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IN THE INDIANA TAX COURT

DREADED, INC. d/b/a V-LINE CORP.,	)	
Petitioner,	)	
v.	)	Cause No. 49T10-0209-TA-105
INDIANA DEPARTMENT OF STATE REVENUE,	)	
Respondent.	)	

ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

NOT FOR PUBLICATION
April 20, 2006

FISHER, J.

Dreaded, Inc. d/b/a V-Line Corp. (V-Line)[1] appeals the final determination of the Indiana Department of State Revenue (Department) assessing it with gross retail tax (sales tax) liability on income received for services performed during the 1994, 1995 and 1996 tax years (years at issue). The matter is currently before the Court on the parties' cross-motions for summary judgment. The issue for the Court to decide is

[1] On August 1, 2001, V-Line sold its assets (including the V-Line name). The company continued with certain liabilities, including this appeal, under the new name of Dreaded, Inc. Because many of the facts and events leading to this appeal reference the name V-Line, the Court will, for purposes of this opinion, refer to the Petitioner as V-Line.

whether charges imposed by V-Line for delivery services are subject to Indiana sales tax pursuant to Indiana Code § 6-2.5-4-1. For the following reasons, the Court GRANTS the Department's motion for summary judgment and DENIES V-Line's motion for summary judgment.

FACTS AND PROCEDURAL HISTORY

The facts in this case are undisputed. During the years at issue, V-Line was a wholesale building materials distributor domiciled in Indiana. In conjunction with its sales of building materials, V-Line also provided delivery services for its customers using its own, or leased, trucks and equipment.

V-Line's customary delivery practice entailed the buyer placing an order for certain materials, after which a delivery driver (employed by V-Line) was given a delivery ticket indicating the quantity of materials and place of delivery. Upon delivery of the materials to the designated location, the customer would sign the ticket and return it to the delivery driver who, in turn, would return the ticket to V-Line's accounting department. V-Line would then generate an invoice from the signed ticket indicating the amount owed for the materials and delivery. On its invoices to its customers, V-Line listed its delivery charges separately from the materials purchased. V-Line did not collect or remit sales tax on the delivery charges.

In 1997, after completing an audit, the Department determined that V-Line should have collected sales tax from its customers on the delivery charges. Therefore, on April 25, 1997, the Department issued proposed assessments for each of the years at issue totaling $98,754.[2] V-Line timely protested the assessment. On January 23, 2002, the

[2] The assessment represented: $90,928 in sales tax and $7,825 in interest.

Department held an administrative hearing and, on March 7, 2002, issued a Letter of Findings (LOF) denying V-Line's protest.

On September 3, 2002, V-Line initiated an original tax appeal. On April 30, 2004, V-Line filed a motion for summary judgment and on June 10, 2004, the Department filed a motion for summary judgment. The Court held a hearing on the cross-motions on September 3, 2004. Additional facts will be supplied as necessary.

ANALYSIS AND OPINION

Standard of Review

This Court reviews final determinations of the Department *de novo*. IND. CODE ANN. § 6-8.1-5-1(h) (West 2006). Accordingly, the Court is bound by neither the evidence nor the issues presented at the administrative level. *Galligan v. Indiana Dep't of State Revenue,* 825 N.E.2d 467, 472 (Ind. Tax Ct. 2005), *review denied*. Although a statute that imposes a tax is strictly construed against the State, the burden of proving the proposed assessment is wrong rests with the person against whom the proposed assessment is made. *Clifft v. Indiana Dep't of State Revenue,* 748 N.E.2d 449, 452 (Ind. Tax Ct. 2001).

In addition, a motion for summary judgment will be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). Cross-motions for summary judgment do not alter this standard. *Snyder v. Indiana Dep't of State Revenue,* 723 N.E.2d 487, 488 (Ind. Tax Ct. 2000), *review denied*.

