial court directed the Receiver to close the sale.

{¶ 4} Several disputes arose between idX Dayton and the Receiver regarding implementation of the Asset Purchase Agreement. One such dispute concerned the anticipated $250,000 that Creative Cabinet owed to the states in which it did business. According to the Receiver, for about a year, Creative Cabinet collected "sales tax" but, due to a lack of cash, did not remit the money to the states. idX Dayton was satisfied that all sales tax due to the state of Ohio had been paid, but it was concerned that, as purchaser of Creative Cabinet's assets, the other states would hold it (idX Dayton) liable for the unpaid taxes.

{¶ 5} To address this concern and others, the Receiver and idX Dayton entered into an "Implementation Agreement for Asset Purchase Agreement." Under this agreement, idX Dayton deposited into an escrow account $250,000 of the roughly $2 million asset purchase price to be used to pay any sales tax obligations. The provision provided:

> Sales Taxes. Promptly following Purchaser's receipt of evidence sufficient to Purchaser in its reasonable discretion that all sales taxes of Debtor have been paid in full or that the applicable states have waived any claims for sales taxes, and within 180 days, Purchaser shall instruct the Escrow Agent to disburse to Receiver $250,000, or such lesser amount as remains in the Escrow Account as payment for sales tax, to the extent such Debtor's and Receiver's sales tax obligation have been satisfied or properly waived. Escrow Agent shall also disburse to Receiver partial amounts approved by Receiver and Purchaser to either fund payment of outstanding sales tax or reimburse Receiver for payment of sales tax. Any balance is payable to (1)

> pay sales tax, (2) Purchaser if there remain sales tax obligations not satisfied by the Receiver or waived by the applicable state authority or (3) Receiver if all sales tax obligations have been satisfied or waived by the applicable state authority.

Implementation Agreement for Asset Purchase Agreement, 9(b). The trial court approved the Implementation Agreement on December 31, 2012.

{¶ 6} No escrow funds were disbursed during the specified 180-day period, and the only tax obligation satisfied by the Receiver was to the state of Florida, to which the Receiver paid $23,000.

{¶ 7} North Carolina, Indiana, and Virginia attempted to attach and garnish receivership funds to satisfy Creative Cabinet's tax obligations to those states; those actions were dismissed after the states released the garnishment. North Carolina reached an agreement with the Receiver that the taxes owed were not sales tax.

{¶ 8} On April 26, 2013, the Receiver moved to establish that the states of Georgia, Illinois, Kentucky, Mississippi, Missouri, Pennsylvania, South Carolina, Virginia, and West Virginia were all *use tax* claimants, that Mississippi may be a *contractor tax* claimant, that all such taxing authorities enjoy unsecured status in the proceedings, and that the taxing authorities possess no priority position superior to PNC Bank. No state taxing authority responded to the motion, and on June 5, 2013, the trial court granted the motion and determined that the tax claims for those states to be "use or contractor tax in nature – not sales tax in nature – unsecured in nature, not priority in nature in these proceedings, and junior in distribution priority from the assets of the receivership to the prior secured position of Plaintiff PNC Bank previously established herein."

{¶ 9} The Receiver's motion and the court's order did not address the states of Alabama, Indiana, and North Carolina, and the parties disagree as to whether the court's order is binding on *any* of the states (none of which is a party to this action) or on idX Dayton (which was not served with the Receiver's motion).

{¶ 10} In September 2013, the Receiver and idX Dayton each filed a motion for the release of the escrow funds. The Receiver asked the trial court for $23,000 as reimbursement for the Florida tax payment and asked the court to distribute the $227,000 balance to PNC Bank. The Receiver claimed that his obligation under the Implementation Agreement was satisfied because Florida was the only state to which Creative Cabinet owed *sales* tax. idX Dayton countered that "no documentation has been furnished by Receiver to show that the outstanding sales taxes that were collected by Creative Cabinet Systems, Inc. and not remitted to the relevant states have been paid or that a waiver has been obtained from those states." idX Dayton agreed that $23,000 should be remitted to the Receiver for payment to the state of Florida, but asserted that the remaining $227,000 in escrow should be returned to idX Dayton.

