

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SADDLE CREEK TRANSPORTATION,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 08-4405
)
DEPARTMENT OF REVENUE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on November 10, 2008, in Tallahassee, Florida, before Carolyn S. Holifield, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Matthew M. Bowles, Esquire
Grant Thornton, LLP
245 Peachtree Center Avenue Northeast
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Atlanta, Georgia 30303

For Respondent: John Mika, Esquire
Office of the Attorney General
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to a partial refund pursuant to Subsection 212.08(9)(b), Florida Statutes

(2005), for sales tax paid on vehicles and parts thereof during the period March 20, 2004, through August 20, 2006.

PRELIMINARY STATEMENT

On April 16, 2007, Respondent, Department of Revenue ("Department"), denied the application for a refund of sales tax paid on charges for the purchase of motor vehicles, trailers, and parts thereof filed by Petitioner, Saddle Creek Transportation, Inc. ("Saddle Creek"). On June 1, 2007, Saddle Creek filed a written protest challenging the Department's denial of its application for a refund of sales tax. In its Notice of Decision of Refund Denial dated July 30, 2007, the Department upheld its initial denial of Saddle Creek's application for a refund.

Saddle Creek timely challenged the Department's denial and requested an administrative hearing. The matter was forwarded to the Division of Administrative Hearings ("Division") on September 8, 2008, for assignment of an Administrative Law Judge to conduct the hearing.

Prior to the final hearing, the parties filed a Joint Pre-Hearing Statement that included stipulated facts which required no proof at hearing.

At hearing, the parties' Joint Exhibits 1 through 27 and Petitioner's Exhibits 1 and 2, and the Affidavits of Darrell Lake and Mark Cabrera were admitted into evidence. Respondent

stipulated to all facts in the Affidavits with the exception of the paragraphs which referred to Petitioner as a "common carrier."¹ Petitioner presented no witnesses. The Department presented the testimony of one witness, Matthew Crockett, a tax law specialist with the Department.

The hearing Transcript was filed with the Division on December 3, 2008. Both parties timely filed post-hearing submittals, which have been carefully considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency responsible for administration of the Florida sales and use tax pursuant to Sections 20.21 and 213.05, Florida Statutes (2008).²

2. Saddle Creek is a Florida corporation with its principal place of business located at 3010 Saddle Creek Road, Lakeland, Florida.

3. Saddle Creek is a motor carrier within the meaning of 49 U.S.C. Section 13102(14). Pursuant to that provision, the term "motor carrier" means "a person providing motor vehicle transportation for compensation."

4. Effective November 21, 2003, Saddle Creek obtained its Contract Carrier Permit from the Federal Motor Carrier Safety Administration ("FMCSA"). The Contract Carrier Permit authorized Saddle Creek to engage in transportation as a

"contract carrier" of property (except household goods) by motor vehicle in interstate or foreign commerce.

5. Since November 21, 2003, Saddle Creek has engaged in interstate commerce and has held itself out to the general public as offering transportation and warehousing services for a fee.

6. The fact that a company holds itself out to the general public by offering transportation services for a fee does not mean that it operates as a common carrier.

7. Since November 21, 2003, Saddle Creek has possessed cargo liability insurance and has made said insurance available to all of its shippers.

8. As a contract carrier, the fee, terms, conditions of carriage, and the scope of liability can be specifically defined, limited, and restricted by the contract between the shipper and carrier. See 49 U.S.C. § 14101 (b).

9. Between December 1, 2003, and October 31, 2006, Saddle Creek purchased trucks, trailers and parts for use on said vehicles in Florida and paid sales tax on all purchases. However, the parties stipulated that the time period at issue is March 20, 2004, through August 20, 2006.

10. Effective March 9, 2007, Saddle Creek obtained its Common Carrier Certificate from the FMCSA. The Common Carrier Certificate authorized Saddle Creek to engage in transportation

as a "common carrier" of property (except household goods) by motor vehicle in interstate or foreign commerce.

11. On March 12, 2007, Saddle Creek applied to the Department for a refund of \$175,023.99 for sales tax paid on trucks, trailers and parts thereof, during the period of March 20, 2004, through August 20, 2006. Saddle Creek claimed a refund based on the partial exemption from sales tax provided to interstate carriers in Subsection 212.08(9), Florida Statutes (2005).

12. The Department denied Saddle Creek's Application for Refund, because Saddle Creek was not licensed/registered or classified by FMCSA as a common carrier during the time period for which it was requesting a refund.

