

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER COURT
CIVIL ACTION
Docket No. BCD-WB-AP-09-08

OCTOBER PRINCESS HOLDINGS LLC,

Petitioner,

v.

DECISION AND ORDER

STATE TAX ASSESSOR,

Respondent.

Before the court is the motion of the State Tax Assessor (“Assessor”) for summary judgment on the Appeal of Final Agency Action filed by October Princess Holdings LLC (the “Petitioner” or “OPH”). Also before the court is OPH’s motion for summary judgment. In this Rule 80C appeal, OPH seeks judicial review of an assessment of use tax imposed by the Assessor.¹

FACTUAL BACKGROUND

In October or November 2004, Tom Toye III (“Toye”) a boat show in Ft. Lauderdale, Florida, and became interested in the yacht he would ultimately purchase and rename “October Princess”, an English built 72-foot Viking Sport Cruiser. Toye formed OPH, a New Hampshire

¹ The motion record may require some clarification. OPH’s petition only alleges that OPH is entitled to an exemption from the use tax assessment in this case pursuant to 36 M.R.S. §§ 1760(25) and (45). However, its motion for summary judgment is based on the statutory exemption in subsection 82. OPH has not made any argument based on subsection 25.

Because of some pertinent factual and legal similarities, oral argument in this case was joined with the oral arguments in two other cases claiming exemptions based on Section 1760(23-C), (45) and (82), and based on a further claim that the use tax assessments in those cases violated the Commerce Clause of the United States Constitution, to wit: BCD-WB-AP-09-28 *Victor Bravo Aviation, LLC v. State Tax Assessor*; and BCD-WB-AP-09-15 *Blue Yonder, LLC v. State Tax Assessor*.

At oral argument, the court granted the oral motion of OPH to incorporate and adopt in its motion for summary judgment the constitutional arguments made in *Victor Bravo* and *Blue Yonder*. Accordingly, this Decision and Order will address the Commerce Clause issue even though it does not appear in OPH’s motion.

limited liability company to acquire the vessel. The yacht was purchased by OPH on December 22, 2004 and brought to Maine on May 28, 2005 where it remained until October 19, 2005.

The October Princess is equipped with two helm stations, each equipped with full instrumentation, a master stateroom with private bath, a VIP stateroom, also with a private bath, and two additional “double bunk staterooms.” The yacht has a salon with seating for six, a fully equipped galley and a second dining/entertaining area on the bridge.

The yacht is fully air-conditioned, has a stereo system with a CD player and there are stereo speakers inside and outside. The air-conditioning system was kept running throughout the summer of 2005. There are at least two operational televisions, both equipped with Direct TV satellite service that was active for the entire period of time that the yacht was in Maine during 2005.

Toye is master of the October Princess, a designation that is synonymous with being the owner and captain (i.e., the person responsible for the yacht and generally in charge), and he was the captain, master, and solely in charge of the yacht for the entire time that it was in Maine. No person other than a member of OPH has ever had authority to direct or allow access to the yacht and no person other than Toye has ever exercised that authority.

On May 28, 2005 the yacht first arrived at Sunset Marina in South Portland. On July 16, 2005 in calm and sunny weather Toye took the yacht for a day cruise from Portland to Boothbay Harbor to have lunch. On board were his guests Janice Hutchins, her son Travis and three of his college friends. While navigating around Boothbay Harbor, the boat struck ground and became stuck. Toye concluded that he was in no peril and determined to wait for the incoming tide to float him free. He and his guests had lunch and enjoyed the weather while they waited.

Sometime in early August, Toye made a reservation for the boat to be docked in the town of Mount Desert, Northeast Harbor. He and Ms. Hutchins intended to cruise from Portland to Northeast Harbor and stay in Northeast Harbor for three nights. En route, the watercraft suffered a breakdown in the Fox Island Thoroughfare and was towed into Stonington, Maine where it received service. The boat returned to Portland after several days, where it remained in the water at the Sunset Marina dock until October 19, 2005 when it returned to Florida. In 2005 the boat was in Maine for no fewer than 144 days. It was in the water at the Sunset Marina dock where it was available for Toye to use, and was being operated by Toye for 128 of those days.

STANDARD OF REVIEW

36 M.R.S. § 151 governs judicial review of decisions by the Assessor and “provides that the Superior Court ‘shall conduct a *de novo* hearing and make a *de novo* determination of the merits of the case.’” *Foster v. State Tax Assessor*, 1998 ME 205 ¶ 7, 715 A.2d 1012, 1014 (quoting 36 M.R.S.A. § 151). OPH bears the burden of proof in this regard. *Id.*

A party may obtain summary judgment if there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c). “To survive a defendant’s motion for summary judgment, a plaintiff must produce evidence that, if produced at trial, would be sufficient to resist a motion for judgment as a matter of law.” *Prescott*, 1998 ME 250, ¶ 4, 721 A.2d at 171 (quoting *Rodrigue v. Rodrigue*, 1997 ME 99 ¶ 8, 694 A.2d 924, 926).