{¶ 11} An evidentiary hearing was held on September 19, 2013. idX Dayton produced two witnesses: Cherie Jobes, Creative Cabinet's comptroller from 1997 to 2012, and Patrick Whelan of Chikol Equities, which was retained by PNC Bank in February 2012 to help manage Creative Cabinet's operations. Jobes testified regarding the collection of sales tax from customers and the remission of those taxes to state taxing authorities; Creative Cabinet's invoices charged sales tax, not use tax. Jobes stated that Creative Cabinet had registered to collect and pay sales tax to states other than Ohio; she identified Alabama, Florida, Georgia, Illinois, Indiana, Kentucky, Mississippi, Missouri,

North Carolina, Pennsylvania, South Carolina, Virginia, and West Virginia as states for which Creative Cabinet would collect sales tax from customers. Jobes testified that Creative Cabinet did not remit taxes to those states between April 2011 and February or March 2012 due to limited funds. After Chikol began managing operations, sales taxes received from customers have been remitted to those states.

{¶ 12} Whelan also testified that taxes collected after Chikol began managing Creative Cabinet were remitted to the states; Chikol was concerned that it could be held responsible as a successor for those sales taxes. Whelan testified that he subsequently learned that not all of the taxes collected should have been paid as sales tax; he stated that only the states of Florida and Ohio were owed sales tax.

{¶ 13} The Receiver presented the expert testimony of the accountant retained to help with the receivership, Edward Melvin. Melvin had analyzed Creative Cabinet's tax obligations and had prepared and filed tax returns in each of the states to which tax was owed. Melvin testified that only Florida was paid because, of the 14 states to which Creative Cabinet owed taxes, only Florida was owed *sales* tax. He stated that Creative Cabinet improperly collected *sales* tax and, instead, owed *use* taxes to the other states. Melvin explained that, unlike unpaid sales tax, unpaid use tax is an unsecured, non-priority debt. Consequently, the use-tax states will get their unpaid taxes only if money is left over from the sale of Creative Cabinet's assets after PNC Bank – the secured, priority creditor – is fully paid. The expert doubted this would occur.

{¶ 14} On October 3, 2013, the trial court ordered that the Receiver be reimbursed in the amount of $23,000, and that the clerk of courts hold the balance for an additional period of time. The court found, in part:

> From [the terms of the Implementation Agreement], it is clear that idX Dayton was concerned about successor liability for unpaid sales tax liens. A portion of the purchase price was specifically placed into escrow to cover the estimated amounts. This entire process was premised upon the practice of Creative Cabinet to collect sales taxes on the full amount of its sales. However, based on the undisputed testimony of Mr. Melvin, there are no further sales tax liabilities of Creative Cabinet (except Florida which will be paid as agreed). While Mr. Melvin did concede that this was his opinion that was not necessarily binding on each of the various state governments, the possibility of future litigation was nothing more than evidence based on speculation.
>
> Since this conclusion is undisputed from the testimony, the Court must then determine how to classify the escrow funds. Clearly, pursuant to paragraph 2 of the Implementation Agreement, the escrow funds are a portion of the purchase price. Accordingly, any portion of the funds not used to pay outstanding sales taxes should be disbursed to the secured creditor, PNC Bank. * * *

Nevertheless, "in the interests of equity and in order to reduce the concern that idX Dayton will be subject to successor liability for sales taxes," the court gave the escrow balance to the Darke County Clerk of Courts to hold "pending further order of the Court." The entry stated that the Clerk will hold the funds "for at least twelve (12) months (as later determined by the Court) to allow additional time to determine if sales tax claims are eventually pursued against idX Dayton."

{¶ 15} idX Dayton appealed the trial court's order. That appeal was dismissed for lack of a final appealable order, noting that the escrow funds had not been definitively allocated. *PNC Bank, N.A. v. Creative Cabinet Sys., Inc*., 2d Dist. Darke Nos. 2013-CA-14, 2013-CA-15, 2014-Ohio-3264.

{¶ 16} Following the dismissal of the appeal, idX Dayton and the Receiver each moved for an order awarding it the balance of the escrowed funds. idX Dayton further sought a stay of the execution of the distribution if the money were ordered to be remitted to the Receiver.