Discussion

Indiana imposes an excise tax, known as the state sales tax, on retail transactions made within the state. *See* IND. CODE. ANN. § 6-2.5-2-1 (West 2006). During the years at issue, a taxable retail transaction was defined as "a transaction of a retail merchant that constitutes selling at retail as is described in IC 6-2.5-4-1[.]" IND. CODE ANN. § 6-2.5-1-2(a) (West 1995). A person is "selling at retail when, in the ordinary course of his regularly conducted trade or business, he: (1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IND. CODE ANN. § 6-2.5-4-1(b)(1), (2) (West 1995) (amended 2003).

Because selling at retail requires the transfer of tangible personal property, the sale of services generally falls outside the scope of taxation because no transfer of tangible personal property occurs. *Howland v. Indiana Dep't of State Revenue,* 790 N.E.2d 627, 628 (Ind. Tax Ct. 2003). Nevertheless, services are subject to sales tax to the extent the income from the service represents "any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, *delivery*, or other service performed in respect to the property transferred *before its transfer and which are separately stated* on the transferor's records." A.I.C. § 6-2.5-4-1(e)(2) (emphases added). Likewise, the Department's regulation interpreting Indiana Code § 6-2.5-4-1(e)(2) states that "[s]eparately stated delivery charges are considered part of selling at retail and subject to sales [] tax if the delivery is made by or on behalf of the seller of property not owned by the buyer." IND. ADMIN. CODE tit. 45, r. 2.2-4-3(a) (1996).

The Department's regulation also provides guidelines explaining when delivery charges are taxable based on F.O.B. designations.[3] Specifically, the regulation advises:

> **(1)** Delivery charge[s] separately stated with F.O.B. destination [are] taxable.
> **(2)** Delivery charge[s] separately stated with F.O.B. origin [are] non[-]taxable.
> **(3)** Delivery charge[s] separately stated where no F.O.B. has been established [are] non[-]taxable.
> **(4)** Delivery charges included in the purchase price are taxable.

45 IAC 2.2-4-3(b)(1)-(4). V-Line claims that pursuant to subsection (b)(3) of the regulation, its delivery charges are not subject to tax because it did not designate an F.O.B. point with its customers.[4] (*See* Pet'r Mot. for Summ. J. Br. at 5-7 (footnote added).)

V-Line's interpretation of the regulation elevates form over substance, thereby limiting the scope of Indiana Code § 6-2.5-4-1(e)(2) in a manner that the legislature did not intend. Nevertheless, V-Line's interpretation stems, in part, from the problematic nature of 45 IAC 2.2-4-3(b)(3) itself. More specifically, Indiana Code § 6-2.5-4-1(e)(2)

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[3] "F.O.B." (i.e., free on board) is "[a] mercantile-contract term allocating the rights and duties of the buyer and the seller of goods with respect to delivery, payment, and risk of loss[.]" BLACK'S LAW DICTIONARY 690 (8th ed. 2004). Generally, it stands for the proposition that the seller's delivery is complete. *Id*. An F.O.B. designation may be helpful in this context because, generally, title to tangible property is deemed to have transferred from the seller to the buyer at the point where the seller completes his performance with respect to the physical delivery of the goods. *See* IND. CODE ANN. § 26-1-2-401(2) (West 1995) (amended 2000).

[4] In its LOF, the Department claimed that the regulation's guidelines did not apply in this case because F.O.B. designations apply only to common carriers, and V-Line is not a common carrier. (*See* Pet'r Pet., Ex. C at 5; Pet'r Pet. at 2-4.) While V-Line disputes that conclusion, the Court need not address the issue as it does not affect the resolution of this case.

and 45 IAC 2.2-4-3 both stand for the proposition that delivery charges are subject to sales tax if the delivery is performed *before title to the property is transferred to the buyer*. *See* A.I.C. § 6-2.5-4-1(e)(2); 45 IAC 2.2-4-3(a) (stating that separately stated delivery charges are taxable "if the delivery is made by or on behalf of the seller *of property not owned by the buyer*").

