

T & T SWEEPING SERVICES, INC.

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IN THE

vs.

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MARYLAND TAX COURT

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Nos. 14-SU-OO-1410

COMPTROLLER OF THE TREASURY

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## MEMORANDUM AND ORDER

Petitioner, T & T Sweeping Service, Inc., is a street sweeping business that was selected for an audit by the Respondent, Comptroller of the Treasury, after an anonymous complaint was filed against the business. The audit found that the Petitioner was renting portable toilets and failing to charge sales tax. Using a test period, the Respondent issued an assessment for unpaid sales and use taxes in the amount of \$96,401 (including interest and penalty) for the period January 2010 through December 2013.

The Petitioner has appealed the assessment and presents three principal questions for consideration:

- 1) Whether the portable toilets services and maintenance by Petitioner's business is a service exempted from the sales tax pursuant to Tax General Article § 11-102 of the Annotated Code of Maryland.
- 2) Whether in the absence of COMAR 03.03.01.28(E) and its interpretation of the sales tax statute to include the taxing of portable toilets, the sales tax statute encompasses Petitioner's portable toilet business and whether the enactment of COMAR 03.03.01.28(E) in August 2013 served to bar the

assessment of sales tax prior to August 2013 against the Petitioner and in the alternative, unless authorized by statute.

3) Whether the taxability of portable toilets as adopted in COMAR 03.03.01.28(E) requires legislative enactment and assuming *arguendo* that Petitioner's portable toilet business is taxable under the sales tax statute through the guidance of COMAR 03.03.01.28(E), whether the enactment of COMAR 03.03.01.28(E) was defective due to the lack of a public hearing by the AELR Committee of the General Assembly or any action by the committee.

The facts in this case are generally not in dispute. Petitioner, a Maryland corporation, has been in business for approximately eight (8) years and on advice from its certified accountant, did not collect tax on the rental and maintenances of portable toilets. Upon being notified of the audit and the Respondent interpretation of the law, Petitioner began collecting and paying, sales tax in 2014.

Witnesses for the Petitioner testified with respect to the cleaning and maintenance service that were necessary to provide a sanitized portable toilet. The Petitioner contends that its portable toilet business consists of two components: 1) the physical-which includes the transport of the actual portable toilet and the equipment, such as specialized sanitation trucks and assorted cleaning and hygienic supplies necessary to maintain the toilets as well as the 2) labor necessary to clean, service, and remove the toilets back to Petitioner's principal place of business. The Petitioner had several contracts with government installations as well as smaller verbal contracts with contractors, outdoor events organizers and individuals. Approximately eighty-five percent (85%) of the contracts

were long term and typically a toilet was sanitized once or twice a week without any additional charge over and above the rental cost.

In 1955, the General Assembly amended former Article 81, §324, to impose the sales tax on rentals of tangible personal property. “[I]t intended to include all kinds of rentals of such property (not expressly excluded) in the sales tax law...” *Comptroller v. Pittsburgh-Des Moines Steel Co.*, 231 Md. 132, 189 A.2d 107 (1963). However, Petitioner argues (1) that COMAR 03.06.01.28(E) did not impose the sales tax on portable toilets until 2013; and (2) that its tangible personal property is excluded from the sales tax because it also maintains and services the portable toilets, and therefore, its rentals of portable toilets are a nontaxable service.

The Court of Appeals developed a test for the precise situation in *Quotron Sys. v. Comptroller*, 287 Md. 178, 411 A.2d 439 (1980):

To determine whether a sales tax could be imposed when a company provided both a service and related equipment, a two-step analysis must be employed. First, the overall function must be characterized by the examination of various factors as either a rental or transfer of possession, or a service. Secondly, it must be determined whether that function is subject to sales tax.

The first step in the *Quotron* analysis is to characterize the overall function as either a rental or transfer of possession, or a service. The primary function of Petitioner’s portable toilet business is to provide portable toilets to customers. The maintenance and cleaning services, although important, are incidental to the dominant purpose of providing a portable toilet to its users. The portable toilet is transferred from Petitioner to the customer user for

as long as the customer uses the portable toilet, and thus the customer briefly has control over the rented equipment.

On the other hand, renting a garbage can for trash to a customer can be distinguished from a portable toilet. The primary purpose of renting a garbage can or trash dumpster is to provide a service to the actual user of the container. A portable toilet is rented to a customer (subject to sales tax) for use by others.

The Court disagrees with Petitioner's contention that the absence of a regulation bars the assessment of any sales tax prior to 2013. A regulation cannot impose a tax as it only provides guidance on the tax law. COMAR 03.06.01.28(E) addressed portable toilets as an example because the taxability of portable toilets was a recurring question posed to the Respondent. Therefore, the Respondent elected to modify the regulation to include an example that would address questions it was receiving from the public.

The Court agrees with the Respondent that the regulation did not *make portable toilets taxable*; it simply used them as an example to provide guidance on a law that has long been in existence. Legislation was not necessary to tax the renting of portable toilets. Finally, the Court finds that the 30 day comment period was appropriate to consider the proposed regulation and that a public hearing was not required.

The Petitioner, in good faith, relied on the advice of its accountant in failing to pay the sales tax which is the subject of this appeal. Upon discovering that the advice was incorrect, Petitioner began collecting and paying sales tax in 2014. The Court is convinced the Petitioner acted in good faith and for good cause shall abate the penalty.

Therefore, it is this 11<sup>th</sup> day of December, 2015, by the Maryland Tax Court ORDERED the sales and use tax assessment of taxes and interest is AFFIRMED and the penalty is REVERSED.

cc: Joseph F. Vallario, Jr., Esq.  
Cristina Milnor-Dunbar, Esq.

**CERTIFIED TRUE COPY**  
**TEST: John T. Hearn, Clerk**

**NOTICE:** You have the right of appeal from the above Order to the Circuit Court of any County or Baltimore City, wherein the property or subject of the assessment may be situated. The Petition for Judicial Review **MUST** be filed in the proper Court within thirty (30) days from the date of the above Order of the Maryland Tax Court. Please refer to Rule 7-200 et seq. of the Maryland Rules of Court, which can be found in most public libraries.