{¶ 17} On November 19, 2014, the trial court incorporated by reference its October 3, 2013 order and found that "the funds being held in escrow are the property of PNC Bank and that the escrow agent shall distribute the funds to the Receiver for distribution. No provision is incorporated herein which reserves distribution for potential sales and/or use tax payments." The court sustained idX Dayton's request for a stay of execution, provided that idX Dayton posted a supersedeas bond in the amount of $20,000. idX Dayton posted the required bond.

II. Analysis of the Parties' Entitlement to Escrow Account Balance

{¶ 18} idX Dayton appeals from the trial court's judgment ordering the escrow funds to be released to the Receiver, raising two assignments of error:

A. THE TRIAL COURT ERRED AS A MATTER OF LAW BY MISINTERPRETING THE TERMS OF THE PARTIES' IMPLEMENTATION AGREEMENT BY RELEASING THE BALANCE OF THE ESCROW FUNDS TO THE RECEIVER AND NOT TO IDX DAYTON.

B. THE TRIAL COURT ERRED BY FINDING THAT IT WAS "UNDISPUTED" THAT NO SALES TAXES WERE DUE.

{¶ 19} idX Dayton asserts that the trial court erred in finding that the evidence was undisputed that no sales taxes were due and in concluding that, under the terms of the Implementation Agreement, the Receiver was entitled to receive the escrowed funds.

{¶ 20} When reviewing a contract, the court's primary role is to ascertain and give effect to the intent of the parties. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos*., 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999). A contract that is, by its terms, clear and unambiguous requires no real interpretation or construction and will be given the effect called for by the plain language of the contract. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 55, 544 N.E.2d 920 (1989).

{¶ 21} A contract is ambiguous if its provisions are susceptible to two or more reasonable interpretations. *Johnson v. Johnson*, 2d Dist. Miami No. 2010 CA 2, 2011-Ohio-500, ¶ 11. "If an ambiguity exists in a contract, then it is proper for a court to consider 'extrinsic evidence,' i.e., evidence outside the four corners of the contract, in determining the parties' intent. *Blosser v. Carter*, 67 Ohio App.3d 215, 219, 586 N.E.2d 253 (1990). Such extrinsic evidence may include (1) the circumstances surrounding the parties at the time the contract was made, (2) the objectives the parties intended to accomplish by entering into the contract, and (3) any acts by the parties that demonstrate the construction they gave to their agreement. *Id.*" *U.S. Fid. & Guar. Co. v. St. Elizabeth Med. Ctr.*,129 Ohio App.3d 45, 55-56, 716 N.E.2d 1201 (2d Dist.1998); *GZK, Inc. v. Schumaker Ltd. Partnership*, 2d Dist. Montgomery No. 19764, 2003-Ohio-5842, ¶ 20.

{¶ 22} The parties agree that paragraph 9(b) of the Implementation Agreement is clear and unambiguous. As stated above, that provision provides:

> Sales Taxes. Promptly following Purchaser's receipt of evidence sufficient to Purchaser in its reasonable discretion that all sales taxes of Debtor have been paid in full or that the applicable states have waived any claims for sales taxes, and within 180 days, Purchaser shall instruct the Escrow Agent to disburse to Receiver $250,000, or such lesser amount as remains in the Escrow Account as payment for sales tax, to the extent such Debtor's and Receiver's sales tax obligation have been satisfied or properly waived. Escrow Agent shall also disburse to Receiver partial amounts approved by Receiver and Purchaser to either fund payment of outstanding sales tax or reimburse Receiver for payment of sales tax. Any balance is payable to (1) pay sales tax, (2) Purchaser if there remain sales tax obligations not satisfied by the Receiver or waived by the applicable state authority or (3) Receiver if all sales tax obligations have been satisfied or waived by the applicable state authority.

{¶ 23} On its face, paragraph 9(b) provided a mechanism for escrowed money (a portion of the purchase price) to be used to pay for outstanding sales tax liabilities. The provision included a 180-day deadline by which idX Dayton was to receive evidence that reasonably demonstrated that the sales taxes had been satisfied or waived. If such evidence were received, idX Dayton was to instruct the escrow agent to disburse the amount of those satisfied or waived tax obligations to the Receiver.

