STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-AP-09-15

BLUE YONDER, LLC,

Petitioner

v.

DECISION AND ORDER

STATE TAX ASSESSOR,

Respondent

Before the Court is the Motion of Petitioner Blue Yonder, LLC (hereinafter "Petitioner" or "Blue Yonder") for summary judgment on all counts of its Petition for judicial review of an assessment of use tax imposed by Respondent State Tax Assessor ("State" or "Assessor").

FACTUAL BACKGROUND

Except where noted, the following facts are undisputed for the purposes of the instant motion:

Blue Yonder is a Massachusetts limited liability company headquartered in Bedford, Massachusetts. Pl.'s S.M.F. ¶ 1; Def.'s Opp. S.M.F. ¶ 1. Blue Yonder purchased a Cirrus SR22 aircraft from Cirrus Design Corporation on November 4, 2002 in Duluth, Minnesota. Pl.'s S.M.F. ¶ 2; Def.'s Opp. S.M.F. ¶ 2. According to Blue Yonder, the aircraft was delivered by Cirrus Design to Blue Yonder in Minnesota. Pl.'s S.M.F. ¶ 2. The Assessor objects to Blue Yonder's characterization of the location of the "delivery," and contends that that characterization is a legal question. Def.'s Opp. S.M.F. ¶ 2.

According to Blue Yonder, the aircraft was outside of Maine at the time of its delivery. Pl.'s S.M.F. ¶ 3. The Assessor again objects to "Blue Yonder's use and characterization of the

phrase 'upon its delivery' which involves a legal determination . . . Subject to this objection," however, the Assessor admits Blue Yonder's Statement of Material Fact 3. *See* Def.'s Opp. S.M.F. ¶ 3.[1] The Assessor goes on to assert that the manager and registered agent of Blue Yonder, Mr. Stephen Kahn, "conducted the sale, and flew the aircraft from Minnesota, where it was delivered, to Massachusetts," on November 4, 2002. Def.'s A.S.M.F. ¶ 11[2]. The parties agree that the aircraft has never been registered with the State of Maine. Pl.'s S.M.F. ¶ 4; Def.'s Opp. S.M.F. ¶ 4.

According to Blue Yonder, the aircraft was used outside of Maine for more than 12 months after its purchase, but has not been used solely outside of Maine. Pl.'s S.M.F. ¶ 5. The Assessor admits that the aircraft was not used solely outside of Maine, but adds that "the aircraft also was used inside Maine during the first 12 months after its purchase by Blue Yonder." Def.'s Opp. S.M.F. ¶ 5.

Finally, the parties agree that, except as paid under protest in Maine, no sales or use tax related to the purchase of the Aircraft has been paid to any jurisdiction at any time. Def.'s A.S.M.F. ¶ 64; Pl.'s Reply A.S.M.F. ¶ 64.

DISCUSSION

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

[1] Although Def.'s S.MF. ¶ 3 indicates that, subject to its objection, the Assessor admits "paragraph 2," this appears to be a typographical error and the court assumes the Assessor was in fact referring to paragraph 3.

[2] As Blue Yonder correctly notes, many of the Assessor's Additional Statements of Material Fact do not comply with M.R. Civ. P. 56 in that they contain excerpts from deposition testimony rather than short, concise statements of fact supported by record citations. *See e.g.* Def.'s A.S.M.F. ¶¶ 10, 14, 15, 27. The court notes that all litigants involved in summary judgment practice must comply with the Rules of Civil Procedure and with the Law Court's admonishments regarding motions for summary judgment. *See Stanley v. Hancock County Comm'rs,* 2004 ME 157, ¶¶ 13 & 27-29, 864 A.2d 169, 178-79.

merits of the case.'" *Foster v. State Tax Assessor*, 1998 ME 205, ¶ 7, 715 A.2d 1012, 1014 (quoting 36 M.R.S. § 151). Blue Yonder bears the burden of proof in this regard. *Id.*

A party may obtain summary judgment if there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c). For purposes of summary judgment, a "material fact is one having the potential to affect the outcome of the suit." *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. "A genuine issue of material fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial." *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, ¶ 2, 845 A.2d 1178, 1179. If ambiguities in the facts exist, they must be resolved in favor of the non-moving party. *Beaulieu v. The Aube Corp.*, 2002 ME 79, ¶ 2, 796 A.2d 683, 685.

