

RECEIVED

JUN 12 2012

CAROL G. GREEN
CLERK OF APPELLATE COURTS

No. 10-105, 139-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

IN THE MATTER OF THE *APPEAL OF CESSNA EMPLOYEES
CREDIT UNION* FROM AN ORDER OF THE DIVISION OF TAXATION

**MOTION FOR ORDER TO ALLOW FILING OF BRIEF BY
MULTISTATE TAX COMMISSION AS *AMICUS CURIAE*
IN SUPPORT OF APPELLEE'S PETITION FOR REVIEW**

APPEAL FROM THE KANSAS COURT OF TAX APPEALS
Bruce F. Larkin, Chief Judge
Docket No. 2009-8166-DT

The Multistate Tax Commission (the Commission) moves this Court pursuant to Appellate Rules 5.01 and 6.02 for an Order permitting the Commission to file a brief as *Amicus Curiae* in support of the Appellee's *Petition for Review by Supreme Court* of the opinion rendered by the Court of Appeals in this matter on April 6, 2012. The Commission seeks to file a brief as *Amicus Curiae* because of its concern that the lower court has misconstrued a key component of the Streamlined Sales and Use Tax Agreement (SSUTA), a multi-jurisdictional agreement intended to increase uniformity in state sales and use tax laws. If allowed to stand, the Court of Appeal's decision could lead to inconsistent interpretation of common statutory language in 24 states, including Kansas, which have amended their laws to conform to the SSUTA. A lack of uniformity in implementing the SSUTA would impair its central purpose and benefit to the states and to taxpayers.

I. The Interest of the Multistate Tax Commission as *Amicus Curiae*.

The Commission is the administrative agency for the Multistate Tax Compact (“Compact”), which became effective in 1967. (See RIA *State & Local Taxes: All States Tax Guide* ¶ 701 *et seq.* (2005).) The stated purposes of the Compact are to:

1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes;
2. Promote uniformity or compatibility in significant components of tax systems;
3. Facilitate taxpayer convenience and compliance in the filing of tax returns and other phases of tax administration;
4. Avoid duplicative taxation.

Compact, Article 1.

Twenty jurisdictions, including the state of Kansas, have enacted the Compact into their statutes, and another 27 states participate in the Commission’s activities. (The Commission files this motion only on its own behalf and on behalf of the state of Kansas.)

The Commission’s interest in this case stems from its role in promoting and fostering all of the goals of the Compact, and in particular, “promoting uniformity or compatibility in significant components of tax systems.” The Commission believes it can assist the Court by providing its unique multistate experience and perspective on the importance of a uniform interpretation and application of state tax systems.

II. Basis for the Motion.

The Commission suggests that this case presents a matter of general importance to Kansas as well as the other 23 states that have amended their sales and use tax laws to come into

compliance with the SSUTA. See <http://www.streamlinedsalestax.org/index.php?page=state-taxability-matrices>. The Commission believes that it can assist this Court in understanding the relationship, and the importance of the relationship, between the statutes being construed and the operation of the SSUTA.

The Court of Appeals held that the definition of “selling price” embodied in K.S.A. 79-3602(11)(1) did not include amounts billed separately and received as a reimbursement of expenses incurred while performing taxable services incident to selling tangible personal property (computer software). K.S.A. 79-3602(11)(1) is identical to the “selling price” language contained in the SSUTA. The Commission believes that the Court of Appeals’ failure to give effect to that language is contrary to the language’s intended operation in those states which have agreed to amend their laws to conform to the SSUTA, and thus, would compromise SSUTA’s essential purpose of increasing uniformity in state taxing systems.

SSUTA is the culmination of a decade-long effort by many states to simplify and standardize their sales and use tax systems in response to a 1992 decision by the U.S. Supreme Court, *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992). In that decision, the Court held that, under the Commerce Clause of the U.S. Constitution (U.S. Const., Art. I, Sec. 8), states could not impose sales and use tax collection responsibilities on out-of-state retailers whose only connection to the state was fulfilling orders by common carrier or U.S. mails because the existence of a “virtual welter of inconsistent obligations” in some 6,000 separate taxing jurisdictions impermissibly burdening interstate commerce. 504 U.S. at 313, fn.6, quoting, *National Bells Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753, 759-60 (1967). Concerned that the *Quill* decision had placed in-state businesses at a competitive disadvantage to the rapidly growing Internet-based retailing sector, Kansas joined many other states in pursuing a

project to simplify and make their sales tax laws uniform, including adoption of uniform administrative definitions.