{¶ 24} No escrow funds were disbursed during the specified 180-day period.

The Receiver later paid $23,000 (an amount less than what was owed) to the state of Florida to settle that sales tax obligation; idX Dayton did not challenge the Receiver's request to be reimbursed for that amount from the escrow account.

{¶ 25} Paragraph 9(b) further addressed how any remaining escrow money was to be disbursed. If any sales tax obligations were not satisfied by the Receiver or waived by the applicable state authority, the remaining escrow money was payable to idX Dayton. On the other hand, if *all* sales tax obligations had been satisfied or waived by the applicable state authority, the remaining balance was payable to the Receiver. There is nothing unclear or ambiguous about the terms of paragraph 9(b).

{¶ 26} What is unclear is whether there remained "sales tax obligations not satisfied by the Receiver or waived by the applicable state authority." It is undisputed that the Receiver did not obtain waivers of sales tax obligations from *all* of the applicable state authorities. The record reflects that the Receiver reached a settlement with North Carolina whereby North Carolina agreed that the outstanding tax claim was comprised of 100% use tax. The record contains emails from the states of West Virginia and Georgia which reflect those states' apparent agreement that their tax claims are unsecured debts. However, the parties stipulated that none of the relevant states, except Florida, signed a written waiver of any obligation for taxes – sales, use or otherwise.

{¶ 27} Accordingly, the focus of the trial court's hearing and the parties' briefing is whether there remain sales tax obligations not satisfied by the Receiver.

{¶ 28} At the outset, the parties dispute who has the burden to establish the existence or lack of any remaining sales tax obligation. The Implementation Agreement placed this burden unambiguously on the Receiver. As stated above, during the

180-day period, the contract required disbursement of escrow money only after the *Receiver provided* evidence sufficient *to idX Dayton* that all sales taxes had been paid or the claims for sales taxes had been waived. The portion of paragraph 9(b) concerning the disbursement of any remaining balance does not alter this burden.

{¶ 29} Next, the record is clear that Creative Cabinet invoiced its customers for sales tax and collected taxes as sales tax. Ms. Jobes testified that she was comptroller of Creative Cabinet from 1997 until 2012, when Creative Cabinet was purchased by idX Dayton. During those fifteen years, Jobes was in charge of the financial daily operations, accounts payable, accounts receivable, general ledger, producing financial statements, and sales tax. Her day-to-day duties and responsibilities continued after Chikol began managing the company.

{¶ 30} Jobes testified that she was familiar with the collection and payment of sales taxes. She stated that Creative Cabinet was registered to collect and pay sales tax in states other than Ohio, including Alabama, Florida, Georgia, Indiana, Illinois, Missouri, Mississippi, Pennsylvania, West Virginia, Virginia, Kentucky, North Carolina, and South Carolina. Creative Cabinet issued invoices to customers in those states with a line item for payment of sales taxes. Jobes indicated that Creative Cabinet determined the rate of sales tax that was due by researching online the departments of revenue for the various states. Jobes stated that it was the regular practice to invoice customers for sales tax and to remit those sales taxes to the states. Jobes filed sales tax returns for Creative Cabinet.

{¶ 31} Jobes further testified that, from April 2011 until February or March of 2012, Creative Cabinet continued to invoice for sales tax from out-of-state customers and those

customers were still paying sales tax to Creative Cabinet. However, Creative Cabinet did not remit the collected sales tax to the states. idX Dayton's Exhibit 1 was a chart that Jobes prepared that indicated the amount of sales tax collected from customers but not remitted to states.

{¶ 32} Jobes and Whelan both testified that, after Chikol took control of Creative Cabinet, Chikol instructed Jobes to pay collected sales tax to the states from that point forward. Whalen similarly testified that, after Chikol had assumed management responsibility for Creative Cabinet, Chikol had "what we believed to be sales tax" that was collected from customers remitted to the states. Whalen stated that this was done to avoid the possibility of Chikol's being held responsible for those sales taxes as a successor.