I. Statutory Framework

As the Assessor explained in his Reconsideration Decision, the tax involved in this case was assessed pursuant to 36 M.R.S. § 1861. Section 1861 imposes a tax "on the storage, use or other consumption in this State of tangible property or a service, the sale of which would be subject to tax under section . . . 1811." 36 M.R.S. § 1861 (2003). Section 1811, in turn, provides for the imposition of sales tax "on the value of all tangible personal property and taxable services sold at retail in this State." 36 M.R.S. § 1811 (2003). The term "use," as defined under the statute in 2003:

> includes the exercise in this State of any right or power over tangible personal property incident to its ownership when purchased by the user at retail sale, including the derivation of income, whether received in money or in the form of other benefits, by a lessor from the rental of tangible personal property located in this State.

36 M.R.S. §1752(21) (2003).

Blue Yonder contends that it is exempt from Maine use tax under three distinct statutory exemptions – 36 M.R.S. §§ 1760(23-C), (82) & (45). Blue Yonder also contends that the Assessment violates the Commerce Clause contained in Article I, Section 8, Clause 3 of the United States Constitution. Finally, Blue Yonder seeks an abatement of interest on its tax assessment pursuant to 36 M.R.S. § 186. The court will address each argument in turn.

II. 36 M.R.S. § 1760(23-C) (Count I)

Blue Yonder argues that any use of the Aircraft in Maine is exempt from taxation under 36 M.R.S. § 1760(23-C), which provides in pertinent part:

> Subject to the provisions of section 1760-C, no tax on sales, storage or use may be collected upon or in connection with:
> . . .
>
> 23-C. CERTAIN VEHICLES PURCHASED OR LEASED BY NONRESIDENTS. Sales or leases of the following vehicles to a person that is not a resident of this State, if the vehicle is intended to be driven or transported outside the State immediately upon delivery:
>
> C. Aircraft*;*
> . . .
>
> If the vehicles are registered for use in the State within 12 months of the date of purchase, the person seeking registration is liable for use tax on the basis of the original purchase price.

36 M.R.S. § 1760(23-C).

According to Blue Yonder, under Section 1760(23-C)(C)), "neither sales nor use tax may be levied on the sale of an aircraft if: (1) it is purchased by a non-resident; (2) the aircraft is intended to be driven or transported outside of Maine immediately upon delivery; and (3) the aircraft is not registered for use in Maine within 12 months of the date of purchase." Pl.'s Mot. at 3.

The court agrees with the State's contrary argument that Section 1760(23-C) only applies to property originally sold or leased in Maine[3] because it exempts property "intended to be driven or transported outside the State", and, absent a Maine sale, this statutory language is meaningless. Our Law Court has repeatedly explained that "[a]n 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, 821, 822 (Me. 1980) and citing *Brent Leasing Co., Inc. v. State Tax Assessor*, 2001 ME 90, PP12, 15, 773 A.2d 457 (reiterating narrow construction of tax exemptions)). Further, under general rules of statutory construction, "[n]othing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible." *Struck v. Hackett*, 668 A.2d 411, 417 (Me. 1995) (quoting *Labbe v. Nissen Corp*., 404 A.2d 564, 567 (Me. 1979)).

In the court's view, the only reasonable interpretation of Section 1760(23-C), and the clear import of the condition that immediate transport *out of* the State be made, is that the initial sale or lease must occur within the State. Blue Yonder's interpretation would exempt any sale or lease of property immediately delivered outside of Maine, including those sales and leases taking place entirely outside of and with no connection to the State of Maine. Given that Maine "is without authority to tax sales beyond its territorial limits." *Hanbro, Inc. v. Johnson,* 181 A.2d 249, 251 (Me. 1962), such a result would, in effect, render the whole of subsection 23-C surplusage. Blue Yonder's interpretation would purport to exempt sales and leases occurring beyond Maine's borders – sales over which Maine has no taxing authority in the first place.

[3] *See* 36 M.R.S. § 1811 (providing that the "sales tax" applies to the rental/lease of certain property).

Neither the language of the statute nor the larger purpose and context of Maine's tax code support such an interpretation.

In this case, there is no dispute that the sale of the aircraft to Blue Yonder took place outside of Maine and, therefore, Section 1760(23-C) was not triggered. For that reason, Blue Yonder's use of the aircraft in Maine is not exempt from taxation under Section 1760(23-C)(C)), and it is not entitled to summary judgment in its favor on Count I of the Petition.

