

## OHIO BOARD OF TAX APPEALS

Chrysler Financial Company L.L.C.,	)	
	)	
Appellants	)	CASE NO. 2001-T-36
	)	
vs.	)	(SALES AND USE TAX)
	)	
Thomas M. Zaino, Tax	)	DECISION AND ORDER
Commissioner of Ohio,	)	
	)	
Appellee.	)	Affirmed on Appeal Aug. 11, 2004

APPEARANCES: 102 Ohio St.3d 443, 2004-Ohio-3922

For the Appellant - Akerman, Sentrerfitt & Eidson, P.A.  
Peter O. Larsen  
David E. Otero  
50 North Laura Street  
Suite 2750  
Jacksonville, Florida 32202

For the Appellee - Betty D. Montgomery  
Attorney General of Ohio  
Janyce C. Katz  
Assistant Attorney General  
Taxation Section  
State Office Tower, 16th Floor  
30 East Broad Street  
Columbus, Ohio 43215-3248

Entered: January 3, 2003

Ms. Jackson and Ms. Margulies concur. Mr. Johnson dissents.

The Board of Tax Appeals considers this matter pursuant to a notice of appeal filed by Chrysler Financial Company, L.L.C. Chrysler appeals from a final determination of the Tax Commissioner, in which the commissioner denied Chrysler's refund claim. Chrysler had sought a refund of \$371,488.99 in sales and use tax claimed to have been reported during the period of January 1997 through December

1999 but which was later written off as bad debts. The commissioner determined that Chrysler was not the vendor or seller of the property for which the tax had been remitted but was the provider of financing. As such, the commissioner determined Chrysler did not qualify for a refund under the provisions of R.C. 5739.121 and Ohio Adm. Code 5703-9-44 (E).

Generally, Chrysler finances the sale of motor vehicles, mobile homes, and manufactured homes, along with the sale of other tangible personal property. Specific to the matter now before us is Chrysler's acquisition of installment loans from Ohio automotive dealers. When a consumer decides to purchase a motor vehicle from a dealer and wishes to finance the purchase over several years, the customer enters into an installment contract with the dealer. The dealer, as the creditor, agrees to finance the purchase over a specified period of time at an annual percentage rate charged on the amount financed. The financed amount includes the purchase price of the motor vehicle, fees, and the sales tax imposed upon the transaction, less any downpayment or credit for a vehicle offered in trade. Customers may also choose to finance the purchase of optional service contracts. (Appellant's Exhibit A.)

Following the sale and the execution of the installment agreement between the dealer and the customer, the dealer assigns its "entire right, title, and interest to [the installment] contract and authorizes Chrysler to do every act and thing necessary to collect and discharge obligations" arising from the contract without

recourse.<sup>1</sup> (Appellant's Exhibit A.) When the dealer assigns the contract to Chrysler, Chrysler will review the contract to determine if it meets agreed-upon terms. If so, Chrysler will accept the contract. Chrysler pays the dealer all amounts due on the contract, including the sales tax. The dealer then remits the full amount of tax due on the purchase of the vehicle.<sup>2</sup> The customer makes his or her installment payments to Chrysler.

Some purchasers fail to make their periodic payments and default on the contract. In such cases, Chrysler attempts to repossess the motor vehicle and resell it at auction, the proceeds of which are applied to the delinquent accounts. This action is often insufficient to pay the entire balance. In other cases, repossession is not possible and the accounts remain unpaid.

Chrysler attempts to collect on the balance for at least six months. If unable to collect, Chrysler writes off of its books the unpaid balances as uncollectible debts for federal income tax purposes. In the matter before us, Chrysler has written off the balances of accounts it claims to be uncollectible. Chrysler subsequently filed a claim for refund seeking reimbursement of Ohio sales and use tax proportional to the unpaid

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<sup>1</sup> We note that the commissioner attempted to introduce through his post-hearing brief additional evidence, which purported to impeach Chrysler's representations that all the contracts at issue were non-recourse. As we stated in an order considering Chrysler's motion to strike, materials presented for purposes of impeaching Chrysler's evidence, including that offered through the testimony of witnesses, should have been brought to our attention during the evidentiary hearing and not through extrinsic evidence offered through a post-hearing brief. *Chrysler Financial Co. v. Zaino* (Interim Order, Sept. 6, 2002), BTA No. 2001-T-36, unreported. We further find that the commissioner was unable to impeach Chrysler's testimonial and corroborating evidence at the hearing. Thus, we find Chrysler's evidence that all the contracts in issue were non-recourse to be sufficient, competent, and persuasive.

