

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
HOFFMAN CAR WASH, INC. : DECISION
for Revision of a Determination or for Refund of : DTA NO. 820681
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period December 1, 2000 through :
August 31, 2003. :
:

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on December 20, 2007 in the matter of the petition of Hoffman Car Wash, Inc. Petitioner appeared by Hodgson Russ LLP (Mark S. Klein, Esq., and Timothy P. Noonan, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (James Della Porta, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition and the Division of Taxation filed a reply brief. Oral argument, at the request of the Division of Taxation, was held on June 11, 2008 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether Hoffman Car Wash, Inc.'s receipts from the sale of car washes at its in-bay automatic car wash facilities are exempt from the imposition of sales tax under Tax Law § 1115 former (t).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Hoffman Car Wash, Inc., began doing business in New York as a stand-alone car wash facility. The company was started by the parents of the current CEO of petitioner, Thomas J. Hoffman, Jr. Since 1965, petitioner has added car washes in and around the Albany, New York, area every few years. Currently, petitioner operates 18 car wash facilities and employs approximately 550 people.

Petitioner provides four types of car wash services at its facilities. One type of car wash service provided by petitioner is described as a “full service wash.” Here, the customer exits the vehicle and petitioner’s employees vacuum it, take it through a conveyORIZED wash process, and dry the vehicle at the end of the process. All this occurs while the customer is out of the vehicle and in petitioner’s waiting area. Payment is made to a cashier inside the facility, and the hours of operation for this service are generally 8:00 A.M. to 8:00 P.M. During busy periods in the wintertime, petitioner has as many as 45 employees servicing its customers’ cars. For this service, customers do not wash their vehicles by means exclusively of coin-operated equipment, and petitioner’s employees do provide assistance.

Another type of car wash service provided by petitioner is referred to as an “exterior conveyor” wash. In this situation, the customer drives the vehicle onto a conveyor and it proceeds automatically through the wash process. Petitioner’s employees are present to greet the customer, advise on different wash services, accept payment, and prewash the vehicle prior to the

conveyor process. For this service, customers do not wash their vehicles by means exclusively of coin-operated equipment, and petitioner's employees do assist in the wash process.

A third type of car wash service provided by petitioner is described as a "self-service wand" facility. At the wand wash facility, a customer pulls up to a coin selection box, exits the vehicle, and selects the type of wash from a variety of different categories, including high pressure soap, foam brush, bug remover, wheel-scrubbing brush, etc. Following the selection, the customer inserts coins into a coin box, which initiates the wash process. The customer takes the "wand" out of the holster, aims it at the car, and presses a button to deliver the pressurized hot, soapy water through the hose and out a nozzle. Customers have the option to purchase additional time to wash and rinse their vehicle. This type of facility operates 24 hours a day, 7 days a week, 365 days a year, and customers serve themselves. At these facilities, petitioner's customers wash their vehicles by means exclusively of coin-operated equipment, and neither petitioner nor any of its employees provides assistance.

The final type of car wash service is that which is at issue in this matter, described variously as "self-service in-bay automatic," "laser wash," "touch-free automatic" and "roll-over." For purposes of clarity and consistency, this type of car wash service will be referred to as "in-bay" washes.

At the in-bay wash facilities, the customer pulls the vehicle up to a coin selection box, rolls down the window and selects from three different wash categories: wash package, deluxe wash package and a works package. The "deluxe" and "works" packages include undercarriage cleaning, and the "works" also includes the polish wax. Following the selection, the customer inserts coins into a coin box, which initiates the wash process, and the customer is directed to move forward into the bay by lighted signs. If the customer has selected the deluxe or works

package, he needs to drive slowly through the first part of the in-bay wash process in order to thoroughly wash the undercarriage of the vehicle.

After the customer pays for service, he has approximately two minutes to move his vehicle inside the wash bay. If the customer does not move the vehicle forward, the automatic wash process will not activate. Sensors and a set of directional lights guide the driver of the vehicle to the precise location in the bay where the car is washed. If the customer pulls the car too far into the bay, the wash process will not begin or continue. The bay doors automatically close after the car enters the bay. The car wash process automatically starts after the vehicle is in the correct location within the bay. A set of ultrasonic sensors detects the size and location of the car for purposes of directing the car wash equipment. This process saves energy and water because the overhead car wash equipment is directed only to the area covered by the car. A third set of proximity sensors ensure that the car wash equipment remains a certain distance from the vehicle during the wash process. Should the equipment come into contact with the vehicle, the automated car wash process will cease. The doors automatically open after the car wash process is completed. The in-bay car wash facilities operate 24 hours a day, 7 days a week, 365 days a year, and customers serve themselves.