13. In reaching this decision, the Department relied on Florida Administrative Code Rule 12A-1.064,³ which implements and interprets Subsection 212.08(9)(b), Florida Statutes (2005).

14. The Department's interpretation of the above-referenced rule is that entitlement to the partial exemption authorized in Subsection 212.08(9)(b), Florida Statutes (2005), requires that the motor carrier engaged in interstate commerce as a common carrier be licensed as a common carrier by the U.S. Department of Transportation.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

16. The Department is, and was at all times relevant to this proceeding, authorized to control, administer and enforce the revenue laws of the State of Florida. See §§ 20.21 and 213.05, Fla. Stat.

17. Florida's sales tax is imposed by Chapter 212, Florida Statutes. Any exemption from sales tax must be specifically authorized by statute.

18. Petitioner seeks a refund for sales tax paid for the purchase of motor vehicles, trailers, and parts thereof pursuant to the partial exemption authorized in Subsection 212.08(9)(b), Florida Statutes (2005).

19. As the party seeking an exemption, Petitioner has the burden of proving entitlement to the exemption that it seeks by a preponderance of evidence.

20. Subsection 212.08(9)(b), Florida Statutes (2005), provides in pertinent part:

(9) PARTIAL EXEMPTIONS; RAILROADS AND
MOTOR VEHICLES ENGAGED IN INTERSTATE OR
FOREIGN COMMERCE.-

* * *

(b) Motor vehicles that are engaged in interstate commerce as common carriers, and parts thereof, used to transport persons or property in interstate or foreign commerce are subject to tax imposed in this chapter only to the extent provided herein. The basis of the tax shall be the ratio of intrastate mileage to interstate or foreign mileage traveled by the carrier's motor vehicles which were used in interstate or foreign commerce and which had at least some Florida mileage during the previous fiscal year of the carrier. Such ratio is to be determined at the close of the carrier's fiscal year. . . . Motor vehicles that are engaged in interstate commerce, and parts thereof, used to transport persons or property in interstate and foreign commerce are hereby determined to be susceptible to a distinct and separate classification for taxation under the provisions of this chapter^[4]

21. The Department is, and was at all times relevant to this proceeding, authorized to adopt rules to implement the provisions of the revenue law pursuant to Section 213.06, Florida Statutes.

22. Pursuant to its rulemaking authority, the Department promulgated Florida Administrative Code Rule 12A-1.064, which provides in pertinent part:

(1) SCOPE. This rule is intended to provide guidelines for the partial exemption for railroad rolling stock and parts and motor vehicles and parts provided in Section 212.08(9), F.S., to carriers who transport persons or property for hire in interstate and foreign commerce.

(2) MOTOR VEHICLES.

(a) Motor vehicles used to transport persons or property for hire in interstate or foreign commerce that are operated by any common carrier licensed by the United States Department of Transportation, and parts for such motor vehicles, are subject to the partial exemption provided in Section 212.08(9)(b), F.S. Tax imposed is based on the ratio of Florida highway mileage to total highway mileage traveled by the carrier's motor vehicles that were used in interstate or foreign commerce and that had at least some Florida mileage during the previous fiscal year of the carrier.

23. Florida Administrative Code Rule 12A-1.064 is a duly-promulgated rule and, as such, is treated as presumptively valid until invalidated.

24. In promulgating Florida Administrative Code Rule 12A-1.064(2), the Department has interpreted Subsection 212.08(9)(b), Florida Statutes (2005), to extend the subject partial exemption to all common carriers that are licensed/registered as such by the U.S. Department of Transportation.

25. The Department has determined that in order to be licensed by the U.S. Department of Transportation, a motor carrier must register with the FMCSA, a unit under the Secretary of the U.S. Department of Transportation. See 49 C.F.R. § 1.4(1)(2).

26. The FMCSA was established in 1999, with the enactment of the Motor Carrier Safety Improvement Act, and became effective on January 1, 2000. See P.L. 106-159. The FMCSA is responsible for, among other things, carrying out motor carrier registrations. See 49 C.F.R. § 1.4.(1)(2).

27. The FMCSA differentiates between types of motor carriers, including between a common carrier and a contract carrier, for the purpose of registration with the agency. See 49 C.F.R. § 365.107(a)(1). A carrier can register as a common carrier, a contract carrier or as both.