<sup>2</sup> The dealer must collect and remit the entire amount of the tax at the time of the transaction, the dealer's agreement to accept installment payments notwithstanding. R.C. 5739.02; Ohio Adm. Code 5703-9-19.

balances on the debts written off its books. The commissioner denied the claim, finding (a) that Chrysler was not a “vendor” for purposes of qualifying for the refund and (b) that the uncollectible accounts in issue were expressly excluded from the bad debt deduction. Chrysler asserts before this board that it is a vendor for purposes of the deduction and that the accounts were not excludable as being transferred to a third party for collection.

In reviewing Chrysler’s specifications of error, we observe that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish by competent and probative evidence a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner’s determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Additionally, all sales of tangible personal property within Ohio are presumed to be subject to tax until shown otherwise. We emphasize that exceptions and exemptions to taxation are to be strictly construed in favor of taxation, and the burden rests with the taxpayer to affirmatively establish its right thereto. *National Tube Co. v. Glander* (1945), 157 Ohio St. 407. See, also, *Frankelite Co. v. Lindley* (1986), 28 Ohio St.3d 29.

R.C. 5739.121 provides:

“As used in this section, ‘bad debt’ means any debt that has become worthless or uncollectible in the time period between a *vendor’s* preceding return and the present return, have been uncollected for at least six months, and that may be claimed as a deduction pursuant to the ‘Internal Revenue Code of 1954,’ 68A Stat. 50, 26 U.S.C. 166, as amended, and regulations adopted pursuant thereto, or that could be claimed as such a deduction if the *vendor* kept accounts on an accrual basis. ‘Bad debt’ does not include any interest or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the *vendor* until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or for any portion of the debt recovered, any accounts receivable that have been sold to a third party for collection, and repossessed property.

“In computing taxable receipts for purposes of this chapter, a *vendor* may deduct the amount of bad debts, as defined in this section. The amount deducted must be charged off as uncollectible on the books of the *vendor*. A deduction may be claimed only with respect to bad debts on which the taxes pursuant to sections 5739.10 and 5739.12 of the Revised Code were paid in a preceding tax period. If the *vendor’s* business consists of taxable and nontaxable transactions, the deduction shall equal the full amount of the debt if the debt is documented as a taxable transaction in the *vendor’s* records. \*\*\*” (Emphasis added.)

Chrysler first argues that it is a “vendor” for purposes of R.C. 5739.121.

R.C. 5739.01(C) defines a “vendor” as “the person providing the service or by whom the transfer effected or license given by a sale is or is to be made or given \*\*\*.”

Chrysler emphasizes that the statute defines a vendor as a “person.” Chrysler argues that an assignee is included in the definition of a “person”<sup>3</sup> and maintains that, as the

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<sup>3</sup> R.C. 5739.01(A) defines “person” to include “individuals, receivers, *assignees*, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, the state and its political subdivisions, and combinations of individuals of any form.” (Emphasis added.)

assignee of the subject installment contracts, it is a vendor for purposes of R.C. 5739.121. We disagree.

Although an assignee is included in the definition of a person, the definition of “vendor” requires more than merely being a person. A vendor is the person who effects a sale. A sale is defined as a transaction by which “title or possession, or both of tangible personal property, is or is to be transferred.” R.C. 5739.01(B)(1). By definition, Chrysler was not the person who effected the sale of the motor vehicles that gave rise to the uncollectible debts at issue.

This definition is further borne out by Ohio Adm. Code 5703-9-44, which amplifies R.C. 5739.121. Ohio Adm. Code 5703-9-44(A) defines a “bad debt” as “any debt or account receivable *arising from the sale of tangible personal property by the vendor* upon which sales tax has been reported and paid in a prior reporting period which has become worthless or uncollectible \*\*\*.” (Emphasis added.) An administrative rule adopted pursuant to statutory authority has the force of law, unless the rule is unreasonable or in clear conflict with statutes governing the same subject matter. *State ex rel. Gallon & Takacs Co., L.P.A. v. Conrad* (1997), 123 Ohio App.3d 554. Moreover, words appearing in an administrative regulation are to be given their plain and ordinary meaning. *Guanzon v. State Med. Bd. of Ohio* (1997), 123 Ohio App.3d 489; *State ex rel. Weich Roofing, Inc. v. Indus. Comm.* (1990), 69 Ohio App.3d 281. We find Ohio Adm. Code 5703-9-44(A) to be in conformity with R.C. 5739.121.

By its terms, the code limits the bad debt deduction to the vendor that has made the sale that gave rise to the uncollectible debt.<sup>4</sup>

Nor do we accept Chrysler's argument that it has effectively "stepped into the shoes" of the dealers. Under Ohio law, the dealers who sold the motor vehicles in this instance had the duty to collect the sales tax at the same time the price was paid, i.e., at the time possession of the motor vehicle was delivered to the customer. R.C. 5739.03(A). R.C. 5739.12 then requires the vendor to remit the sales tax collected to the state at the time the dealer files its sales tax returns. Here the dealers, not Chrysler, held the vendors' licenses under which the subject sales were made. As a result of the motor vehicle sales, the dealer collected, held, and remitted the sales tax in trust for the state. *Lawrence v. Lindley* (1981), 65 Ohio St.2d 105; *Hamer v. Limbach* (Jan. 11, 1991), BTA No. 1989-F-1178, unreported. Chrysler had no obligation to either collect or remit the tax and, in fact, did not for any of the subject transactions.

