

**ILLINOIS INDEPENDENT
TAX TRIBUNAL**

NOKIA SIEMENS NETWORKS US LLC,)	
Petitioner,)	
)	
v.)	14 TT 10
)	Chief Judge James M. Conway
ILLINOIS DEPARTMENT)	
OF REVENUE,)	
Respondent.)	

ORDER ON SUMMARY JUDGMENT MOTIONS

Nokia Siemens Networks US, LLC is challenging two notices of use tax liability issued by the Department covering the period July 1, 2007 through June 30, 2009. According to the Department, Nokia failed to pay use tax on certain equipment it sold to T-Mobile USA that it was obligated to pay pursuant to 35 ILCS 105/1 *et seq.*

Nokia claims that, if classified as a “construction contractor,” it was exempt from paying use tax pursuant to 86 Ill. Adm. Code § 130.1940(c) because 1) the equipment was not affixed to real estate and 2) the contract for the equipment did not state a fixed price for the equipment. Nokia further argues that the equipment was sold for resale and that it was supplied a resale exemption certificate from T-Mobile prior to the purchase of the equipment.

The Department, in turn, argues that Nokia owes use tax 1) regardless of whether the equipment is considered to be fixtures attached to real estate or items of tangible personal property; 2) because the contract governing the purchase of the equipment contains fixed prices; and 3) because Nokia was not a retailer for

purposes of the equipment sales transactions, it was ineligible to collect resale exemption certificates.

As explained below, Nokia's summary judgment motion is denied and the Department's summary judgment motion is granted.

1. Background

The Illinois Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. 86 Ill. Adm. Code § 130.101. The Use Tax Act imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer. 86 Ill. Adm. Code § 150.101. Taken together, those taxes comprise "sales tax" in Illinois.

A "Construction Contractor" is defined at 86 Ill. Adm. Code § 130.1940(a)(1) as:

The word "construction contractor" when used in this Subpart includes general contractor, subcontractor and specialized contractor such as a landscape contractor. "Contractor" means any person who is engaged in the occupation of entering into and performing construction contracts for owners.

Construction contractors may incur Retailers' Occupation Tax, use tax, or neither tax when performing under a construction contract depending on its activity under the contract. For example, construction contractors do not incur Retailers' Occupation Tax liability for the sale of tangible personal property when it is "incorporated into a structure as an integral part thereof for an owner when furnished and installed as an incident of a construction contract." 86 Ill. Adm. Code § 130.1940(c).

Sales of tangible personal property as part of construction contracts for telecommunication systems are specifically covered under 86 Ill. Adm. Code § 130.1940(c)(3), which states:

Construction contractors who contract for the improvement of real estate consisting of engineering, installation, and maintenance of voice, data, video,

security, and all telecommunications systems incur Use Tax, rather than Retailers' Occupation Tax liability on those items if they are sold at one contract price. This provision applies to all of the items in this subsection (c)(3) even if they are not incorporated into real estate.

Nokia Siemens Networks US, LLC

Nokia Telecommunications, Inc. is a nationwide telecommunications hardware, software, and professional services company. During the 2007-2009 tax period in question, Nokia operated three separate business segments. One segment consisted of selling mobile devices and related services. Another segment, NAVTEQ, provided digital mapping information. Its third segment, Nokia Siemens Networks, provided mobile and fixed network solutions and services including system design, installation, commissioning, integration, supervision, training, and consultancy as part of its business of installing and maintaining telecommunications networks for its customers. Nokia's network infrastructure and related services business served a limited number of telecommunications customers under large, multi-year contracts.

In March 1998, Nokia entered into a Supply Contract with Western PCS Corporation, T-Mobile's predecessor in interest. The contract called for Nokia to provide GSM 1900 Base Station Subsystem infrastructure equipment and software as well as related services. T-Mobile's purpose in entering the contract was to deploy the latest Personal Communications Service technology at that time, 2G,¹ on its networks.

