Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2012-000200 06/16/2014

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

ROD ROBERTSON ENTERPRISES INC

MICHAEL G GALLOWAY

v.

ARIZONA STATE DEPARTMENT OF REVENUE

SCOT G TEASDALE

DAVID F BARTON

UNDER ADVISEMENT RULING

Following oral argument on April 28, 2014, the Court took Plaintiffs' Consolidated Motion for Partial Summary Judgment and Defendant's Cross-Motion for Summary Judgment under advisement. Upon further consideration, the Court finds as follows.

Before addressing the competing summary judgment motions,

IT IS ORDERED denying Plaintiff's Motion to Strike Certain Affidavit Statements by Defendant's Counsel and Alternative Motion to Disqualify Defendant's Counsel, filed April 21, 2014.

The Court now turns to the arguments in the summary judgment motions.

The statute as currently in effect reads in relevant part, "'Sale' means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatever, including consignment transactions and auctions, of tangible personal property or other activities taxable under this chapter, for a consideration." A.R.S. § 42-5001(13).[1] A "retailer" is defined as one who is in "the business of selling personal property at

[1] This will become subsection 14 when the 2014 amendments to this statute take effect.

retail." A.R.S. § 42-5001(12).[2] A retailer's tax base is defined as the "gross proceeds of sales or gross income derived from the business," with several specified exceptions. A.R.S. § 42-5061(A).

Fundamental to the Supreme Court's holdings in *State Tax Comm. v. Martin*, 57 Ariz. 283 (1941), and *O'Neil v. United Producers & Consumers Co-op*, 57 Ariz. 295 (1941), is that a consignment transaction is a sale by the consignor because title never passes from the consignor to the consignee, but from the consignor directly to the purchaser. The consignment nature of the transaction is, under the reasoning of these cases, immaterial to the transfer of title and therefore to the sale. *Martin*, *supra* at 292-93. In 1941, and for decades thereafter, there was no statutory language specifically addressing the taxation of consignment and auction sales. In 1984, as quoted above, the legislature added such language. The Court can only conclude that, by adding that language, the legislature intended to make consignment transactions and auctions sales and persons who conduct retail consignment transactions or auctions retailers conducting a sale. This conclusion is reinforced by the expansive language of § 42-5001(12), which allows the Department to treat as retailers those who serve "as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, whether in making sales on their own behalf or on behalf of the dealers, distributors, supervisors or employers." Thus, while the reasoning of the 1941 cases remains valid, their legal consequence has changed because the law has changed. That neither *Martin* nor *O'Neil* has been formally overruled strikes the Court as unimportant, simply because neither has been cited on this point in any other Arizona published opinion since 1950, long before the change in the statute.[3]

In a certain sense, Plaintiff is an agent of CBP: it was hired by CBP to perform a service that CBP could presumably have performed itself. However, that is not sufficient to extend to Plaintiff the federal government's immunity from state taxation. The governing case is *U.S. v. New Mexico*, 455 U.S. 720 (1982), in which the United States Supreme Court held that "the limits on the immunity doctrine are … as significant as the rule itself. Thus, immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy…. Similarly, immunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government." *Id.* at 734. Rather, immunity is limited to those situations where "the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar

[2] This will become subsection 13 when the 2014 amendments to this statute take effect.
[3] An unrelated holding in *O'Neil* has been cited on several occasions since then, most recently in *Construction Developers, Inc. v. City of Phoenix*, 194 Ariz. 165, 168 ¶ 20 (App. 1998). *Martin* turns up in an opinion from the District of Montana as an example of law superseded by the Uniform Commercial Code; its criticism carries no weight in this case. *Newhall v. Haines*, 10 B.R. 1019, 1021 (D.Mont. 1981).

as the activity being taxed is concerned…. Thus, a finding of constitutional tax immunity requires something more than the invocation of traditional agency notions: to resist the State's taxing power, a private taxpayer must actually stand in the Government's shoes." *Id.* at 734-35 (internal quotation marks omitted). This opinion specifically rejects Plaintiff's "congruence" argument that it and CBP share an interest in maximizing profits which precludes the State from reducing them by imposing a tax: apart from the lack of true congruence in the parties' interests – Plaintiff is interested in maximizing profits, but the federal government's interest is more accurately characterized as depriving criminals of the instrumentalities and fruits of their crimes – "immunity may not be conferred simply because the tax has an effect on the United States." *Id.* More broadly, Plaintiff's services to CBP as an auctioneer can readily be separated from the activities of CBP itself. That CBP dictates the terms of the service Plaintiff performs for it is unremarkable. Were it to hire a painter for its headquarters building, the painter would not be allowed to work without its permission, and it would be able to specify which walls were to be painted and in what color. These constraints, however, would not turn the painter into an instrumentality of the United States government. No more do the constraints here turn Plaintiff into one. That Congress has by statute required that seized vehicles be disposed of does not change the analysis: what controls is the character of the party hired and the nature of the service it performs, not the obligatoriness of the service.

The Court does not believe that the Department has adequately shown the volume of non-CBP (other than Pima County) sales during the audit period. Even assuming that the later sales referred to on Plaintiff's website can be extrapolated back, there is no stated basis for the auditor's estimate of their volume. Mr. Robertson states in his affidavit that such sales were de minimis; while this may not be enough to overcome the presumption of correctness at trial, it is sufficient at the summary judgment stage.

The Court believes that penalties for late filing and negligence are clearly appropriate: Plaintiff concededly did not file in a timely manner, and the Court finds sufficient evidence in the record that it was negligent or had reasonable cause for not doing so. Whether its asserted belief that records could not be turned over to the Department was, in whole or in part, held in good faith remains a fact question to be determined later.

Therefore, the Court denies Plaintiff's motion in its entirety. It grants the Department's Cross-Motion with respect to CBP and Pima County sales, with the appropriate penalties for late filing and negligence, and denies the remainder. Plaintiff will be credited with any payments made to Pima County and turned over to the Department.