Upon remittance, the dealers discharged their obligation as to the sales tax. Although the dealers assigned their "entire right, title, and interest \*\* to collect and discharge obligations" under the installment contracts, there is no evidence that the dealers assigned the right to apply a bad debt deduction; none existed at the time of assignment.

Additionally, the dealer, as the vendor who collected the tax, became personally liable for any failure to either file the appropriate sales tax returns or to

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<sup>4</sup> We also recognize that only a licensed dealer or a salesperson licensed in the employ of a licensed dealer may sell motor vehicles. R.C. 4517.20. There is no evidence in the record to establish that Chrysler is a licensed motor vehicle dealer.

remit the tax. R.C. 5739.12 and 5739.13. The vendor cannot contractually assign its responsibility to collect and remit the sales tax to another. *Jacobson Home Furnishings, Inc. v. Limbach* (Dec. 22, 1989), BTA No. 1988-H-168, unreported. Cf. *Mull v. Tracy* (Aug. 25, 1995), BTA No. 1994-H-967, unreported; *HRP Auto Centers, Inc. v. Tracy* (May 5, 1995), BTA No. 1993-J-989, unreported; *Wrestler v. Limbach* (Dec. 22, 1989), BTA No. 1987-A-255, unreported. Moreover, in situations where a refund has been sought for tax erroneously paid, it has been held that the party who remits the tax is the proper party to be reimbursed for the erroneous payment. *Giorgi Interior Systems, Inc. v. Limbach* (June 28, 1991), BTA No. 1987-G-276, unreported. Cf. *Stines v. Limbach* (1988), 61 Ohio App.3d 461 (On application for refund from the buyer, the commissioner should refund erroneously paid tax to the seller, who, in turn, should pay the refund to the buyer.) Again, Chrysler did not remit the tax in the transactions before us, nor would Chrysler be held liable for the failure of the dealer to meet its obligation to remit. Chrysler was not a party to the sale of the motor vehicle. It was a party to subsequent transactions in which it was assigned the right to collect on the installment contract.

Upon review, we must agree with the commissioner that, in this instance, Chrysler was not a vendor eligible to receive the bad debt reduction under R.C. 5739.121. In reaching this conclusion, we acknowledge that this is an issue of first impression in Ohio. We note that both parties have referred us to the decisions of foreign tribunals that have addressed similar questions. We find that our determination not only is consistent with the statutory provisions of the Ohio Revised Code but is

also in conformity with the majority of states who have determined that a person who has been assigned the right to collect on an installment contract is not the proper party to receive any refund or deduction arising from an uncollectible debt. See, e.g., *Chrysler Financial Co., LLC v. State Tax Assessor of Maine* (June 13, 2002), Sup. Ct. No. AP-00-41; *Dept. of Revenue v. Bank of America, N.A., et al.* (Fl. 2000), 752 So.2d 637; *In the Matter of the Petition of Gen. Elec. Capital Corp.* (Dec. 27, 2001), DTA No. 816785, State of New York Tax Appeals Tribunal, unreported; *Chesapeake Indus. Leasing Co., Inc. v. Comptroller of the Treasury* (Md. 1993), 331 Md. 428; 628 A.2d 234; and, *Suntrust Bank v. Johnson* (Tenn. 2000), 46 S.W.3d 216. But, see, *Puget Sound Natl. Bank v. Department of Revenue* (Wa. 1994), 868 P.2d 127, and *Chrysler Financial Co. v. Indiana Dept., of State Revenue* (In. 2002), 761 N.E. 2d 909, in which the tribunals of those states found the bad debt deduction assignable under their respective statutes.

Based upon the foregoing, we need not address Chrysler's other assignment of error, that the commissioner erred in finding the uncollectible accounts assigned to Chrysler to be expressly excluded from R.C. 5739.121's definition of "bad debt."

In summary we find that Chrysler has failed to prove by competent and probative evidence that the commissioner's denial of its refund claim is in error. We further find that, upon review, the commissioner's determination is supported by a preponderance of the record and is in accordance with law. Based upon all of the foregoing, the Board of Tax Appeals determines and orders that the final determination of the Tax Commissioner must be, and the same hereby is, affirmed.

Mr. Johnson dissents.

I respectfully and reluctantly dissent from the foregoing decision, which denies Chrysler the right to take the bad debt deduction derived from defaulted installment loans assigned by Ohio automobile dealers. It is my opinion that Chrysler is entitled to the deduction as a matter of law, and the legislative purpose in the enactment of the bad debt deduction is fulfilled. The economic loss from the debtors' default in completing the installment loan is ameliorated by the deduction of sales tax paid at the time of sale. By virtue of the assignment of the installment loan contract without recourse to Chrysler, it has assumed from the dealer the risk of loss and should therefore be entitled to the deduction for the bad debt to which the dealer would otherwise be entitled. Chrysler is a licensed vendor that remits sales upon lease transactions and other sales made in Ohio.

R.C. Chapter 5739: Sales Tax, relates to the same subject matter and its provisions must be construed together, and should be reconciled or harmonized to accomplish the manifest purpose of the enactment. *Trotwood Trailers, Inc. v. Evatt* (1943), 142 Ohio St. 197; *Wren Paper Co. v. Glander* 1952), 156 Ohio St. 583, 591. A vendor is a "person" as defined in R.C. 5739.01(C). R.C. 5739.01(A), which defines "person," was amended in Am.Sub.S.B. 376, 128 Ohio Laws 423, effective July 1, 1959, to its current form to include "assignees." The deduction for bad debts authorized by R.C. 5739.121 was enacted in Am.Sub.S.B. 16, 138 Ohio Laws, effective July 1, 1980. In enacting a statute, the General Assembly is presumed to

have legislated with full knowledge and in light of statutory provisions concerning the subject matter of the act.

The Tax Commissioner's contention that, in the application of the deduction for bad debts, the term "vendor" must be limited in this instance to the seller of the automobile, actually begs the question which we must decide in this appeal. The issue is whether the tax laws, the common or other statutory law limit the rights the assignee receives under a general assignment without recourse of an installment loan by the vendor who originated the loan.

As a general rule, Ohio law establishes that any contract may be assigned in the absence of an express statutory prohibition, or where the terms of the contract express the parties' intent that the contract is not assignable, or where something in the public policy of the law necessitates a limitation on such an assignment. See *Edgar v. Haines* (1926), 109 Ohio St. 159, 163. See, also, Restatement of Contracts § 151. An assignee is said to stand in the shoes of the assignor and succeed to all the rights and remedies of the assignor. R.C. 5739.121 does not expressly preclude the assignment of the sales tax deduction. The deduction is available to any "vendor" who qualifies under the terms of the statute. R.C. 5739.01(C) defines a vendor as a "person." The term, "person" is defined to include an "assignee." without any limitation. R.C. 5739.01(A). Thus, in construing these provisions in pari materia, as we should, I conclude that Chrysler is a vendor eligible to receive the bad debt deduction.

In terms of public policy, I can find nothing that prohibits the assignment of the sales tax deduction for bad debts. In enacting R.C. 5739.121, the General

Assembly determined that the economic loss should be shared with the state and announced its readiness to give vendors an opportunity to deduct certain bad debts when computing taxable receipts. There is no question that, in the absence of the assignments to Chrysler, the dealers would have been entitled to the deduction, provided the other statutory provisions were met. The state should continue to follow its expressed policy of sharing this economic loss. It should not now recognize a windfall in tax revenue simply because the loan contracts were assigned.

This is a matter of first impression, and the majority has made reference to decisions in other jurisdictions that support their view. Many of these decisions are decided on very narrow grounds in the construction of the particular statutes involved. None of the contrary decisions sufficiently address the economic realities of the transaction in which the installment loan is in default and the assignee alone suffers the loss, while the state has been enriched by the sales tax revenue collected at the outset of the transaction. We have been cited to two decisions, one from our neighboring state of Indiana, which involve similar statutes that have allowed the benefit of the deduction for bad debts by an assignee. The Indiana Tax Court, in an appeal in which Chrysler was the party, held that the common law of assignment should be followed and found nothing in the Indiana bad debt statute to prevent assignment of the bad debt deduction. *Chrysler Financial Co. v. Indiana Dept. of State Revenue* (2002), 761 N.E.2d 909. The Supreme Court of Washington in *Puget Sound National Bank v. Dept. of Revenue* (1994), 868 P.2d 127, held that a bank's status as assignee entitled it to the sellers' rights, including the right to a sales tax refund. The bank had purchased

installment contracts on a non-recourse basis from automobile dealers who sold automobiles to retail buyers. The court found no public policy prohibition, and saw an important policy reason to permit assignment of a sales tax refund to ensure that commercial paper continues to travel freely in the market place.

It is my opinion that Chrysler, as assignee, should be able to take the deduction provided it has otherwise satisfied the requirements of R.C. 5739.121, which presumably it has. I would therefore reverse the final determination and remand this matter to the commissioner for further consideration of Chrysler's claim.

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