10/22/03

FURNITURELAND SOUTH, INC.	*	IN THE
	*	
	*	MARYLAND TAX COURT
	*	
V.	*	
	*	
	*	
COMPTROLLER OF THE TREASURY	*	NOS. 02-SU-OO-0305 &
	*	02-SU-OO-0306
	*	

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MEMORANDUM OF GROUNDS FOR DECISION

Petitioner, Furnitureland South, Inc., has appealed from final determinations of the Respondent, Comptroller of the Treasury, assessing sales and use tax in the amount of $737,044.01, plus interest and penalty for the period July 1, 1997 through June 30, 2001. Petitioner moves this Court to set aside the assessments. A hearing was held on the Petitioner's Motions to Dismiss and the Court allowed additional time for supplemental documents to be filed.

The assessments at issue emanate from actions taken by the Respondent against the Petitioner and Royal Transport, Inc. (hereinafter "Royal"), both foreign corporations, for failure to collect sales and use tax on the sale and delivery of furniture in the State of Maryland. Those initial actions and the facts supporting them are best summarized in the Court of Appeals decision, *Furnitureland South, Inc. et al v. Comptroller of the Treasury*, 364 Md. 126 (2001).

In brief, Petitioner is a nationwide furniture retailer, headquartered in North Carolina. Petitioner sold furniture throughout the United States, including Maryland and hired Royal as a common carrier to deliver its goods to customers. Petitioner did not collect sales or use taxes on furniture it sold to out-of-state customers when shipped from North Carolina by for-hire motor carriers such as Royal. Both Petitioner and Royal were assessed for failure to collect the tax. The

Circuit Court for Baltimore City found that sufficient nexus existed to establish the liability of Petitioner and Royal for the collection of sales and use tax on the sales of furniture by Petitioner.

The Court of Appeals in *Furnitureland South, Inc*., supra found that the Respondent had failed to "invoke and exhaust the statutory administrative and judicial review remedies" and therefore its attempt for a declaratory judgment was barred.

The Assessments

Subsequent to the Court of Appeals ruling, on July 25, 2001, the Respondent issued an assessment (hereinafter, the "2001 Assessment") for the period July 1, 1997 through June 30, 2001. Petitioner timely appealed and one of its arguments was that the Respondent had failed to exhaust its administrative remedies prior to issuing the 2001 assessment. In particular, Petitioner contended that before an assessment could be issued, the Respondent was required to mail to Petitioner a notice and demand for the filing of a sales and use tax return within 10 days.

In an effort to keep the issue of Petitioner's liability moving forward through the appeals process, Respondent, on December 17, 2001, attempted to correct what may have been a procedural defect by mailing to Petitioner a Notice and Demand for Tax Return. When Petitioner responded by way of legal argument, Respondent issued a second assessment (hereinafter the "2002 Assessment") on January 15, 2002 for the identical period as that in the first assessment.

The 2001 Assessment (Case No. 02-SU-OO-0305)

Petitioner asserts that failure of the Respondent to provide a "notice and demand" for tax return filing warrants dismissal. § 13-103 of the Tax-General Article provides:

> If a person or governmental unit fails to file a tax return as required under this article, the tax collector shall mail the person or governmental unit a notice and demand for the return that requires the person or governmental unit:
> (1) for the sales and use tax, to file the return and to pay the tax within 10 days after the date on which the notice was mailed…

If a return is not filed within the 10-day period, §13-402 requires the Respondent to "compute the tax by using the best information in its possession and to assess the tax due.