According to the terms of the contract, the "Total Supply Contract Price" was \$150,000,000 which was to be an aggregate price over 5 years, after taking into account all credits and discounts to which the purchaser was eligible to take. Attached to contract were certain appendices which described certain equipment to be supplied as well as the prices for the individual types of equipment. Amongst the type of equipment purchased were Power Modules. The Power Modules were designed to slide into a base unit attached to T-Mobile's network towers and were meant to be removable. The Modules were designed to be easily inserted and easily

¹ 2G is short for second generation wireless telephone technology. 2G made the leap from transmitting analog radio signals to transmitting digital signals. The current standard for most broadband communications services is 4G, with 5G wireless systems being rolled out by 2020 with at least one telecommunications services provider forecasting that it will employ 5G technology as early as 2017.

removed from a base unit, much like sliding a drawer into and out of a dresser. In addition to being attached to T-Mobile's cell towers, the base units were also located at ground level or on tops of buildings.

The Contract

The 1998 Supply Contract contains the following specific language:

1.21 "Supply Contract" shall mean this Supply Contract and all its appendices as well as any amendments or addenda that may subsequently be agreed upon in writing between the Parties.

....

1.26 "Total Supply Contract Price" shall mean ONE HUNDRED FIFTY MILLION U.S. DOLLARS (\$150,000,000), which is to be an aggregate price over five (5) years, after taking into account all credits and discounts to which Purchaser may be eligible under Appendix 10C (other than those credits and discounts referred to in Paragraph 11 of Appendix 10C). In other words, the total amount of Equipment, Software and Services ordered under this Supply Contract must equal at least \$150 million after 5 years, after all offsetting credits and discounts have been factored in, except the handset credits as specified in Paragraph 11 of Appendix 10C. The Total Supply Contract Price also excludes any sales or similar taxes, payable by the Purchaser to the Supplier for the Equipment, Software and Services provided hereunder.

....

1.8 "Equipment" shall mean all the telecommunications equipment (together with the manuals and other equipment-specific documentation separately itemized in Appendices 1A and 1B attached hereto and including - without separate itemization - such installation materials and consumables that are necessary for installation at the Sites), but not including the Software. In the event of

new items of equipment to be included into the Supply Contract as Equipment, or items of existing Equipment to be deleted from the scope of the Supply Contract, then the Parties shall amend Appendix 1A and 1B accordingly. Whenever the Supplier shall have new equipment to offer to its GSM 1900 customers, then the Supplier shall offer the same to the Purchaser, and such equipment will then be included as part of Appendix 1A and 1B.

....

1.17 "Services" shall mean the system design, installation, commissioning, integration supervision, training, consultancy and technical assistance services that the Supplier is required to provide to the Purchaser under this Supply Contract and which are described in Appendix 7. Whenever the Supplier shall have new services to offer to its GSM 1900 customers, then the Supplier shall offer the same to the Purchaser, and such services will then be included as part of Appendix 7.

....

3.9 The Supplier hereby grants to the Purchaser during the term of this Supply Contract, options to order additional quantities of Equipment, Software and Services beyond that covered by the Total Supply Contract Price. Unless otherwise mutually agreed, all the terms and conditions of this Supply Contract shall apply to the deliveries of the additional quantities of Equipment and Software and to the performance of the additional Services. An Additional Order consistent with the foregoing shall be duly issued by the Purchaser and accepted by the Supplier, in the event that the Purchaser elects to exercise these options.

....

5.1 Appendices 10A and 10B contain itemized prices for individual units of Equipment, Software and Services as well as provisions concerning validity of the prices over

time. Appendix 10C contains additional discounts available to Purchaser for these items.

In 2006, T-Mobile upgraded its network to the next generation of Personal Communications Service technology-3G. Nokia and T-Mobile entered into the Seventh Amendment to the original 1998 Supply Contract, in order for Nokia to supply its equipment, software and services to T-Mobile to accommodate the new 3G technology. The Seventh Amendment had a minimum purchase commitment of \$400,000,000, net of all applicable credits, incentives and discounts for the period 2006 through 2010. As with the original 1998 Supply Contract, the Seventh Amendment included specific price schedules for individual types of equipment, including Power Modules, in its appendices.