{¶ 33} The Receiver's cross-examination of Jobes and Whalen raised questions about whether Creative Cabinet *properly* collected sales tax and filed sales tax returns, rather than collecting and filing use tax returns. Jobes testified that a portion of the product that Creative Cabinet shipped to other states was to be attached to real estate; other products were not. This affected whether the item was subject to sales tax or use tax. However, Creative Cabinet's customer service was instructed to charge sales tax on all items that were shipped to the states for which Creative Cabinet was registered to collect sales tax, and the company filed sales tax returns for the tax that was collected. Whalen testified that he has since learned that some of the sales tax collected by Creative Cabinet should not have been collected from customers as sales tax; Whalen explained that Chikol hired an outside accountant, who determined that sales tax was owed only to Florida and Ohio.

{¶ 34} Melvin, the accountant hired by the Receiver, testified that Creative Cabinet should have collected use tax, that he filed use tax returns for the period from April 2011 until March 2012, and that Creative Cabinet had overpaid when it previously filed sales tax returns. Melvin indicated that, although the sales tax rate and use tax rate are generally the same, the rates can differ and the bases from which the tax is computed are different. Melvin stated that, for the time period at issue, Creative Cabinet owed approximately $118,237 (minus what was actually paid to Florida) for use tax, and that Creative Cabinet would have overpaid by $110,000 had it filed a sales tax return. Melvin stated that Creative Cabinet theoretically could file amended tax returns and obtain a refund for the sales tax overpayments for past years' returns (depending on the state's statute of limitations).

{¶ 35} Neither Jobes, Whalen, nor Melvin reviewed invoices to determine what portions of the invoices were properly collected as sales tax or use tax. Jobes stated that only sales tax was assessed. Melvin stated that he asked general questions about the scope of the projects, such as whether they were construction contracts. (Tr. at 141, 144) He did not make an independent determination as to which items were to be affixed to the real estate and which were just display tables that could be moved around. When asked if Creative Cabinet would be required to collect sales tax if it "sold a display table by itself to Dress Barn (one of its customers) in one of the relevant states," Melvin responded "possibly." (Tr. 143-44.)

{¶ 36} We accept, for purposes of this appeal, that Melvin correctly concluded that Creative Cabinet owed use tax for the period between April 2011 and March 2012 and that he properly filed use tax returns. However, even accepting those conclusions,

his testimony did not establish that Creative Cabinet was not required to remit some amount of sales tax to the various states based on the fact that the company invoiced its customers and collected taxes as sales tax.

{¶ 37} The Receiver argued that the customers did not pay sales tax to Creative Cabinet, because Creative Cabinet did not properly assess sales tax. idX Dayton cross-examined Melvin on that issue, as follows:

> Q: Mr. Melvin, I'd like to sort of get right to the heart of the matter then we'll circle back a little bit. You testified that sales tax are trust taxes. Do you remember saying that?
>
> A: Yes.
>
> Q: You understand that when you say trust tax it means that the recipient of those sales taxes hold them in trust for the state to whom they are to be remitted, correct?
>
> A: Yes.
>
> Q: And that holder has a fiduciary obligation to remit those taxes to that state, correct? Or I'll put it another way. It's the law, right?
>
> A: Sure. Okay.
>
> Q: Well, don't okay me. If you don't agree, then tell us. Do you have CCH that says you're allowed to put those sales taxes in your pocket?
>
> A: No.
>
> Q: Okay. So your understanding as a trust tax when you collect sales tax from the customer that comes in to you, you have an obligation to disburse them to the proper state, correct?

A: If you collect the sales tax –

Q: Correct.

A: -- yes.

* * *

Q: In your analysis, whether this is a use tax or sales tax, you didn't take into account, did you, that what we're dealing with here today are taxes that were collected as sales taxes for customers of Creative Cabinet, correct?

* * *

A: I'm not sure I understand the question.

Q: I'll try it again. It's your understanding that sales taxes are trust taxes. When a company collects them from its customer, it's obligated to remit those to the states where they're registered to collect those taxes, correct?

A: If it is a sales tax, yes.

Q: No. I'm not – if they collect sales tax from the customers, they have an obligation because it's a trust tax to remit those to the State.