III. 36 M.R.S. § 1760(82) (Count II)

Blue Yonder also contends that Section 1760(82) exempts the aircraft from Maine 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.[4]

In this case, Blue Yonder maintains that its use of the aircraft is exempt because it was delivered outside of Maine, namely in Minnesota, following the sale. The State counters that subsection 82, like subsection 23-C, applies only to Maine sales and does not exempt Blue Yonder from use tax associated with its use of the aircraft in Maine.

[4] Following the 2007, amendment subsection 82 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).

Notwithstanding the prefatory language to Section 1760, which Blue Yonder contends provides that the exemptions contained in its subsections all apply to sales *and* use taxes, the court concludes that, when read in the context of Maine's tax statutes as a whole, the individual subsections of 1760 have varying applicability to sales and use tax. Just as the language of subsection 23-C, when read in the context of the complimentary purposes of the sales and use tax, makes clear that it applies to property originally sold in Maine – the language of subsection 82 demonstrates that the exemption is predicated on a sale first taking place in Maine. Given that the State of Maine is without authority to tax sales that take place outside of its borders, the interpretation urged by Blue Yonder would render subsection 82 entirely without purpose.

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, Blue Yonder is not entitled to summary judgment in its favor on Count II of the Petition.

IV. Whether the Assessment and Reconsideration Decision Violate the Commerce Clause of the United States Constitution (Count III)

Blue Yonder also alleges that the Assessor's interpretations of 36 M.R.S. § 1760(23-C) & (82) violate 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.

Blue Yonder 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 *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.*

Blue Yonder contends that the Assessor's interpretation of Sections 1760(23-C) & (82), the interpretation that this court has now adopted, violates the Commerce Clause because it renders those exemptions applicable only to sales that take place in Maine. Blue Yonder appears to argue that, as so interpreted those subsections lend themselves to a disparate apportionment of taxes as between in-state and out-of-state purchases and, as a result, discriminate against interstate commerce.

With respect to the "fair apportionment" prong, the court is not persuaded by Blue Yonder'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 Opp. at 17 (citing *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988)). In light of the fact that Maine's statute does indeed 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.

Blue Yonder also contends that, as applied to use taxes, the interpretation of Sections 1760(23-C) & (82) by the Assessor and the court renders Maine's use tax discriminatory against interstate commerce because, in Blue Yonder's words, it:

> essentially create[s] a tariff on goods brought into Maine that had been both purchased and delivered outside the state, with no corresponding tariff on goods brought into Maine that had been purchased in the state but delivered outside the state. The effect would be to benefit in-state sellers over out-of-state sellers by

> encouraging people to purchase aircraft from Maine sellers, even when both types of sellers were delivering their aircraft outside of Maine.

Pl.'s Mot. at 9 n. 8. The court disagrees. 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, subsections (23-C) and (82) make clear that neither discriminates 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).[5] Accordingly, the combination of Section 1760(82) and Maine's lack of authority to impose a sales tax on out-of-state sales, results in the same exemption for in-state and out-of-state sales meeting the criteria of subsection 82. Both in-state and out-of-state sales are exempt from sales tax but both are subject to use tax should the property be re-located to Maine. Consequently, the court's interpretation does not result in an unconstitutional interference with interstate commerce.

[5] 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 Section 1760 is ambiguous. In light of that ambiguity, the court looks 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).

Second, although Blue Yonder makes much of the fact that the court's interpretation renders Section 1760(23-C) applicable only to property sold in Maine, the assertion that that this discriminates against interstate commerce is unavailing. Under the court's interpretation of Section 1760(23-C), aircraft sold in Maine and immediately transported out of the Maine is exempt from Maine sales tax in the same way that property that is sold outside of Maine is exempt from Maine sales tax. Further, under that subsection, aircraft sold in Maine, transported out of Maine, and then returned to Maine for use substantial enough to require registration is subject to the Maine use tax in the same way that aircraft purchased out-of-state but brought into Maine for substantial use is subject to the Maine use tax. *See* 36 M.R.S. §§ 1861, 1862 & 1760(45)(B)(2004). As such, there is no disparate tax treatment of property sold in Maine and property sold outside of Maine.

