

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEONARD F. NICHOLS)
)
 Petitioner,)
)
 vs.) Case No. 97-2996
)
 STATE OF FLORIDA,)
 DEPARTMENT OF REVENUE)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held by video teleconference in this case on October 31, 1997, at West Palm Beach, Florida, before Susan B. Kirkland, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Leonard F. Nichols, pro se
1800 Southeast Street Lucie Boulevard
Building 4-305
Stuart, Florida 34996

For Respondent: Eric J. Taylor
Assistant Attorney General
Department of Legal Affairs
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

Whether Petitioner is entitled to a refund of use taxes paid to the State of Florida on October 11, 1995, relating to the purchase in another state of an automobile.

PRELIMINARY STATEMENT

By letter dated April 28, 1997, Respondent, Department of Revenue (Department), issued to Petitioner, Leonard F. Nichols (Nichols), a Notice of Reconsideration of Refund Denial, denying Nichols' request for a refund of use taxes paid to the Department relating to Nichols purchase of a 1995 Buick Century in New Jersey. By letter dated June 25, 1997, Nichols requested an administrative hearing.

On July 2, 1997, the case was forwarded to the Division of Administrative Hearings for assignment to an administrative law judge.

At the final hearing, the parties agreed to the facts contained in Section III E. of Respondent's Prehearing Statement with the exception of the following sentence: "No sales taxes were imposed on or paid by the Petitioner at the time of purchase of the Buick in Newton, New Jersey." Nichols testified in his own behalf at the final hearing and introduced Petitioner's Exhibits 1-4 in evidence. Respondent did not present any witnesses and introduced Respondent's Exhibits 1-13 in evidence.

The parties agreed to file proposed recommended orders within ten days of the filing of the transcript. The transcript was filed on November 17, 1997. The parties timely filed their proposed recommended orders, and they have been duly considered.

FINDINGS OF FACT

1. Petitioner, Leonard F. Nichols (Nichols), maintains a

residence in Florida at 1800 Southeast St. Lucie Boulevard, Building 4-305, Stuart, Florida 34996. Nichols is legally domiciled in Florida. He also maintains a residence in New Jersey at 3 Wood Run, Newton, New Jersey 07860.

2. Prior to October, 1995, Nichols owned a motor vehicle, which was registered in Florida. The vehicle had a Florida vehicle tag.

3. On October 4, 1995, Nichols purchased a 1995 Buick Century (VIN 1G4AG55M1S6418376) from an automobile dealer in Newton, New Jersey. The amount paid for the automobile was \$13,710.00.

4. New Jersey imposes a sales tax on the purchase of tangible personal property in New Jersey. Pursuant to Section 60-570.016, New Jersey Statutes Annotated, New Jersey allows an exemption for the payment of sales tax on nonresidents on the purchase of a motor vehicle if the conditions of the statute are met.

5. At the time of the purchase in New Jersey, Nichols submitted a ST-10 Motor Vehicle Dealer Sales Tax and Use Tax Exemption form. The submission of the ST-10 was made in lieu of payment of sales taxes. Without the submission of the ST-10, the New Jersey dealer would have been required to collect the sales tax. Because Nichols filed the ST-10 at the time of the purchase of the automobile, no New Jersey sales taxes were paid at that time.

6. One week later, on October 11, 1995, Nichols registered his vehicle in Florida. At the time of registration, since no sales tax had been paid on the vehicle prior to this registration, Florida's use tax of \$855.95 was imposed on and paid by Nichols. Nichols' Florida tags were then transferred to Nichols' new vehicle.

7. On December 8, 1995, Nichols received notification from the State of New Jersey, Department of Treasury, Division of Taxation that Nichols' request for an exemption from payment of the New Jersey sales tax was denied and Nichols owed the State of New Jersey \$896.63 in taxes, penalty and interest for the sales tax on the purchase of the Buick in New Jersey.

8. Nichols contacted the Department and told them that he was being assessed a sales tax by New Jersey. Nichols was advised that he should pay the New Jersey sales tax and file a DR-26 form, requesting a refund from the Department.

9. The charges for penalty and interest were later dropped by New Jersey. On December 29, 1995, Nichols mailed a check in the amount of \$822.60 to the State of New Jersey. On January 5, 1996, Nichols received a receipt of payment from the New Jersey Division of Taxation.

10. At the time of the registration of Nichols' new Buick in Florida and the payment of the Florida use tax on October 11, 1995, no taxes had been paid on the sale and purchase of Nichols' 1995 Buick Century in New Jersey or any other state.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes.

12. The Legislature has authorized the taxation of tangible personal property when the item is sold at retail in Florida. Section 212.05(1)(a)1a, Florida Statutes. When an item is not sold at retail in Florida, and is not subject to the Florida sales tax but is being used in Florida, the item is subject to the use tax imposed by Section 212.05(1)(b), Florida Statutes, which states:

At the rate of 6 percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state.

13. The use tax is also imposed by Section 212.06(1)(a), Florida Statutes, which provides:

The aforesaid tax at the rate of 6 percent of the retail sales price as of the moment of sale, 6 percent of the cost price as of the moment of purchase, or 6 percent of the cost price as of the moment of commingling with the general mass of property in this state, as the case may be, shall be collectible from all dealers as herein defined on the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state of tangible personal property or services taxable under this part

14. The sale or use of a motor vehicle is subject to the Florida sales or use tax. Section 212.05(1)(a)1 b, Florida Statutes, states:

Each occasional or isolated sale of an aircraft, boat, mobile home, or motor vehicle of a class or type which is required to be registered, licensed, titled, or documented in this state or by the United States Government shall be subject to tax at the rate provided in this paragraph. . . .