* * *

A: If they collect a sales tax –

Q: Right.

A: -- and a sales tax is properly assessed.

* * *

Q: * * * My premise is whether or not the sales tax is owed to the state, if a company invoices a customer for a sales tax and that customer pays that amount, that sales tax to that company, they have a duty because it is a

trust tax to remit those taxes period. Do you agree with me on that, Mr. Melvin?

* * *

A: I guess my answer is that if it is a sales tax and it's properly assessed – if it is a sales tax, it is a sales tax. And a sales tax is a trust tax. And a trust tax should be paid to the appropriate authority. Now, I don't know that those are necessarily sales tax, and I don't know that they didn't make a mistake.

* * *

Q: So even if it's a mistake, it should have been a use tax and they called it a sales tax, if I am a retailer, say Polo, that was the example, and I pay Creative Cabinet sales tax. I'm invoiced for it and I pay that amount, isn't it true that because it's a trust tax being paid as a trust tax, Creative Cabinet has to remit that to the appropriate tax authority?

A: I don't know that stating it on an invoice or calling it that makes it that.

Q: So as a CPA you think that a company can collect an amount of sales tax and then keep it in its pocket if it thinks it's a mistake. Is that what you're telling the Court?

A: No.

{¶ 38} On redirect examination, Melvin was asked, "And the fact that somebody says it was on an invoice as a sales tax, does that make it sales tax?" Melvin responded, "No."

{¶ 39} Melvin's opinion as to whether Creative Cabinet was required to remit the

collected taxes to the states as sales tax addressed a question of law, not fact. The Receiver provided no statutory citations to support Melvin's testimony that tax collected as sales tax was not actually held in trust as sales tax (and subsequently could be relabeled as a different tax, i.e., use tax) if it were improperly assessed. Although, on appeal, we need not conduct a comprehensive review of each state's tax laws, a general survey indicates that, at least in some of the relevant states, the opposite may be true.

{¶ 40} Moreover, there are situations where sales tax may be improperly collected. For example, a retailer may collect sales tax on a sale to an entity that is tax-exempt, such as a qualifying non-profit entity. In that case, none of the tax collected from the sale was properly assessed and collected. In addition, due to the fact that many municipalities impose a local sales tax in addition to the state sales tax, it is not uncommon that a consumer be charged an incorrect rate, resulting in an over-collection of sales tax, even though the collection of sales tax generally was correct.

{¶ 41} States have established procedural mechanisms for addressing the over-collection of sales tax. In Alabama, for example, Section 40-23-26(d) of the Code of Alabama provides that, "[i]n the event that any sum is collected from a consumer *that purports to be collected because of this section* [concerning the collection of sales tax], *whether or not the amount is actually provided for hereunder*, then any such sum, except such as is collected solely because of rounding the correct amount of tax upward to the nearest cent, shall be paid to the Department of Revenue for the purposes provided in Section 40-23-35."[1] (Emphasis added.) Guidance documents from the Department of Revenue explain this provision, stating, in part:

[1] A seller who remits sales tax to the state either in excess of the amount due, erroneously, or due to a mistake of fact or law may seek a refund.

> The Alabama Legislature passed Act #87-662, effective Oct. 1, 1987, providing that any over collection of sales tax by a retailer from the customer must be paid to the state unless such over collection results solely from rounding the correct amount of tax upward to the nearest cent per Sales Tax Law Section 40-23-26(d).
>
> Example of an over collection of sales tax that should be paid to the state is if the 4% tax rate is charged to the customer instead of the correct rate of 2%. The 4% tax collected would be due to the state. Another example would be charging tax on an exempt sale.

Alabama Dept. of Revenue, http://revenue.alabama.gov/publications/business-taxes/sales/Sales_Tax--Sales_Tax_Brochure.pdf (accessed June 16, 2015).

{¶ 42} Applying this law to the circumstances before us, Ala.Code 40-23-26 would appear to require the Receiver to remit all of the taxes invoiced and collected as sales tax from Alabama customers to the Alabama Department of Revenue, regardless of whether that purported sales tax was properly assessed. That being the case, Melvin's conclusion that Creative Cabinet owed use tax, rather than sales tax, to Alabama had no bearing on whether Creative Cabinet had an outstanding sales tax liability in Alabama. The sales tax obligation existed because taxes were collected as sales tax, not because sales tax was actually owed. Accordingly, it appears that there remains a sales tax obligation in Alabama, even accepting that the sales tax was improperly collected and that the Receiver should have paid use tax instead.