Based upon the foregoing, the court concludes that Blue Yonder's constitutional challenge fails as a matter of law and, therefore, it is not entitled to summary judgment in its favor on Count III of the Petition.

V. 36 M.R.S. § 1760(45) (Count IV)

Count IV of the Petition alleges that Blue Yonder is exempt from taxation pursuant to 36 M.R.S. § 1760(45). Subsection 45, as it existed in 2004, provided:

> 45. CERTAIN PROPERTY PURCHASED OUTSIDE THE STATE. Sales of property purchased and used by the present owner outside the State:
>
> A. If the property is an automobile, as defined in Title 29-A, section 101, subsection 7, and if the owner was, at the time of purchase, a resident of the other state and either employed or registered to vote there;
>
> A-1. If the property is a watercraft or all-terrain vehicle that is registered outside the State by an owner who at the time of purchase was a resident of another state and the watercraft or all-terrain vehicle is present in the State not more than 30 days during the 12

> months following its purchase for a purpose other than temporary storage; or
>
> B. For more than 12 months in all other cases.
>
> For purposes of this subsection, "use" does not include storage, but means actual utilization of the property for a purpose consistent with its design. Property, other than automobiles, watercraft and all-terrain vehicles, that is required to be registered for use in this State does not qualify for exemption unless it was registered by its present owner outside this State more than 12 months prior to its registration in this State.

Id.

Blue Yonder asserts that, because it not only purchased the aircraft outside of Maine but also used it outside of Maine during the first 12 months of ownership, it is exempt from use tax under subsection 45(B). To this end, Blue Yonder argues that the express language of the statute does not require that the aircraft be used *solely* outside of Maine in order to be entitled to the exemption. In opposition, the Assessor contends that subsection 45(B) plainly requires that an aircraft must be used outside of Maine *exclusively* for the first twelve months after purchase in order to be exempt from taxation.

The context of subsection 45, and the exemption it provides for property purchased outside of Maine, makes clear that while watercraft, for example, will not be subject to a use tax if not used in Maine for more than 30 days during the first *12 months following purchase*, all other non-enumerated property, including aircraft, will be subject to taxation if used in Maine during the first 12 months following purchase. In other words, subsections 45(A) & (A-1) set the predicate from which the exemption in 45(B) for "all other cases" flows. As a result, the only reasonable interpretation of 45(B) is that it applies only to property purchased outside of Maine and used exclusively outside the State for the first 12 months following that purchase.

In light of the foregoing, the court concludes that Blue Yonder is not entitled to summary judgment in its favor on Count IV of the Petition.

VI. Abatement of Interest under 36 M.R.S. § 186 (Count V)

Count V of the Petition alleges that the Assessor's refusal to waive or abate interest on the assessment, pursuant to the authority granted the Assessor in 36 M.R.S. § 186 was "arbitrary and capricious, and/or constitutes an abuse of discretion.

Section 186 provides, in pertinent part:

> Any person who fails to pay any tax, other than a tax imposed pursuant to chapter 105, on or before the last date prescribed for payment is liable for interest on the tax, calculated from that date and compounded monthly. . . . If the failure to pay a tax when required is explained to the satisfaction of the assessor, the assessor may abate or waive the payment of all or any part of that interest.

Id.

Based on its assertion that it was exempt from paying use tax, Blue Yonder contends that it was error for the Assessor to refuse to abate interest. However, in light of the fact that the court has upheld the Assessment's determination that Blue Yonder is not exempt and the further fact that it has not been sufficiently demonstrated that the Assessor's denial of the request for an abatement of interest was an abuse of the discretion, the Assessor's refusal to abate interest was not erroneous. Accordingly, Blue Yonder is not entitled to summary judgment in its favor on Count V of the Petition.

DECISION

Based upon on this motion record and the material facts that are not disputed or controverted or that exist without substantial controversy, the court concludes that it would be appropriate to render summary judgment against the moving party on all counts of the Petition and enter judgment in favor of the Respondent. *See* M.R. Civ. P. 56(c).

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 in its favor on all counts of the Petition is DENIED;

B. Pursuant to M.R. Civ. P. 56(c), summary judgment is rendered against Respondent and Judgment is entered in favor of Respondent on all counts of the Petition.

Date: December 14, 2009

s/Thomas E. Humphrey
Chief Justice, Superior Court