15. Rule 12A-1.007(2)(a), Florida Administrative Code, which implements Section 212.05(1)(a)1 b, Florida Statutes, states:

There shall be a presumption that any aircraft, boat, mobile home, motor vehicle, or other vehicle purchased in another state, territory of the United States, or the District of Columbia but titled, registered, or licensed in this state is taxable

16. Florida permits a credit against Florida use taxes if the taxpayer paid a sales tax to another state on the same purchase of tangible personal property. Florida's credit provision is found in Section 212.06(7), Florida Statutes, which states:

The provisions of this chapter do not apply in respect to the use or consumption of tangible personal property, or distribution or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to or greater than the amount imposed by this chapter has been lawfully imposed and paid in another state, territory of the United States, or the District of Columbia. The proof of payment of such tax shall be made according to the rules and regulations of the department. If the amount of the tax paid in another state, territory of the United States, or the District of Columbia is not equal to or greater than the amount of tax imposed by this chapter, then the dealer shall pay to the department an amount sufficient to make the tax paid in the other state, territory of the United States, or the District of Columbia and in this state equal to the amount imposed by this chapter.

17. The Department has implemented the provisions of Section 212.06(7), Florida Statutes, by rule. Rule 12A-1.007(3)(a), Florida Administrative Code, provides:

A credit is allowed to a person who as purchaser provides documentary evidence that a lawfully imposed sales or use tax has been paid to another state, territory of the United States, or the District of Columbia on any aircraft, boat, mobile home, motor vehicle, or other vehicle, which later becomes subject to Florida tax. The credit shall be the amount of legally imposed sales and use tax paid to another state, territory of the United States, or the District of Columbia.

18. Section 212.06(7), Florida Statutes, is an exemption from taxation and as such must be strictly construed against the person claiming the exemption. Sebring Airport Authority v. McIntyre, 642 So. 2d 1072 (Fla. 1994); Capital City Country Club v. Tucker, 613 So. 2d 448 (Fla. 1993); Mikos v. City of Sarasota, 636 So. 2d 83 (Fla. 2d DCA 1994); Asphalt Pavers, Inc. v. Department of Revenue, 584 So. 2d 55 (Fla. 1st DCA 1991).

19. The Department interprets Section 212.06(7), Florida Statutes, and Rule 12-A1.007(3)(a), Florida Administrative Code to mean that in order for the credit to be applicable, a tax had to have been lawfully imposed and paid in another state prior to the tax being due and payable in Florida.

20. In other cases where a statute similar to Section 212.06(7), Florida Statutes, has been interpreted, the other state courts have focused on when the other state tax had been paid. In New England Yacht Sales, Inc. v. Commission of Revenue

Services, 198 Conn. 624, 504 A. 2d 605 (Conn. 1986), the Connecticut Supreme Court dealt with a similar statute relating to credit for taxes paid in other states. Connecticut General Statutes, Section 12-430(5), provides:

(5) PAYMENT OF SALES OR USE TAX TO ANOTHER STATE. If any service or article of tangible personal property has already been subjected to a sales or use tax by any other state or political subdivision thereof and payment made thereon in respect to its sale or use in an amount less than the tax imposed by this chapter, the provisions of this chapter shall apply, but at a rate measured by the difference, only, between the rate herein fixed and the rate by which the previous tax or use was computed. If such tax imposed in such other state or political subdivision thereof is equivalent to or in excess of the rate imposed under this chapter at the time of such sale or use, then no tax shall be due on such article.

21. The court in New England Yacht Sales, Inc. rejected a yacht sellers argument that it should be given a credit for use tax paid in another state by the out-of-state purchaser. The court stated:

The plaintiff's claim is difficult to square with the language of Section 12-430. That statute provides a credit in the event that 'any service or article of tangible personal property has already been subjected to a sales or use tax by any other state . . . and payment made thereon. . . .' (Emphasis added.) Since the plaintiff's liability for sales tax in this state was antecedent to the purchaser's payment of use tax in Rhode Island, the plaintiff can succeed only if we give retroactive effect to the Rhode Island payment. Such retroactive effect would be inconsistent with the general rule that statutory exemptions are a matter of legislative grace and are thus strictly

construed against the taxpayer. The B.F. Goodrich Co. v. Dubno, 196 Conn. 1, 8-9, 490 A. 2d 991 (1985); Yaeger v. Dubno, 188 Conn. 206, 212, 449 A. 2d 144 (1982). As in Connecticut Theater Foundation v. Brown, 179 Conn. 672, 677, 427 A. 2d 863 (1980), the

plaintiff cannot rely on an exemption that does not yet exist when its tax obligation becomes due.

22. In the case of Potashnick Construction Co. v. Louisiana Department of Revenue and Taxation, 470 So. 2d 526 (La. App. 1st Cir. 1985), the court awarded a credit toward Louisiana taxes because the taxpayer had proved that prior to the equipment coming into Louisiana it had paid a sales tax to Missouri. The same result was reached in Allmed, Inc. v. Department of Revenue, 428 101 Ill. App 747, 428 N.E. 714 (Ill. 4th DCA 1981).

23. In the instant case, at the time the Florida use tax became due and payable, when Nichols applied for titling and registration of his Buick, no sales tax had been paid by Nichols in any other state. Thus, the exemption from taxation contained in Section 212.06(7), Florida Statutes, does not apply and Nichols is not entitled to a credit for sales taxes paid in New Jersey.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered denying Leonard F. Nichols' request for a refund of the use taxes paid to the Department on October 4, 1995.

DONE AND ENTERED this 18th day of December, 1997, in
Tallahassee, Leon County, Florida.

SUSAN B. KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of December, 1997.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to

this Recommended Order should be filed with the agency that will issue the Final Order in this case.