Kansas' definition of "selling price" in K.S.A. 79-3602(II)(1) is a vitally important uniform administrative definition contained in the Agreement. Under SSUTA, states are given a limited number of choices as to how to tax various sales transactions, including transactions where incidental services are involved, such as delivery, installation or other services necessary to complete the sale. While the participating states retain wide latitude to make policy choices as to taxation, they are required to use common definitions and provisions in order to implement

those choices. See *Agreement*, Section 104. The list of gross receipts categories which may be

included in the definition of "selling price" is set forth in the Agreement as Exhibit C, "Library

of Definitions"; part I, as subdivisions (A) through (F), pp. 135-136.

<http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Am>

[ended%205-24-12.pdf](http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%205-24-12.pdf). The Kansas legislature chose to incorporate five of those items,

including the provision which is at issue in this appeal, item (B), "the cost of materials used,

labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on

the seller, and any other expenses of the seller." *Id.* This provision is codified in verbatim

language as K.S.A. 79-3602(II)(1)(B).

The same definition in SSUTA includes a list of three items that are excluded from the

definition of "sales price", including: "C. Any taxes legally imposed directly on the consumer

that are separately stated on the invoice, bill of sale or similar document given to the purchaser."

<http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Am>

[ended%205-24-12.pdf](http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%205-24-12.pdf). This provision has been incorporated into Kansas law as K.S.A. 79-

3602(II)(3)(C). The Commission suggests that this provision is not intended, as the Court of

Appeals believed, to exclude previously-taxed amounts of goods and services sold to the seller from the definition of “selling price.” Rather, the Commission suggests that the provision reflects the normative rule of state taxation that the amount of separately-stated tax charged to the ultimate consumer (the party bearing the legal incidence of sales tax) is “backed out” of the taxable receipts total, as those receipts are merely collected by and held in escrow for the state by the seller. See *Matter of Tax Appeal of Atchison Cablevision L.P.*, 936 P.2d 721, 727 (Kan. 1997). By contrast, when a seller includes on its invoice charges for amounts previously

incurred by the seller to complete its contractual obligations, it is not collecting those amounts as an agent for the state or anyone else; the receipts are the seller’s alone. Although states may

elect to allow a deduction for separately-stated expense items, Kansas has not chosen to do so.

The Legislature may have been concerned that allowing such a deduction would encourage

taxpayers to inappropriately “unbundle” contractual agreements in order to reduce overall tax

liability. The lower court’s decision in this case may lead to uncertainty in other states as to

whether such “unbundling” is a permitted contractual practice.

The Commission believes that the provisions of Kansas law adopting the SSUTA

framework are clear and unambiguous. K.S.A. 79-3602(II)(1)(B) should be construed by its

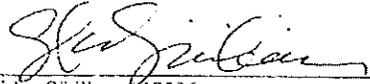
terms so that it may achieve the Legislature’s goal of promoting uniformity and consistency in

application of the SSUTA.

III. Prayer for Relief.

The Commission prays for an Order allowing it leave to file a brief as *amicus curiae* supporting the *Petition for Review by Supreme Court* filed by Appellee, the Kansas Department of Revenue.

Respectfully Submitted,



Shirley Sicilian, # 12336,
General Counsel, Multistate Tax Commission
Bruce J. Fort,
Counsel, Multistate Tax Commission
444 North Capitol Street, Suite 425
Washington, DC. 20001-1538
(202) 624-8699

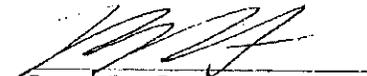
ATTORNEYS FOR *AMICUS CURIAE*
MULTISTATE TAX COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that I deposited with the U.S. Mail, postage pre-paid, two copies of the foregoing *Motion for Leave to File Briefs Amicus Curiae in Support of Petition for Review* to the following parties, on this 12 day of June, 2012:

Alice Leslie Rawlings, # 9252
Kansas Department of Revenue
915 SW Harrison, Room 230
Topeka, Kansas 66612-1588

Gerald N. Capps, # 13681
500 North Main
Suite 1700
Wichita, Kansas 67202


Bruce J. Fort, Esq.