10/22/03

ROYAL TRANSPORT, INC.	*	IN THE
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	*	MARYLAND TAX COURT
	*	
V.	*	
	*	
	*	
COMPTROLLER OF THE TREASURY	*	NOS. 02-SU-OO-0298 &
	*	02-SU-OO-0299
	*	

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MEMORANDUM OF GROUNDS FOR DECISION

Petitioner, Royal Transport, 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 memorandum and documents to be filed.

The assessments at issue emanate from actions taken by the Respondent against the Petitioner and Furnitureland South, Inc., 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 small commercial carrier, headquartered in North Carolina, conducting for-hire trucking operations in interstate and foreign commerce pursuant to a certificate of license issued by the Interstate Commerce Commission. Petitioner's primary customer during the period in question was Furnitureland South, Inc., (hereinafter "Furnitureland") a nationwide furniture retailer. Petitioner was hired as a common carrier to deliver Furnitureland's goods to customers nationwide, including Maryland. Furnitureland did not collect sales or use taxes on furniture it sold to out-of-state

customers when shipped form North Carolina by for-hire motor carriers such as Petitioner. Furnitureland was assessed for failure to collect the tax and due to its relationship with Furnitureland, Petitioner was deemed by the Respondent to have nexus with Maryland and also liable for sales and use tax.

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. As a result, the subject assessments were issued and Petitioner asserts both federal statutory violations and procedural defects exist to warrant dismissal.

Federal Statutory Violations Issue

First, Petitioner seeks dismissal on the grounds that a federal statute, the Interstate Commerce Act, expressly prohibits the Respondent from compelling the Petitioner to collect and remit sales and use tax. The statute at issue can be found in 49 U.S.C. §14501 (c), a 1995 amendment to the Airline Deregulation Act of 1978 (hereinafter "ADA"), which provides,

> **Motor Carriers of Property.** (1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of two or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier… or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

The term "motor carrier" is defined as " a person providing motor carrier transportation for compensation", 49 U.S.C. § 13102(13).

Petitioner contends that Maryland's tax statute compelling it to collect and remit tax during the course of delivery of property constitutes a "law related to a price, route, or service" of Petitioner "with respect to the transportation of property". Petitioner seeks broad construction of the "related to" language in the statute to establish that the collecting and remitting of sales/use taxes from a motor carrier's customers during the course of delivery falls within the parameters of the preemption

provision. Petitioner also asserts that the collection and remittance function the Respondent seeks to impose on a motor carrier constitutes significant additional "services" that it would have to perform.

Secondly, Petitioner contends that the Respondent has impinged upon its federal right to deliver property in the State without restriction as mandated by the Interstate Commerce Act and thus has violated Petitioner's civil rights. Petitioner seeks an award of damages, including its reasonable attorneys fees, pursuant to 42 U.S.C. § 1983 to compensate the motor carrier for the injury it has suffered as a result of the illegal enforcement of a state statute in violation of federal law.

Respondent counters that the ADA does not preempt Maryland sales and use tax law. First, he points to case law involving ERISA statutes that narrowly construes the "related to" language when it is applied to laws of general applicability, (i.e. sales tax laws). According to the Respondent, the tax collection law is one of general applicability to all vendors and Petitioner's increased burden, as a vendor, to collect the tax is not significant enough to justify preemption.

In addition, Respondent examines the legislative history of the ADA as support. Specifically, noting that other sections of the act place restrictions on the traditional authority of the state to tax, Respondent asserts that if Congress had intended to restrict sales tax it would have similarly placed that limitation in the act. Finally, Respondent directs us to language in the legislative report accompanying the subject ADA provision that states "nothing in this amendment is intended to change the application of State tax laws to motor carriers". *H.R. Conf. Rep. 103-677.*

As to the Petitioner's §1983 claim, Respondent contends that such actions 1) are beyond the limited jurisdiction of the Maryland Tax Court; 2) cannot be brought against a state official acting in his official capacity; 3) can only be addressed after all administrative remedies have been exhausted and 4) are not permissible in cases involving ADA violations.