{¶ 43} Under the terms of the Implementation Agreement, the Receiver was

entitled to the balance of the escrow account "if all sales tax obligations have been satisfied or waived by the applicable state authority." The record does not establish that *all* sales tax obligations have been satisfied or waived by the applicable state authorities. That being the case, the Implementation Agreement provides that the Purchaser, idX Dayton, would receive the escrow balance.

{¶ 44} In his brief, the Receiver emphasizes that the Implementation Agreement makes no reference to use tax, contractor tax, or "reimbursement to Creative customers that were overcharged by line item invoicing pre-Receivership." This argument fails to acknowledge that paragraph 9 was crafted to address concerns raised by documentation provided by the Receiver to idX Dayton, which indicated that Creative Cabinet collected, but did not pay, *sales tax* for a particular period of time. Nothing in the record suggests that, at the time that the Implementation Agreement was drafted, Creative Cabinet, the Receiver, Chikol, or idX Dayton was aware that Creative Cabinet potentially owed taxes other than sales tax. To the extent that the Receiver asserts that idX Dayton should have anticipated that there might be outstanding use tax or contractor tax obligations when drafting the Implementation Agreement, we find that argument to be unavailing. And, it would not have been implausible for idX Dayton to have argued in the trial court that paragraph 9 was based on mutual mistake (an argument that was not made).

{¶ 45} Finally, the Receiver suggests that returning the escrowed funds to idX Dayton would result in a windfall to idX Dayton, because idX Dayton does not actually face successor liability. The Receiver states that "[t]he general rule is that corporate successor liability is not applicable to asset sales" and supports its contention with Ohio case law. idX Dayton provided the trial court with printouts of successor liability

provisions of the sales tax statutes for the states in which Creative Cabinet registered to collect sales tax (idX Ex. 3). Without addressing each state individually, several of the states provide for successor liability for unpaid taxes and require the purchaser of a business to withhold a portion of the purchase price until the seller provides a statement from the state that taxes have been paid or that no taxes are due. *See, e.g.,* Vernon's.Ann.Mo.Stat. 144.150. The Receiver does not address any of these statutes.

{¶ 46} Nevertheless, we need not decide definitively whether idX Dayton actually faces successor liability in any of the states in which Creative Cabinet registered to collect sales tax. Paragraph 9 of the Implementation Agreement did not condition any of the parties' actions or their right to any of the escrow funds on whether successor liability exists. Rather, the relevant question was whether there was sufficient evidence *to idX Dayton* that all sales taxes had been paid or waived, and that burden was on the Receiver.

{¶ 47} We further note, parenthetically, that our survey of state laws also reflects that Melvin may have over-generalized when he testified that use taxes are not trust taxes. For example, Ky.Rev.Stat.Ann. 139.340 requires retailers to "collect the tax imposed by KRS 139.310 [use tax] from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the department. The taxes collected or required to be collected by the retailer under this section *shall be deemed to be held in trust for and on account of the Commonwealth*." This is similar to Ky.Rev.Stat.Ann. 139.210, concerning sales tax, which states, "The taxes collected under this section shall be deemed to be held in trust by the retailer for and on account of the Commonwealth." Again, this would seem to augur against any potential "windfall" for the purchaser.

{¶ 48} Given that the evidence does not support the trial court's conclusion that the Receiver met its burden of showing that all sales tax obligations have been paid or waived, idX Dayton's assignments of error are sustained.

{¶ 49} We are not oblivious to the frustrations that these disputes and the courts' decisions cause to the parties and the trial court. However, the trial court's judgment ordering the disbursement of the entire escrow balance to the Receiver must be reversed, and the matter must be remanded to the trial court for an order disbursing $23,000 of the escrow funds to the Receiver, as agreed by the parties, and the remainder to idX Dayton.

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FAIN, J. and WELBAUM, J., concur.

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