DISCUSSION

Maine’s use tax is imposed on every person storing, using, or otherwise consuming tangible personal property that would otherwise be subject to Maine sales tax. 36 M.R.S. §§ 1861, 1811, 1764 (2005). Where specific statutory criteria are met, however, certain exemptions to the imposition of use tax may apply. 36 M.R.S. §§ 1752-A, 1760 (2005). “An exemption

from taxation, while entitled to reasonable interpretation in accordance with its purpose, is not to be extended by application to situations not clearly coming within the scope of the exemption provisions.” *J & E Air Inc. v. State Tax Assessor*, 2001 ME 95, ¶ 10, 773 A.2d 452, 455-56 (quoting *Harold MacQuinn Inc. v. Halperin*, 415 A.2d 818, 820 (Me. 1980)); *Brent Leasing Co. Inc. v. State Tax Assessor*, 2001 ME 90, ¶¶ 12, 15, 773 A.2d 457 (tax exemptions are to be narrowly construed).

As noted above, in this case, OPH appears to rely on two exemptions to support its claim that the Assessment was in error.

I. Whether the October Princess is Exempt from Use Tax Under 36 M.R.S. § 1760(82)

OPH argues that 36 M.R.S. § 1760(82) exempts the October Princess from Maine’s use tax. The applicable version of subsection 82 provides:

82. SALES OF PROPERTY DELIVERED OUTSIDE THIS STATE. Sales of tangible personal property when the seller delivers the property to a location outside this State or to the United States Postal Service, a common carrier or a contract carrier hired by the seller for delivery to a location outside this State, regardless of whether the property is purchased F.O.B. shipping point or other point in this State and regardless of whether passage of title occurs in this State.

36 M.R.S. § 1760(82)(2004), *amended by* P.L. 2007, ch. 627, § 49.²

According to OPH, because it purchased the October Princess outside of Maine and took delivery outside the State, it is exempt from the use tax pursuant to subsection

² As a result of the 2007 amendment to 36 M.R.S. § 1760, subsection 82 now provides as follows:

82. SALES OF PROPERTY DELIVERED OUTSIDE THIS STATE. Sales of tangible personal property when the seller delivers the property to a location outside this State or to the United States Postal Service, a common carrier or a contract carrier hired by the seller for delivery to a location outside this State, regardless of whether the property is purchased F.O.B. shipping point or other point in this State and regardless of whether passage of title occurs in this State. *This exemption does not apply to any subsequent use of the property in this State.*

36 M.R.S. § 1760(82)(2009) (emphasis added).

82. In response, the Assessor maintains that subsection 82 applies only to sales that take place in Maine and, therefore, constitutes a sales tax exemption, not a use tax exemption.

Notwithstanding the prefatory language to Section 1760, which appears to provide that the exemptions contained in that section apply to sales *and* use tax, the court concludes that, when read in the context of Maine's tax statutes as a whole, the individual provisions of Section 1760 have varying applicability to sales and use tax depending on the language of each individual subsection.

Under the plain language of subsection 82, the sale of tangible property is exempt when the property is delivered outside the State of Maine. In the court's view, the only reasonable interpretation of this language, and the clear import of the condition that the property be delivered *outside of* the State, is that the initial sale must occur within the State. Given that the State of Maine is without authority to tax sales that take place outside of its borders, the interpretation of subsection 82 urged by OPH would render that section entirely without purpose with respect to the sales tax. Further, were the court to adopt OPH's interpretation, subsection 82 would render Maine's use tax all but a nullity. Accordingly, the court concludes that the only reasonable interpretation of subsection 82, and the interpretation this court adopts, is that that section constitutes a sales tax exemption for sales originating in Maine. It does not constitute an exemption from the use tax for goods purchased outside of Maine.

Because there is no dispute that the sale of the aircraft originally took place outside of Maine and because this court concludes that 36 M.R.S. § 1760(82) only applies to Maine sales, OPH's claim for an exemption to the use tax assessment under that subsection fails as a matter of law.

II. Whether the October Princess is Exempt from Use Tax Under 36 M.R.S. § 1760(45)

The Assessor moves for summary judgment against OPH on its claim that the October Princess is exempt from use tax pursuant to 36 M.R.S. § 1760(45). According to the Assessor, OPH is not entitled to the benefit of the exemption outlined in subsection 45 because it is a corporate entity.