The Interstate Commerce Act protects "motor carriers" by way of preemption from state laws or regulations that pertain to "a price, route or service" provided by the motor carrier. As previously noted, motor carrier is defined in the statue as "a person providing motor carrier transportation for compensation."

Respondent insists that Petitioner, due to its wholly owned subsidiary status, is not a motor carrier, but rather, upon delivering furniture within Maryland, becomes the agent or representative of

the vendor (Furnitureland) and thus, itself is a vendor under Maryland law. Assuming *arguendo* that an agency relationship existed (and this Court can only assume because no facts were offered upon which to make this conclusion)[1], the preemption provision is not limited to common carriers only. Motor carriers, as defined, as well as motor *private* carriers (emphasis added), are protected from State regulatory interference of their price, route or service provisions. As a for-hire carrier, charging for pickup delivery, and over-the road movement of Furnitureland's products for sale, Petitioner qualifies as a "motor carrier".[2]

The question then becomes whether the sales and use tax laws are "related to a price, route or service" of Petitioner's. While Respondent seeks a narrow reach of this language, we hesitate to utilize the rationale applied in the ERISA group of cases to interpret federal preemption of taxation laws in the transportation statutory regime. Indeed, the federal courts have broadly construed the statute as applied to laws of general applicability, *Morales v. TWA*, 504 U.S. 374 (1992), concluding that the narrow interpretation effectively nullifies the "related to" language.

Most recently, in *United Parcel Service, Inc., et al v. Flores-Galarza*, United States Court of Appeals for the First Circuit, Nos. 02-1621, 02-1792 (Slip Opinion 2003), the issue was whether a Commonwealth of Puerto Rico statute, prohibiting an interstate air carrier from delivering any package unless the carrier first provides proof that the package's addressee has paid the appropriate excise tax, or the carrier prepays the amount of tax on the addressee's behalf, was preempted by federal law. The Court stated,

> (T)he phrase "related to" has a broad meaning in ordinary usage: 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association or connection with.' Id. (quoting Black's Law Dictionary 1158 (5th ed. 1979). When used in a preemption provision such as § 41713[3], it has a similarly broad reach. State laws and regulations "having a connection with or reference to" an air carrier's prices,

[1] The Court of Appeals, in *Furnitureland South, Inc*., supra, at p. 130, provides factual guidance as to the relationship between the two entities: "Royal Transport, Inc. was established in 1991 as a long distance trucking company. Furnitureland provided Royal with initial financing and technical assistance. The two companies have never shared employees, officers, directors, or shareholders."

[2] There is no dispute that as to Petitioner's purchases or sales of its own tangible personal property in Maryland, if any, that Petitioner would be the vendor liable for collection and remittance of any tax due.

[3] This provision is virtually identical to § 14501, except for the substitution of "air carrier" for "motor carrier".

> routes or services are preempted under § 41713…(a) narrower interpretation would read the "related to" language out of the statute. Slip Opinion, p. 6.

In that one of the purposes of § 14501 was to place motor carriers on a level playing field with the deregulated air carrier industry,[4] then the broad construction applied to the air carrier preemption statute is equally applicable to the motor carrier preemption provision.

Next, the question becomes whether the imposition of the sales and use tax law relates to a "service" performed by the Petitioner in its delivery operations. The Court in *United Parcel Service, Inc.* supra at page 6, provides: "a sufficient nexus exists if the law expressly references the air carrier's prices, routes or services, or has a 'forbidden significant effect' upon the same, Id at 388" citing *Morales*.