The 2006 Seventh Amendment contains the following specific language:

(a) Minimum Purchase Commitment.

1. During the period of time commencing on the Effective Date and ending May 31, 2010 (The "Purchase Commitment Period") and provided that Purchaser has not provided Supplier a notice of cancellation of the Minimum Purchase Commitment (as defined below) in accordance with Section 1 (a)(2) below, then Purchaser shall, during the Purchase Commitment Period, purchase and/or license UMTS Equipment, Software and Services under the Supply Contract in an aggregate amount of at least Four Hundred million United States dollars (\$400,000,000) net of all applicable credits, incentives and discounts (the "Minimum Purchase Commitment") ... Supplier agrees that, in addition to the Equipment, Software and Services it makes available to Purchaser pursuant to the Original Supply Contract, it shall sell and license to Purchaser, as, when and if ordered by Purchaser, UMTS Equipment, Software and Services, and the terms and conditions of the Original Supply Agreement (as amended by this Amendment) shall apply to such orders.

....

(3)(u) Paragraph 5.1 is hereby deleted in its entirety and replaced by the following:

"Appendix 1OA/B and Appendix 1-2 contain prices for Equipment, Software and Services. All pricing and payments shall be made in United States Dollars. Appendix 10C and Appendix U1-1 contains additional discounts, credits and incentives available to Purchaser."

The Audit

The Illinois Department of Revenue audited Nokia and issued Notices of Tax Liabilities for the tax periods beginning July 1, 2007 and ending September 30, 2009. The parties are in agreement that the corrected overall tax liability amount is \$864,517 and \$736,005 of that amount relates to use tax being assessed on Power Modules and related components. The findings contained in those (corrected) notices are deemed to be *prima facie* correct and are *prima facie* evidence that the amount of tax and penalties due is correct. 35 ILCS 5/904(a). At this juncture in the proceedings, it is Nokia's burden to come forward with clear and convincing evidence as to why use tax should not be assessed on the Power Modules. *See Copilevitz v. Dep't of Revenue*, 41 Ill. 2d. 154, 156-157 (1968).

2. Analysis

Summary judgment is proper when "the pleadings, depositions and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Performance Marketing Ass'n, Inc. v Hamer*, 2013 IL 11496, ¶12 (2013) (quoting 735 ILCS 5/2-1005(c)(2010)). In the present case, the parties have filed cross-motions for summary judgment. When both parties file cross-motions for summary judgment, they agree that no material facts are in dispute and invite a decision as a matter of law. *Irwin Indus. Tool Co. v. Ill. Dep't. of Revenue*, 238 Ill. 2d 332, 340 (2010).

A. Nokia is a Construction Contractor

In order to determine whether or not Nokia owes any sales tax on the sale of Power Modules to T-Mobile, it is necessary to determine whether or not Nokia should be classified as a construction contractor as different sales tax rules apply to them. Pursuant to 86 Ill. Adm. Code § 130.1940(a)(1), the term “construction contractor” is defined as “any person engaged in the occupation of entering into and performing construction contracts for owners.” “Construction contract,” in turn, means a contract “to construct...structures... or to otherwise incorporate tangible personal property into real estate.” 86 Ill. Adm. Code § 130.1940(a)(6). Constructing a structure means to “build, erect, construct, reconstruct, install, plant, repair, renovate or remodel...any building, house, edifice...or any type of structure, or any part thereof, or any improvement to real estate. 86 Ill. Adm. Code §§ 130.1940(a)(3) and (4). When providing new infrastructure components on T-Mobile’s cell towers under the terms of the original 1998 Supply Contract and the 2006 Seventh Amendment, Nokia clearly was acting as a construction contractor as it was responsible to install equipment and to provide other services to T-Mobile’s telecommunications structures as defined under article 1.17 of the Supply Contract.