Petitioner assumes liability for vehicles damaged by petitioner's equipment during the in-bay automatic car wash process. It does not assume liability for damage to vehicles caused by a customer using the self-service wand equipment.

On January 14, 2004 and April 20, 2004, petitioner, by Carole M. Hoffman, vice-president, executed two consents extending the period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law, which collectively extended the period of limitations for assessment for the period December 1, 2000 through August 31, 2001 to September 20, 2004.

Following an audit, the Division of Taxation (“Division”) issued to petitioner a Notice of Determination, dated September 20, 2004, asserting sales tax due in the amount of \$108,097.88, plus penalty and interest. The amount due is based upon petitioner’s failure to collect sales tax on its receipts from the in-bay car wash services, which it believed were exempt from tax. At the Bureau of Conciliation and Mediation Services (BCMS) conference, penalties were canceled.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that the charge for an in-bay car wash at petitioner’s facilities was exempt from sales tax. The Administrative Law Judge stated that the in-bay car wash met the requirements set forth in Tax Law § 1115 former (t) such that a customer of petitioner’s in-bay facilities washes the vehicle by means of coin-operated equipment and the vendor does not assist the customer in washing the vehicle.

ARGUMENTS ON EXCEPTION

In its exception, the Division continues to argue that the statutory language at issue is ambiguous as to whether it encompasses an in-bay car wash service and, as such, the Division asserts that the legislative amendment in 2005 is relevant. The Division reiterates that:

The change in the amendment of section 1115(t) from the active to the passive voice in the first criterion . . . is significant. The change from the active to the passive voice is a clear indication that the identity of the actor is no longer important. Stated differently, it is an indication that the Legislature did not view the customer as washing his/her car when in-bay service was purchased (Exception, page 3, ¶ 7).

Moreover, the Division points to the express reference in the amended statute to automated car wash equipment that washes the car without the assistance by the purchaser. The Division emphasizes that the automated car wash equipment criterion is in the alternative to the criterion that the purchaser or user of the services washes the car. The Division argues that the only

interpretation of this criterion is that the Legislature by this amendment was exempting the car wash service at issue, a service which it alleges was taxable before the amendment was enacted. Thus, the Division states that the in-bay car wash service was taxable during the audit period.

In opposition, petitioner maintains that the statute is clear on its face. Petitioner states that a plain reading of the statute indicates that in order to be exempt from tax, the customer must wash the car at the facility by means of coin-operated equipment and the vendor cannot assist. Petitioner agrees with the Administrative Law Judge that it has met both requirements of the statute and, therefore, its receipts for such service were not subject to sales tax. Petitioner alleges that nowhere in the statute is it required that the customer must manually or literally wash the car in order to qualify for exemption. Thus, it respectfully requests that the determination of the Administrative Law Judge be sustained.

OPINION

The statute at issue, Tax Law § 1115 former (t), provided for an exemption from tax under Article 28 as follows:

Receipts of a car wash facility from every sale, except for resale, of the service of washing, waxing or vacuuming a motor vehicle or other tangible personal property and consideration given or contracted to be given for such service at such a facility, where the purchaser or user of the service washes, waxes or vacuums such person's motor vehicle or other tangible personal property at such a facility by means exclusively of coin-operated equipment at such facility of the vendor providing the service and neither the vendor nor any employee of the vendor assists the purchaser in washing, waxing or vacuuming the vehicle or other tangible personal property, shall be exempt from tax under this article, to the extent of the amount of money or value, in money, of tokens deposited in such coin-operated equipment by the purchaser of the service. For purposes of this subdivision, the term "coin-operated" includes coin-operated, currency-operated or token-operated and the term "motor vehicle" shall mean a motor vehicle as defined in subdivision (f) of section eleven hundred thirty-two of this article.