OPH is correct that watercraft are among the specific types of property that may be exempted from use tax. 36 M.R.S. § 1760(45)(A-1)(2005).³ For the exemption to apply, the watercraft must be purchased outside of Maine, by an owner who is a resident of another state. 36 M.R.S. § 1760(45)(A-1)(Supp. 2004). Furthermore, the watercraft may not be present in Maine (other than for temporary storage) for more than 30 days during the 12 months following its purchase. *Id.*

In addition, 36 M.R.S. § 1752-A restricts eligibility for most § 1760 use tax exemptions (including the exemption of watercraft) to *individuals*.⁴ Thus, before engaging in any analysis of

³ At the time OPH purchased the October Princess and brought her to Maine, 36 M.R.S. § 1760(45)(2005) read, in pertinent part, as follows:

45. CERTAIN PROPERTY PURCHASED OUTSIDE STATE. Sales of property purchased and used by the present owner outside the State:

A-1. If the property is a watercraft that is registered outside the State by an owner who at the time of purchase was *a resident* of another state and the watercraft is present in the State not more than 30 days during the 12 months following its purchase for a purpose other than temporary storage;

For purposes of this subsection, “use” does not include storage but means actual use of the property for a purpose consistent with its design.

Id. (emphasis added).

⁴ At the time OPH purchased the October Princess and brought her to Maine, 36 M.R.S. § 1752-A (2005) read as follows:

In determining eligibility for exemption under section 1760, references to residents or nonresidents refer to individuals.

whether a taxpayer meets the criteria for a particular § 1760 exemption, the taxpayer first must establish that she/he is an individual who is a resident of a state other than Maine. 36 M.R.S. § 1752-A (2005). If this criterion is met, the taxpayer must further establish that the watercraft was not present in Maine, other than for temporary storage, for more than 30 days during the first year of ownership. 36 M.R.S.A. § 1760(45)(A-1)(2005).

It is undisputed that the October Princess is owned by the New Hampshire limited liability company October Princess Holdings LLC. (RSMF ¶¶ 3, 5). The use tax exemption established by 36 M.R.S. § 1760(45)(A-1)(Supp. 2004), however, is available only to “an owner who at the time of purchase was a *resident* of another state[.]” *Id.* (Emphasis added). In determining eligibility for any § 1760 exemption, § 1752-A must be consulted. 36 M.R.S. § 1752-A (Supp. 2004) (the word *resident* is specifically limited to *individuals*).⁵

The word individual, when used as a noun, is generally understood to denote a single person as opposed to a class of persons, or a natural person as opposed to an entity or organization. *See Black’s Law Dictionary* at 773 (6th Ed., 1990). Although *Black’s* allows that the restrictive signification may not be universal, the word individual, as used in the context of Title 36 Chapters 211 and 225, must be read as distinguishing between natural persons and legal entities because elsewhere in § 1760 the word individual is expanded to include legal entities.⁶

⁵ See note 2, *supra*.

⁶ See 36 M.R.S. §§ 1760(23-C) & 1760(25), which state, in pertinent part:

Notwithstanding section 1752-A, for purposes of this subsection, the term “nonresident” may include an individual, an association, a society, a club, a general partnership, a limited partnership, a domestic or foreign limited liability company, a trust, and estate, a domestic or foreign corporation and any other legal entity.

Id. (Emphasis added). Reading the word “individual” in a manner other than to distinguish between a natural person and an entity of some sort renders not only § 1752-A entirely superfluous, it renders the “carve-out” language set forth in §§ 1760(23-C) and 1760(25) surplus as well. Such a reading is not in keeping the strictures of statutory construction.

OPH is not entitled to the exemption established by § 1760(45)(A-1) because it cannot satisfy the threshold requirement set forth in § 1752-A. OPH is a New Hampshire entity, not, as the statute requires, an *individual*. As a matter of law, therefore, OPH cannot take advantage of the use tax exemption set forth in § 1760(45)(A-1).⁷

Accordingly, OPH's claim for an exemption to the use tax assessment under that subsection 45 fails as a matter of law.

III. Whether the Assessment and Reconsideration Decision Violate the Commerce Clause of the United States Constitution

As previously noted, at the oral argument, the court permitted OPH to adopt and incorporate this constitutional arguments made by Victor Bravo⁸ and Blue Yonder⁹, petitioners in two similar tax cases, to the effect that the Assessor's interpretation of Section 1760(82) violates the Commerce Clause of the United States Constitution because it effectively creates an impermissible tariff on goods purchased out of State and then brought into Maine.

OPH's incorporated argument correctly notes that the Commerce Clause grants to the U.S. Congress the authority to "regulate Commerce with foreign nations, and among the several States" U.S. CONST. art. I, § 8, cl. 3. This provision "not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). In line with this limitation, the United States Supreme Court has held that a state tax that discriminates against interstate commerce is unconstitutional. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Under the four-part test developed in the

⁷ Because the Court holds that OPH is not an individual as required by statute it does not address whether OPH "used" the watercraft in Maine.

⁸ See this court's order of even date in BCD-WB-AP-09 *Victor Bravo Aviation, LLC v. State Tax Assessor*.

⁹ See this court's order of even date in BCD-WB-09-15 *Blue Yonder, LLC v. State Tax Assessor*.

Complete Auto Transit case, a tax affecting interstate commerce is valid if it: “(1) is applied to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State.” *Id.*

OPH contends that the Assessor’s interpretation of Section 1760(82), the interpretation that this court has adopted, violates the Commerce Clause because it renders that exemption applicable only to sales that take place in Maine. OPH appears to argue that, as so interpreted, subsection 82 lends itself to a disparate apportionment of taxes as between in-state and out-of-state purchases and, as a result, discriminates against interstate commerce.

With respect to the “fair apportionment” prong, the court is not persuaded by OPH’s argument. As the Assessor correctly notes, the United States Supreme Court has explained that “fair apportionment” exists where a state tax code provides a credit for any sales tax paid to another state with respect to the same purchase, thereby avoiding double taxation. *See* Def.’s Mot. at 18 (citing *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988)) *See also Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995); and *Goldberg v. Sweet*, 488 U.S. 252, 264 (1989). Because Maine’s statute does provide a credit for any sales tax paid to another state, *i.e.* 36 M.R.S. § 1862, there does not appear to be any real dispute that Maine’s use tax is fairly apportioned.

What remains is OPH’s contention that the Assessor’s interpretation of Section 1760(82) renders Maine’s use tax discriminatory against interstate commerce. Subsumed within this contention is the argument that any exemption that is applicable only to in-state sales but not to out-of-state sales necessarily and impermissibly discriminates against interstate commerce. With specific reference to the undisputed facts in this case, the court does not agree.

The court concludes that its interpretation of Section 1760(82) as applying only to property originally purchased in Maine does not discriminate against interstate commerce. As explained by the United States Supreme Court in the context of similar Commerce Clause challenges, when determining whether an individual tax provision is discriminatory, courts must not look at the provision in isolation. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963). Instead, “a proper analysis must take ‘the whole scheme of taxation into account.’” *Id.* (quoting *Galveston, H. & S. A. R. Co. v. Texas*, 210 U.S. 217, 227 (1908)). In this case, the context of Section 1760(82) makes clear that it does not discriminate against interstate commerce.

First, in addition to applying only to property purchased in Maine in the first instance, subsection 82 only applies to Maine sales tax. Nothing in the body of subsection 82 itself indicates that it constitutes an exemption to the use tax. Rather, the language makes clear that it is the “sales of tangible personal property . . . deliver[ed] to a location outside” of Maine that is exempt from taxation. *See* 36 M.R.S. § 1760(82).¹⁰ Accordingly, the combination of Section 1760(82) and the fact that Maine has no authority to impose Maine sales tax on out-of-state sales, results in the same exemption for in-state and out-of-state sales meeting the criteria of Section 1760(82). Second, those sales, whether in-state or out-of-state, would be subject to use

¹⁰ In the alternative, to the extent that the prefatory language of Section 1760 may be read to suggest that the exemptions enumerated therein apply equally to both sales and use tax, despite the contradictory, limiting language contained in the individual exemptions themselves, the court concludes that such a reading would render Section 1760 ambiguous. In the face of such an ambiguity, the court may look to the 2007 amendment to Section 1760(82) in order to clarify the scope of that section. *See Mundy v. Simmons*, 424 A.2d 135, 137 (Me. 1980) (“at times, when there is an ambiguity in prior legislative terminology, enactments by a subsequent legislature may throw light on the legislative intent underlying previously enacted legislation and may be taken into consideration in dissipating the uncertainty of a foundational statute”) (citations omitted). That 2007 amendment makes clear that the exemption contained in Section 1760(82) does not apply to Maine use tax and is, therefore, solely a sales tax exemption. *See* 36 M.R.S. § 1760(82)(2007).

tax should the property be re-located to Maine. Consequently, the court's interpretation of that subsection does not result in an unconstitutional interference with interstate commerce.

Based upon the foregoing, OPH's constitutional challenge fails as a matter of law.

Pursuant to Rule 79(a) M.R. Civ. P., the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

A. Petitioner's Motion for Summary Judgment is DENIED;

B. Respondent's Motion for Summary Judgment is GRANTED, and Judgment is entered in favor of Respondent on the Petition;

Dated: December 14, 2009

s/Thomas E. Humphrey
Chief Justice, Superior Court