B. Nokia was a Construction Contractor of Telecommunications Systems

86 Ill. Adm. Code § 130.1940 also contains a provision that exempts certain types of construction contractors from being liable for Retailer’s Occupation Tax and provides three examples of situations that illustrate when such an exemption applies. It is the third example which governs whether or not Nokia owes sales tax on the sale of the Power Modules at issue in this case as that example specifically applies to construction contractors of telecommunication systems.² 86 Ill. Adm. Code § 130.1940(c) reads, in part:

A construction contractor does not incur Retailer’s Occupation Tax liability as to receipts from labor furnished and tangible personal property (materials and fixtures) incorporated into a structure as an integral part thereof for an owner when furnished and installed as an incident of a construction contract. The construction

² The parties have stipulated that whether or not the Power Modules are subject to tax is controlled by whether or not the third example applies to Nokia’s performance under the Supply Contract and its Seventh Amendment with T-Mobile.

contractor incurs Use Tax on the cost price of the tangible personal property that is incorporated into real estate.

...

3) Construction contractors who contract for the improvement of real estate consisting of engineering, installation, and maintenance of voice, data, video, security, and all telecommunications systems incur Use Tax, rather than Retailer's Occupation Tax liability **on those items if they are sold at one specific contract price**. This provision applies to all of the items in this subsection(c)(3) even if they are not incorporated into real estate. (emphasis added).

Nokia's argument is that term "one specific contract price" refers to an overall contract price, and does not refer to specific prices of specific items of tangible personal property sold under a contract. Nokia further claims that the contract language of the Seventh Amendment does not contain one contract price as the contract price in the Seventh Amendment was set at a minimum of "at least \$400 million" and that number could, and did, eventually increase.

The Department's position is that the term "one specific contract price" refers to a specific price set out for a specific item of tangible personal property such as the Power Modules under Nokia's contract, and because the Power Modules have specific prices listed in the contract, Nokia is liable for use tax on those Power Modules.

Statutory Interpretation

"The fundamental rule of statutory interpretation is to determine and give effect to the intent of the legislature, and the statutory language is the best indicator of the legislature's intent." *Quality Saw & Seal, Inc. v. Illinois Commerce Com'n*, 374 Ill. App. 3d 776, 781, (2nd Dist. 2007). "The best indication of legislative intent is the statutory language, given its plain and ordinary meaning." *Andrews v. Kowa Printing Corp.*, 217 Ill. 2d 101,106 (2005). "Where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction." *Id.* The familiar rules of statutory construction apply with equal force to administrative regulations. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 367 (2009).

The term “one specific contract price” has to be read in conjunction with the rest of the regulatory language in 86 Ill. Adm. Code § 130.1940 and, particularly, subsection (c)(3), to determine if the text is clear and unambiguous. “Regulatory provisions, like statutory provisions, must be read in concert and harmonized.” *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 22 (2013). Even limiting oneself to the single sentence in which the term “one specific contract price” occurs, the plain language of that sentence which reads “Construction contractors...incur Use Tax...on those items if they are sold at one specific contract price” informs the reader that the term “one specific contract price” refers “those items” which are sold as that term appears to qualify and limit the language immediately preceding it. Therefore, the term “one contract price” means the stated price for equipment which is sold under a contract and not an overall contract price.

If one were to find the language of 86 Ill. Adm. Code § 130.1940(c)(3) ambiguous and employed the canons of statutory construction to interpret the language of the regulation’s subsection, he or she would arrive at the same conclusion. A grammatical canon of statutory construction, “the last antecedent doctrine” provides that “relative or qualifying words, phrases, or clauses are applied to the words or phrases immediately preceding them and are not construed as extending to or including other words, phrases, or clauses more remote...” *In re E.B.*, 231 Ill. 2d 459, 467 (2008). The term “one specific contract price” immediately follows “on those items if they are sold” so that qualifying phrase only relates to the immediate preceding phrase. Accordingly, the “one specific contract price” relates to the price of an item as opposed to referring to the entire contract price.

Moreover, in giving a statute or regulation reasonable construction, one should avoid “interpretations that render any part of the statute meaningless or void, and presuming that the legislature did not intend absurdity, inconvenience, or injustice.” *Central Illinois Light Co. v. Ill. Dep’t of Revenue*, 335 Ill. App. 3d 412, 415 (3rd Dist. 2002). It is clear from reading 86 Ill. Adm. Code § 130.1940(c)(3) that construction contractors for the telecommunications industry are to pay Use Tax on tangible personal property supplied under a construction contract. Both the Retailer’s Occupation Tax Act (35 ILCS 120/1 *et seq.* and the Use Tax Act (35 ILCS 105/1 *et seq.*) relate to the taxability of tangible personal property. In general, but with many exemptions and qualifications both of which are common in tax statutes, once it is determined that an item of tangible personal property is to be taxed under one of those taxing schemes, the tax is imposed as a percentage of the price of the item. Accordingly, the only way to calculate a tax on those equipment items sold as part of a telecommunications construction contract is to know the

price of those items. It is irrelevant to know an entire contract price where tangible personal property is but one component, as the entire contract could encompass additional non-taxable amounts, such as amounts billed for services. It is important to know the exact prices of tangible personal property for sales tax to be calculated. Accordingly, in order for one to determine Nokia's use tax liability for its sale of tangible personal property to T-Mobile, it is mandatory that one knows the specific prices for the tangible personal property under the contract.

C. The Supply Modules are subject to Use Tax whether or not they were removable or permanent additions to T-Mobile's telecommunications infrastructure.

Nokia argues that it is exempt from use tax as the Power Modules were meant to be removable from the cabinets on cell towers in which they were housed. While those Power Modules are removable, the characterization of the Power Modules ultimate use as a component of a telecommunications system is irrelevant.

Nokia's contention is premised upon the general language found in 86 Ill. Adm. Code § 130.1940(c) which states:

A construction contractor does not incur Retailer's Occupation Tax liability as to receipts from labor furnished and tangible personal property (materials and fixtures) incorporated into a structure as an integral part thereof for an owner when furnished and installed as an incident of a construction contract. The construction contractor incurs Use Tax on the cost price of the tangible personal property that is incorporated into real estate.

That prefatory language exempts a construction contractor, at least from use tax, when tangible personal property is removable as opposed to being permanently incorporated into and being considered part of real property. However, that argument ignores the specific example that follows in subsection (c)(3) which is applicable to construction contractors of telecommunications systems and which is applicable to Nokia. The subsection's last sentence reads: "This provision applies to all of the items in this subsection (c)(3) even if they are not incorporated into real estate." That means that use tax is imposed on all items of tangible personal property in a telecommunications construction contract regardless of whether or not any particular item of tangible personal property is removable or affixed to a real property component of any telecommunications infrastructure. Therefore, whether

or not the Power Modules are removable or permanently affixed to cell towers and other realty is irrelevant to their taxability under the regulation.

D. Nokia's Resale Exemption Certificates Can Not Be Use to Offset Use Tax

Nokia argues that because it obtained resale exemption certificates from T-Mobile prior to selling to T-Mobile the Power Modules the Power Modules are exempt from taxation.

Resale exemption certificates can be used to avoid paying sales tax when a purchaser of property is a reseller, as opposed to an end-user of property. However, the resale exemption, and the required corroborative resale exemption certificate, may be only used when a particular type of transaction is expressly eligible for such an exemption. A resale exemption applies, in general, for sales transactions of tangible personal property when the transaction would otherwise be assessed Retailer's Occupation Tax. 35 ILCS 120/2(c); 86 Ill. Adm. Code §130/120(c).

The resale exemption only applies to retailers who otherwise would be assessed Retailers' Occupation Tax on a transaction. A taxpayer who is subject to use tax, as opposed to Retailers' Occupation Tax, is not considered acting as a retailer and is not eligible to use resale exemption certificates. In the present case, Nokia is being assessed use tax, and not Retailer's Occupation Tax. Therefore, it cannot use resale exemption certificates to offset its use tax liability on the Power Modules that it sold to T-Mobile.

Conclusion

Nokia is a telecommunications contractor which was required to pay use tax on the Power Modules that it sold to T-Mobile during the tax period in question. Nokia's Motion for Summary Judgment is DENIED and the Department's Motion for Summary Judgment is GRANTED.

s/ James Conway
JAMES M. CONWAY
Chief Administrative
Law Judge

Date: December 22, 2015