

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

RENT-A-CENTER WEST, INC., a foreign corporation registered to do business in the State of Nebraska,

Petitioner,

vs.

NEBRASKA DEPARTMENT OF REVENUE, an agency of the State of Nebraska; and TONY FULTON, Nebraska Tax Commissioner,

Respondents.

CASE NO. CI 17-1291

ORDER

CLERK OF THE DISTRICT COURT

2017 NOV 13 AM 10 58

LANCASTER COUNTY

THIS MATTER came before the Court on August 16, 2017, on the appeal of Petitioner Rent-A-Center West, Inc. ("Petitioner") from a final decision of Tony Fulton, Tax Commissioner ("Tax Commissioner"), denying a petition for redetermination of a deficiency assessment for Nebraska sales tax issued by the Nebraska Department of Revenue ("Department") to Petitioner. Colin J. Bernard and Trent D. Reinert appeared on behalf of Petitioner. L. Jay Bartel appeared on behalf of Respondents. The Court took notice of the transcript¹ and the bill of exceptions² filed on May 11, 2017. The Court heard arguments and took the matter under advisement. The Court, being fully advised in the premises, finds and orders as follows.

¹ The transcript contains a total of 477 pages (Volume 1 and 2). All references to the transcript will be cited as "Tr. ___," followed by the corresponding page number.

² The bill of exceptions contains the transcript from the proceedings below (page 1-112) and Exhibits 1-14 received by the Hearing Officer. All references to the transcript will be cited to the relevant page and line number. All references to the Exhibits will be cited to the relevant exhibit and page number.



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FACTUAL AND PROCEDURAL BACKGROUND

This appeal concerns whether the Optional Liability Damage Waiver (“LDW”) fee and the Optional Expedited Payment (or “pay-by-phone”) fee imposed on certain customers renting property from Petitioner are subject to Nebraska sales tax.

A. Optional Liability Damage Waiver (“LDW”)

Petitioner is a rent-to-own company that rents and sells tangible personal property such as furniture, appliances, electronics, and computers to its customers in Nebraska and throughout the United States. (Ex. 1 at ¶ 2). To rent or purchase tangible personal property from Petitioner, a customer must execute a Rental-Purchase Agreement (“RPA”). (86:5-87:3). From February 1, 2012 to February 28, 2015, Petitioner used two different RPAs. (*Id.* at ¶¶ 33, 36). The first version (“RPA 1”) was used during the period from February 1, 2012 through February 26, 2014. (*Id.* at ¶ 33; Ex. 8). The second version (“RPA 2”) was used during the period from February 27, 2014 through February 28, 2015. (Ex. 1 at ¶ 36; Ex. 9). The RPAs governed Petitioner’s and its customer’s duties and obligations for agreements to rent tangible personal property during the relevant time period. (Ex. 1 at ¶¶ 33,36; Ex. 8; Ex. 9).

Under both RPAs, the LDW fee is itemized under the heading “Initial Payment,” where it is totaled with the rental payment and the tax to yield a total initial payment. (Ex. 1 at ¶¶ 34, 37; Ex. 8; Ex. 9). Both RPAs also list the LDW fee under the heading “Renewal Payment,” where it is totaled with the rental payment to yield a total payment on a weekly, semi-monthly, and monthly basis. (Ex. 1 at ¶¶ 35, 38; Ex. 8; Ex. 9). The LDW fee is also listed in both RPAs under the heading “Other Charges” on a weekly, semi-monthly, and monthly basis. (Ex. 1 at ¶ 39; Ex. 8; Ex. 9). The “pay-by-phone” fee is listed on RPA 2 under the heading “Other Charges” as an “Optional Expedited Payment Fee.” (Ex. 1 at ¶ 40; Ex. 9).

As part of the sales transaction, the customers are given the option of purchasing LDWs as a waiver on all RPAs. (Ex. 1 at ¶ 43). A customer is not required to purchase LDW. (*Id.* at ¶ 42). During the times relevant to this matter, Petitioner used two LDW forms, one labeled “Optional Liability Waiver Provision,” and the other labeled “Optional Liability Damage Waiver.” (Ex. 10; Ex. 11). From February 1, 2012 through about September 30, 2012, Petitioner used an “Optional Liability Waiver Provision” (“LDW 1”). (Ex. 1 at ¶ 44; Ex. 10). From October 1, 2012 through February 28, 2015, Petitioner used an “Optional Liability Damage Waiver” (“LDW 2”). (Ex. 1 at ¶ 45; Ex. 11). LDW 1 stated that the LDW provision was “an additional part of the Rental Agreement.” (Ex. 1 at ¶ 46; Ex. 10). Such statement was removed from LDW 2 when it was revised in October 2012. (Ex. 1 at ¶ 46; Ex. 11). At all times relevant to this matter, Petitioner’s policy was to present all customers, who are entering into a rental purchase agreement, with LDW 1 or LDW 2. (Ex. 1 at ¶¶ 48-49). A customer must have an active RPA with Petitioner or an affiliate of Petitioner to purchase a LDW. (*Id.* at ¶ 50).