The statute sets forth criteria that must be met in order for the service of washing, waxing or vacuuming a motor vehicle to be exempt from the imposition of sales and use tax. Specifically, the service must be performed at a car wash facility, the purchaser of the service washes, waxes or vacuums the purchaser's vehicle by means of coin-operated equipment at the facility and neither the vendor nor any employee may assist the purchaser in washing, waxing or vacuuming the purchaser's vehicle.

In this case, the record is clear that the services were performed at a car wash facility exclusively by coin-operated equipment and neither the vendor nor any of its employees assisted the purchasers in washing, waxing or vacuuming their vehicles. Accordingly, the only question to be addressed is whether the purchasers washed, waxed or vacuumed their vehicles when using petitioner's in-bay car wash service.

The Division contends that the receipts do not come within the scope of the exemption as the purchasers using the in-bay facilities do not wash the vehicles. The Division argues that the phrase in the statute, "where the purchaser or user of the service washes" must have some meaning more than just that the car is washed without the assistance of the vendor's employees. According to the Division, the intended meaning can be derived from the "active" voice used to describe the exempt activity, that is, the customer must "literally" wash the car. Therefore, the Division explains, it is a requirement of the statute that the customer "manually" wash the car. The Division states that its interpretation of the exemption statute has support in the subsequent amendment of the statute to encompass the type of car wash at issue herein.

The Legislature could have enacted the statute retroactively but chose not to do so. We agree with the Administrative Law Judge that it is beyond legislative power to enact a law declaring the construction to be given to an earlier statute, so as to bind the courts between the

enactment of the two acts (*see*, McKinney's Cons Laws of NY, Book 1, Statutes § 223). The Legislature has no controlling power to retroactively declare that an existing statute shall receive a given construction when such a construction is contrary to that which the statute would ordinarily have received (*see*, McKinney's Cons Laws of NY, Book 1, Statutes § 75). Thus, we refuse to be guided by the later amendment to Tax Law § 1115 former (t) in an effort to determine the Legislative intent at the time of the statute's original enactment.

It is well settled that statutes creating exemptions from tax are to be strictly construed (*see*, *Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193 [1975], *lv denied* 37 NY2d 708 [1975]; *Matter of Blue Spruce Farms v. New York State Tax Commn.*, 99 AD2d 867 [1984], *affd* 64 NY2d 682 [1984]). However, in addition, the statutory language providing the exemption must be construed in a practical fashion with deference to the legislative intent behind the exemption (*see*, *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577 [1998]; *Matter of Qualex, Inc.*, Tax Appeals Tribunal, February 23, 1995). To determine legislative intent, courts must first look at the literal reading of the act itself (*see*, McKinney's Cons Laws of NY, Book 1, Statutes § 92). Where the statute is clear, the courts must follow the plain meaning of its words, and "there is no occasion for examination into extrinsic evidence to discover legislative intent . . ." (McKinney's Cons Laws of NY, Book 1, Statutes § 120; *see*, *Matter of Raritan Dev. Corp. v. Silva*, 91 NY2d 98 [1997]; *Matter of Schein*, Tax Appeals Tribunal, November 6, 2003).

We find that the statute at issue here is plain on its face. The statute provides that in order for the sale to be exempt, the customer must wash the car at the facility by means of coin-operated equipment, without the assistance of the vendor. When a purchaser at an in-bay car wash facility pulls his car up to the coin-operated equipment, chooses a wash option, and then

positions the automobile in the appropriate position in the bay, he is washing the vehicle “by means exclusively of coin-operated equipment” (Tax Law § 1115 former[t]). There is no requirement in the statute that the purchaser “literally” or “manually” wash the car. We agree with the Administrative Law Judge that if the Legislature intended to create the requirement that the purchaser participate in the physical washing of the vehicle, it could have done so by placing this requirement in the statute. Words should not be expanded to enlarge their meaning to something that the Legislature could easily have expressed but did not, and new language cannot be imported into a statute to give it a meaning not otherwise found therein (*see*, McKinney’s Cons Laws of NY, Book 1, Statutes § 94). Therefore, it is concluded that petitioner’s customers wash their vehicles when using petitioner’s in-bay facilities and, as such, meet the requirements of the statute.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Hoffman Car Wash, Inc. is granted; and
4. The Notice of Determination dated September 20, 2004 is cancelled.

DATED: Troy, New York
December 11, 2008

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner