



COMMONWEALTH of VIRGINIA

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The Honorable Lynwood W. Lewis, Jr.
Member, House of Delegates
Post Office Box 760
Accomac, Virginia 23301

Dear Delegate Lewis:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire whether the Commonwealth's sales tax may be imposed on a fee a tire merchant charges for used tire disposal as part of a transaction involving the purchase and installation of new tires. You also ask what constitutes a "connection" between the sale and the service that would permit such a tax to be imposed.

Response

It is my opinion that, when the true object of a transaction is the acquisition of a good and the service provided is incidental to that purchase, there is a connection between the sale and service that allows the imposition of the sales tax on the service, so that the tire disposal fee the tire merchant charges to a customer as part of a transaction for the sale of new automotive tires is subject to the retail sales and use tax.

Background

You describe a transaction in which a tire merchant sells new automotive tires to a customer and installs those new tires on the customer's vehicle. The merchant lists separately on the sales invoice a \$2.50 fee identified as "tire disposal labor" for disposal of used tires removed from the customer's vehicle. This fee covers the expense of transporting the used tires to a landfill and the charge imposed at the landfill. The customer is not required to use this service and, if the customer does not leave the used tires with the merchant for disposal, the merchant does not charge the fee. You indicate that your inquiry arises from a 1994 Ruling of the Tax Commissioner¹ that found that the fee for disposing used tires is subject to the tax when the disposal service is provided in conjunction with the sale of new tires while the provision of a tire disposal service without the sale of tangible property remains exempt.

¹ Tax Comm'r Ruling 94-241 (1994).

Applicable Law and Discussion

Section 58.1-603 of the *Code of Virginia* imposes a sales tax “upon every person engaged in the business of selling at retail or distributing tangible personal property in the Commonwealth” in an amount equal to 4% of “the gross sales price of each item or article of tangible personal property when sold at retail or distributed in this Commonwealth.” Section 58.1-602 defines “sales price” as “the total amount for which tangible personal property or services are sold, including any services that are a part of the sale[.]”

In implementing these provisions, the Tax Commissioner, who is charged with “the administration of the tax laws of Commonwealth,”² has promulgated a regulation concerning the taxation of transactions that include services. It provides that “[c]harges for services generally are exempt from the retail sales and use tax.³ However, services provided in connection with sales of tangible personal property are taxable.” To resolve whether such a connection exists, the regulation further sets forth a “true-object test” to be used “to determine whether a particular transaction which involves both the rendering of a service and the provision of tangible personal property constitutes an exempt service or a taxable retail sale”⁴

The test establishes that

If the object of the transaction is to secure a service and the tangible personal property which is transferred to the customer is not critical to the transaction, then the transaction may constitute an exempt service. However, if the object of the transaction is to secure the property it produces, then the entire charge, including the charge for any services provided, is taxable.^[5]

The Supreme Court of Virginia has adopted and applied this “true object” test. In *WTAR Radio-TV Corp. v. Commonwealth*, the Court rejected the taxpayer’s contention that the use of broadcasting equipment by station personnel to produce broadcast advertisements purchased by customers was a non-taxable service.⁶ The Court instead determined that the tax exemption was not available, because “the parties purchasing commercial advertisements from WTAR were more interested in the final product than the service that produced it[.]” so that “the true object of the buyer of the advertisement was not the service per se, but the end product produced by the service.”⁷ Additionally, in *LZM, Inc. v. Dep’t of Taxation*, the Court ruled that a waste pumping service for portable toilets was incidental to the leasing of the toilets and, therefore, taxable.⁸ The Court reached this conclusion because the service was not separate from the leasing transaction. It was billed simultaneously, and the toilets themselves would not work without the service.⁹ Further, there was nothing in the record to suggest that LZM offered waste

² VA. CODE ANN. § 58.1-202 (Supp. 2011).

³ 23 VA. ADMIN. CODE § 10-210-4040(A).

⁴ 23 VA. ADMIN. CODE § 10-210-4040(D).

⁵ *Id.*

⁶ *WTAR Radio-TV Corp. v. Commonwealth*, 217 Va. 877, 884, 234 S.E.2d 245, 249 (1977).

⁷ *Id.* at 883-84, 234 S.E.2d at 248-49

⁸ *LZM, Inc. v. Dep’t of Taxation*, 269 Va. 105, 606 S.E.2d 797 (2005).

⁹ *Id.* at 112-13, 606 S.E.2d at 801 (noting that the manner of computing the service fee or the manner of accounting for it is not dispositive).

pumping services apart from its leasing transactions, suggesting that the pumping service existed incidental to the true object of the transaction.¹⁰

In response to your first inquiry regarding what constitutes a “connection,” therefore, I conclude that a connection resulting in a taxable service exists when the service is incidental to a transaction whose dominant purpose is procuring a product.

You also ask whether the tax assessment in the scenario you present is an improper imposition of the sales tax. I first note that there is a statutory presumption that the assessment of a tax is *prima facie* correct¹¹ and that the Constitution of Virginia provides that any exemptions of property from taxation are to be strictly construed against the taxpayer and in favor of the Commonwealth.¹² Furthermore, taxation is the rule and not the exception, and when a tax statute is susceptible to two constructions, one granting an exemption and the other denying it, then the latter construction is to be adopted.¹³

As you note, the Tax Commissioner previously has addressed the issue of tire disposal fees. He determined that

The service alone is often of little value to the customer without the provision of the tangible personal property sold, i.e. tires. . .The department has historically taken this position on similar “service” transactions that take place in connection with the sale of tangible personal property, such as alteration charges, gift wrap charges, charges for scotchguarding furniture, charges for dismantling leased equipment, and charges for the firing of greenware. For these reasons, I find the waste tire disposal fee made in conjunction with the sale of tangible personal property to be taxable, whether separately stated or not. Likewise, waste tire disposal fees without the provision of tangible personal property would be exempt.¹⁴

The Commissioner’s analysis accords with the Virginia Supreme Court’s holdings. The disposal of used tires is analogous to the waste pumping service in *LZM*. Absent facts to the contrary, the tire merchant does not appear to offer a tire disposal service independent of a sale of new tires. While the operation of the new tires is not dependent on the service, as the toilets were dependent on the pumping service, no disposal service is needed but for the installation of the newly purchased tires. I therefore conclude that the disposal service is only incidental to the customer’s true object of the purchase and installation of new tires and, thus, the cost of the entire transaction, including the tire disposal fee, is taxable.

As a final matter, I note that the Commissioner’s Ruling was issued in 1994 and that *WTAR*, the case adopting the “true-object” test, was decided in 1977. Because the General Assembly is presumed to be aware of the interpretation of its enactments by state agencies and the courts, the legislature is deemed to have acquiesced in that interpretation when it fails to take legislative action to modify the enactment.¹⁵ Given the years that have elapsed since those decisions were rendered and the absence of any action by

¹⁰ *Id.*

¹¹ VA. CODE ANN. § 58.1-205 (Supp. 2011).

¹² VA. CONST. art. X, § 6(f); *see also* Dep’t of Taxation v. Wellmore Coal Corp., 228 Va. 149, 153-54, 320 S.E.2d 509, 511 (1984) (exemptions are construed strictly against the taxpayer).

¹³ *WTAR*, 217 Va. at 879, 234 S.E.2d at 247; *Wellmore Coal*, 228 Va. at 153, 320 S.E.2d at 511.

¹⁴ Tax Comm’r Ruling 94-241 (1994).

¹⁵ *See* 2010 Op. Va. Att’y Gen. 7, 10 n.13 and citations therein.

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the General Assembly evincing disagreement with the taxation of services connected with a sale whose true object is the acquisition of tangible personal property, I conclude that the General Assembly has deemed that such taxation is permissible under Virginia law.

In sum, when a transaction involves both the sale of tangible personal property and the rendering of a service, the true object of the transaction must be examined to determine whether it is subject to the retail sales and use tax as a sale of tangible personal property or is exempt from taxation as a sale of services.

Conclusion

Accordingly, it is my opinion that, when the true object of a transaction is the acquisition of a good and the service provided is incidental to that purchase, there is a connection between the sale and service that allows the imposition of the sales tax on the service, so that the tire disposal fee the tire merchant charges to a customer as part of a transaction for the sale of new automotive tires is subject to the retail sales and use tax.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
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