Subsections (b)(1) and (2) of the regulation reinforce that point of law. Indeed, subsection (b)(1) explains that when the seller's delivery is complete at the goods' place of destination, the charge for the service of delivering the goods is taxable because the service occurred before title passed to the buyer. Subsection (b)(2), therefore, explains that when the seller's delivery is complete at the point where the seller puts the goods into the possession of a carrier (to then be delivered to the destination point), the charge for the service of delivery is non-taxable because the service occurred after title passed to the buyer. Subsection (b)(3), however, effectively negates subsections (b)(1) and (b)(2) by suggesting that delivery charges may escape taxation when the seller has not designated an F.O.B. point, *regardless* of when the service was performed or when title actually passed to the buyer (i.e., the seller's delivery is complete). *See* 45 IAC 2.2-4-3(b)(3). To that end, subsection (b)(3) is contrary to the purpose and scope of Indiana Code § 6-2.5-4-1(e)(2), and the regulation itself; therefore, it is invalid and inapplicable

to this case.[5]

Thus, instead of relying soley on the fact that no F.O.B. designation was made in this case, it must be ascertained whether V-Line's delivery services were actually performed before the customers took title to the property. To that end, Indiana Code § 26-1-2-401 states that "[u]nless otherwise specifically agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods[.]" IND. CODE ANN. § 26-1-2-401(2) (West 1995) (amended 2000). *See also David R. Webb Co. v. Indiana Dep't of State Revenue*, 826 N.E.2d 166, 171 n.6 (Ind. Tax Ct. 2005) ("[t]his Court often looks to Indiana's Uniform Commercial Code (UCC) for guidance in interpreting tax laws"). Because V-Line did not specifically agree with its customers or designate the point at which title was to pass, title is deemed to have passed at the point of physical delivery. *See* A.I.C. § 26-1-2-401. (*See also* Pet'r Br. at 4.)

[5] This Court has previously explained that "[a]n administrative agency may adopt rules and regulations to enable it to put into effect the purposes of the law, but it may not make rules and regulations inconsistent with the statute which it is administering, [and] it may not by its rules and regulations add to or detract from the law as enacted[.]" *See Johnson County Farm Bureau Coop. Ass'n v. Indiana Dep't of State Revenue*, 568 N.E.2d 578, 587 (Ind. Tax Ct. 1991), *aff'd* 585 N.E.2d 1336 (Ind. 1992) (internal quotation and citation omitted).

Furthermore, a regulation must be applied in a logical manner consistent with its (and the corresponding statute's) underlying policy and goal. *See Town of Plainfield v. Town of Avon*, 757 N.E.2d 705, 710 (Ind. Ct. App. 2001), *trans. denied*. *See also Harlan Sprague Dawley, Inc. v. Indiana Dep't of State Revenue*, 605 N.E.2d 1222, 1229 (Ind. Tax Ct. 1992) (stating that when interpreting the Department's regulations, the Court applies the same rules of construction that apply to statutes). Therefore, while the guidelines aid in determining when title transfers based on when the seller's delivery is considered complete (i.e., an F.O.B. designation), they may not apply in cases where the facts dictate a different result. After all, guidelines are merely guidelines, not hard and fast rules.

CONCLUSION

Based on V-Line's customary delivery practice, it is clear that the delivery services were performed prior to the transfer of title in the property to V-Line's customers.[6] Therefore, the corresponding delivery charges are taxable, and the Court GRANTS summary judgment in favor of the Department and against V-Line.

SO ORDERED this 20th day of April, 2006.

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Thomas G. Fisher, Judge
Indiana Tax Court

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[6] This conclusion certainly holds true where V-Line's customers were not required to pay for the building materials or delivery until after the materials were delivered, the delivery driver returned the customer-signed delivery ticket to the accounting department, and V-Line generated and issued an invoice. (*See* Resp't Cross Mot. for Summ. J., Ex. D at 4; Oral Argument Tr. at 8-9.)