There is no question that a formal "Notice and Demand" was not issued by the Respondent. At hearing, the Court requested that Respondent submit any documents proving compliance with §13-402; i.e. that a demand to file a sales tax return within 10 days was made to the Petitioner. The submission to the Court included correspondence pertaining to the earlier Circuit Court declaratory judgment action. These included requests by the Respondent to audit Petitioner, requests for information from Petitioner, requests for statements from Petitioner, a determination that Respondent has found Petitioner to be an out-of-state vendor and finally, pleadings and decisions from the Circuit Court case. The submission clearly indicates an awareness of the Petitioner that the Respondent was seeking to tax Petitioner's transactions. However, while Petitioner may have had "notice" informally of possible future action by the Respondent, the requisite statutory procedure for issuing assessments based on non-filing was not followed. As the Court of Appeals stated:

> In addition, § 13-303 authorizes the Comptroller to demand the filing of a sales and use tax return. If the demand is not complied with, § 13-304 and 13-402 grant to the Comptroller alternate remedies. Section 13-304 authorizes a judicial action to require the filing of a return. Section 13-402(a) authorizes the Comptroller to make an assessment utilizing the best information the Comptroller has, whatever that may be.

Even though Petitioner may have had some notice, its statutory right to file a return within 10 days upon demand in order to avoid an assessment based on § 13-303 was denied.

Respondent counters that based on past history and as seen by the document submission, Petitioner would not have filed a return even if a demand had been issued as Petitioner did not believe it was required to do so. In addition, the General Assembly has provided procedural options to the Respondent in the administration of the sales and use tax law. To assess upon failure to file a return upon demand is one such option. Another procedure, to which the Respondent relies, depends on the availability or records for inspection. § 11-504 requires vendors to keep complete and accurate records and will make them available for inspection upon request of the Respondent. § 13-407

allows Respondent, when the records are not kept pursuant to § 11-504, to compute the sales and use tax and issue an assessment. Respondent claims that although requests were repeatedly made, records have never been provided by Petitioner and thus, the resulting assessment, issued pursuant § 13-407 is procedurally correct.

Respondent seeks to expand the assessment authority allowed under § 13-407 to those vendors who have records and do not make them available. However, the clear language of the statute provides for assessments only for failure to keep the records. If the General Assembly had wanted to include persons who refuse to make records available in § 13-407, it would have enacted the statutes similar to those dealing with the motor carrier tax. § 9-209 (similar to the §11-504 sales and use tax records provision) mandates record maintenance and retention and provides for inspection by the Respondent of motor carriers as that term is defined. However, the companion provision for motor carriers, § 13-405(b), unlike § 13-407, allows the Respondent to assess "if a person fails to keep records or to make records available to the Comptroller as required in § 9-209…" From the clear and unambiguous language of the provisions, the General Assembly limited the scope of § 13-407 to only those vendors who did not keep records. As it is undisputed that Petitioner kept records of its sales during the assessment period, Respondent's attempt to assess pursuant to § 13-407 was erroneous.

Therefore, since no notice and demand was sent to Petitioner prior to the issuance of the 2001 Assessment, the Respondent failed to exhaust all administrative remedies. We shall pass an Order granting the Petitioner's Motion to Dismiss the 2001 Assessment.

The 2002 Assessment (Case No. 02-SU-OO-0306)

Petitioner moves to dismiss the 2002 Assessment claiming it is duplicative of the 2001 Assessment and that the Respondent has no statutory authority to issue identical assessments against the same taxpayer. However, since the 2001 Assessment has been dismissed, this issue is now moot.

Petitioner also argues that the later 2002 Assessment includes periods of time beyond the permissible statute of limitations established under § 1102(a). Specifically, Petitioner seeks the dismissal of a five-month period (July 1, 1997 through November 30, 1997). However, Respondent

correctly notes that subsection (b) of the limitations statute permits "an action may be brought at any time if there is proof that the tax is not paid due to fraud or gross negligence. Respondent is asserting either fraud or gross negligence and thus, has the burden of proving those contentions at a trial on the merits. Therefore, the limitations issue cannot be resolved by a preliminary motion and must wait until the trier of fact has heard all of the evidence.

Accordingly, we shall pass an Order denying the Petitioner's Motion to Dismiss the 2002 Assessment and the matter shall be set for a trial on the merits.