It is clear that the sales and use tax law does not "expressly reference" a motor carrier's price, route or service. However, Petitioner lists 11 additional services that must be performed due to the Respondent's imposition of the tax collection and remittance obligation, which significantly expands its motor carrier function; that is, the delivery of property. The additional services are:

1. Determine whether any Maryland-Destined freight is on its truck;
2. If so, determine whether the shipper, Furnitureland, has collected any sales tax on that Maryland-destined furniture;
3. If so, determine whether the Maryland customer has paid all of the sales tax due in full;
4. Determine the selling price of the furniture – any unpaid tax will be a percentage of that price;
5. If not paid in full or at all, calculate the amount of use taxes due at the time of delivery, create a new invoice, and add that amount to the invoice to be presented to the Maryland consignee at delivery;
6. Instruct Royal drivers how to resolve the situation (in terms of modifying the tax invoice) should the Maryland customer refuse to accept a portion of the furniture at the time of delivery because of loss or damage, wrong pieces tendered, missing pieces, etc.;
7. Collect the sales/use taxes due at time of delivery;

8. Instruct Royal drivers how to resolve the situation should the Maryland resident not be prepared or willing to pay the sales/use tax due at time of delivery;

9. Record, take possession of, and keep safe the monies collected as use taxes at time of delivery;

10. Fill out Maryland tax reports and other forms in connection with the collection of the use tax; and

11. Account for and remit the taxes collected to the Maryland Comptroller and assume full responsibility for any deficiencies in the amounts remitted.

Petitioner's Motion to Dismiss, p. 8-9.

Respondent disputes that these extra services as being "significant", stating that Petitioner "performs many, if not all, these services in conjunction with its 'standard delivery'". Respondent's Memorandum of Law, p. 7. However, Respondent fails to convince this Court that most, if not all, of the 11 listed activities would not be required but for the tax-collection obligation sought to be imposed on Petitioner.

The issue of their significance is resolved by the undisputed testimony, by way of affidavit of Mr. Kenneth B. Hunt, President of Royal Transport, Inc. That affidavit, never questioned by the Respondent, presented evidence that these 11 tax-collection steps are not only expensive and burdensome to perform, but they "would materially delay, complicate, and hamper the process of Royal picking up and loading the furniture in North Carolina, initiating the transportation journey…delivering the furniture." Affidavit, Paragraph 8. The burden imposed caused Petitioner to discontinue delivery operations into Maryland, resulting in substantial financial losses. Affidavit, Paragraph 9.

We conclude that the Respondent's scheme has a significant effect on Petitioner's "prices, routes or services". The significance to the Petitioner, or any motor carrier, expands exponentially for each of the jurisdictions into which Petitioner delivers that may seek to adopt the Respondent's approach. To force each motor carrier (i.e. UPS, Federal Express, etc.) to be liable for collecting the sales taxes for the millions of sales transactions of its customers is beyond daunting and burdensome.

[4] See *H.R. Conf. Rep 103-677, p85*.

Respondent's reliance on legislative history must fail for two reasons. First, the application of the sales and use tax to motor carriers is the same as to any other purchaser/vendor in Maryland and has not been changed by the Respondent's scheme. As footnoted, there is no dispute that Petitioner is liable for sales and use taxes for tangible personal property it purchases and/or uses in Maryland. There has been no specific tax on motor carriers affected by preemption. Second, examining the overall purpose of the preemption statute leads us to conclude that the compelling of motor carriers to become tax collectors for each and every taxing jurisdiction in which it operates results in the chilling effect on the freight transportation industry that the preemption statutes were enacted to prevent.

Based on the above analysis, we find that the Interstate Commerce Act expressly prohibits the Respondent from compelling Petitioner to remit the sales and use tax on which the Respondent's assessment is based. Accordingly, the Motion to Dismiss the assessment on that basis is granted.

However, we agree with the Respondent in finding that an action under § 1983 is beyond the jurisdiction of this Court (an administrative body) and properly resides in the judicial courts.

Procedural Issue

Petitioner also filed a Second Motion to Dismiss based on the procedural defects asserted in similar Motions filed in the companion *Furnitureland South, Inc*. (M.T.C. Nos. 02-SU-OO-0305 and 0306) appeals before this Court. Even though those issues are moot as pertains to Petitioner due to the ruling above, we shall incorporate by reference the rationale and reasoning of the *Furnitureland* Motions decision (dismissing the first assessment) in the event the issue should return by action of an appellate Court.

Accordingly, for all of the above reasons, we shall pass an Order granting the Motion to Dismiss the assessment made by Respondent against Petitioner.