28. The Interstate Commerce Commission Termination Act of 1995 abolished the statutory distinction between common carrier and contract carrier by merging those classes into a single classification of "motor carrier" (i.e. a person providing motor vehicle transportation for compensation). 49 U.S.C. §§ 13102(12) and 13902(a) (2000). However, there continues to be a difference between statutory responsibilities, rights and remedies arising out of "common carriage" and "contract carriage" under the Carmack Amendment, 49 U.S.C. Section 14706.

29. The FMCSA regulations in effect at all times relevant to this proceeding mandate only that cargo insurance surety requirements extend to common carriage, not contract carriage, and that such insurance be made available to shippers by a

BMC-32 endorsement. 49 C.F.R. § 387.303(c). On the other hand, no such cargo insurance surety requirements are imposed on contract carriage.⁵

30. Subsection 212.08(9)(b), Florida Statutes (2005), provides an exemption for motor vehicles "engaged in interstate commerce as common carriers." Florida Administrative Code Rule 12A-1.064(2)(a) interprets the foregoing statute to extend an exemption to all common carriers that are licensed as such by the U.S. Department of Transportation.

31. An agency interpretation of a rule by the agency charged with its enforcement is entitled to great weight. P.W. Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988). Moreover, such interpretation must not be overturned unless clearly erroneous or unreasonable. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716, 719 (Fla. 1983).

32. Here, the Department is the agency charged with enforcement of the revenue laws, including Chapter 212, Florida Statutes. Thus, the Department's interpretation of Subsection 212.08(9)(b), Florida Statutes (2005), and Florida Administrative Code Rule 12A-1.064(2)(a) is entitled to and given great deference. Such deference is appropriate where, as in this case, there has been no showing that the Department's interpretation is clearly erroneous or unreasonable.

33. It is a well-established rule of law that tax exemptions must be strictly construed against the taxpayer seeking them and in favor of the State. Department of Revenue v. Bank of America, N.A., 752 So. 2d 637, 644 (Fla. 1st DCA 2000); Sebring Airport Authority v. McIntyre, 642 So. 2d 1072 (Fla. 1994); Capital City Country Club v. Tucker; 613 So. 2d 448 (Fla. 1993); and Asphalt Pavers, Inc. v. Dept. of Revenue, 584 So. 2d 55 (Fla. 1st DCA 1991).

34. Applying the foregoing principle, in order to demonstrate entitlement to the exemption under Subsection 212.08(9)(b), Florida Statutes (2005), Saddle Creek must establish that it was licensed as a common carrier by the U.S. Department of Transportation during the relevant time period.

35. Petitioner has failed to meet its burden of proof.

36. Here, there is no dispute that Saddle Creek was not registered with the FMCSA as a common carrier (i.e., licensed as common carrier by the U.S. Department of Transportation) until March 8, 2007. Moreover, it is undisputed that, prior to that date and at all times relevant to this proceeding, Saddle Creek was registered with FMCSA as a contract carrier.

37. Saddle Creek was not licensed as a common carrier by the U.S. Department of Transportation during the period March 20, 2004, through August 20, 2006. Therefore, Saddle Creek did not qualify for and is not entitled to the partial

exemption from sales tax specified in Subsection 212.08(9)(b), Florida Statutes (2005), and Florida Administrative Code Rule 12A-1.064(2)(a).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Respondent, Department of Revenue, enter a final order upholding its denial of Petitioner, Saddle Creek Transportation, Inc.'s, application for a partial refund of sales taxes.

DONE AND ENTERED this 1st day of April, 2009, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of April, 2009.

ENDNOTES

^{1/} The Department objected to paragraph 7 of Mr. Lake's Affidavit and paragraph 5 in Mr. Cabrera's Affidavit, both of which used/referenced the term "common carrier."

^{2/} All statutory references are to Florida Statutes (2008), unless otherwise noted.

^{3/} The "history notes" of Florida Administrative Code Rule 12A-1.064 reflect that the rule has not been amended since June 12, 2003.

^{4/} Subsection 212.08(9)(b), Florida Statutes (2005), was amended by Chapter 97-54, Laws of Florida, to limit the exemption in this provision to "common carriers."

^{5/} With regard to contract carriers, 49 U.S.C. Section 14101(b)(1), provides: "If the shipper and carrier [contract carrier], in writing, expressly waive any or all rights and remedies under this part for the transportation covered by the contract, the transportation provided under the contract shall not be subject to the waived rights and remedies"

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.