Petitioner is responsible for maintaining or servicing the property while it is being leased, and customers are liable for all loss and damage to the property leased in excess of normal wear and tear, unless they purchase a LDW and the damage to the property is due to a covered event pursuant to LDW 1 or LDW 2. (*Id.* at ¶ 51). LDW covers the customer’s liability for loss or damage to the property if it is damaged by natural disaster, fire, smoke, or theft. (*Id.* at ¶ 63; Ex. 10; Ex. 11). A separate LDW is required for each item leased by the customer. (77:19-22). A customer can take possession of the rental property without electing to purchase LDW. (Ex. 1 at ¶ 65). A customer can also purchase insurance from a commercial insurance company. (*Id.* at ¶ 68). The fee charged for the LDW is 7.5 percent of the periodic rental payment. (73:9-17). A customer can cancel LDW at any time. (Ex. 1 at ¶ 70). Petitioner can also unilaterally cancel

LDW by providing the customer with one-week notice. (*Id.* at ¶ 64).

B. Optional Expedited Payment Fee (“Pay-By-Phone”)

“Pay-by-phone” fee is a fee for a telephone payment assisted by a customer service representative who will immediately confirm that the payment has been applied to the customer’s account. (*Id.* at ¶¶ 57, 69). A customer is not required to incur a “pay-by-phone” fee. (*Id.* at ¶ 56). The “pay-by-phone” fee cannot be charged without an active RPA on which a payment is being made. (*Id.* at ¶ 58). There is no fee for payments made at one of Petitioner’s stores or payments made online at rentacenter.com. (*Id.* at ¶ 69).

C. The Department’s Deficiency Assessment

The Department reviewed Petitioner’s books and records to determine Petitioner’s liability for sales, consumer’s use, and other taxes and fees for the period February 1, 2012 through February 28, 2015. (Ex. 2). Following the review, the Department issued a Notice of Deficiency Determination (“Notice”) to Petitioner, reflecting a sales tax liability of \$145,590.89, consisting of \$126,260.84 in tax, \$12,626.09 in penalty, and \$6,703.96 in interest. (*Id.*). On April 10, 2015, Petitioner timely filed a Petition for Redetermination of Nebraska Sales and Use Taxes. (Ex. 3). After filing its petition, Petitioner submitted additional data allowing the Department to recalculate the sales tax deficiency, resulting in a total liability of \$148,972.22, consisting of \$124,591.03 in tax, \$12,459.14 in penalty, and \$11,922.05 in interest. (Ex. 4). The parties reached an agreement regarding all issues except for the sales tax related to LDWs and “pay-by-phone” fees reflected on Petitioner’s RPAs.³ The amount of sales tax reflected in the deficiency assessment related to the disputed LDW fee is \$113,164.89, with corresponding interest of \$10,951.59 (through October 28, 2016) and penalty of \$11,316.50. (Ex. 5). The

³ The Notice also included a liability for the Prepaid Wireless Surcharge in the amount of \$319.01, but this issue was resolved by the parties.

amount of sales tax in the deficiency assessment related to the “pay-by-phone” fee is \$10,525.64, with corresponding interest of \$920.03 (through October 28, 2016) and penalty of \$1,052.57. (Ex. 6).

On October 28, 2016, a hearing was held in this matter. Following the hearing, the Tax Commissioner entered an Order, denying Petitioner’s request for redetermination.⁴ (Tr. 461-69). The Tax Commissioner determined that the LDW and pay-by-phone fees are part of the total amount of the consideration charged, and thus, part of the sales price as defined in NEB. REV. STAT. § 77-2701.35(l) included in gross receipts subject to sales tax in Nebraska. Petitioner appealed the Tax Commissioner’s decision to this Court on April 6, 2017.

STANDARD OF REVIEW

This appeal is governed by the Administrative Procedure Act (“APA”). “Any final action of the Tax Commissioner may be appealed, and the appeal shall be in accordance with [APA].” NEB. REV. STAT. § 77-27,127. A petition for review filed pursuant to APA are conducted by the district court without a jury de novo on the record of the agency. NEB. REV. STAT. § 84-917(5)(a). In a review of de novo on the record, the district court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *Schwartz v. Neb. Liquor Control Comm’n*, 271 Neb. 346, 351 (2006). To the extent the interpretation of statutes and regulations is involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made below, according deference to an agency’s interpretation of its own regulations, unless plainly erroneous or inconsistent. *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 1007 (2002). The district court may

⁴ Petitioner filed a Motion to Amend the Certified Transcript due to an error on the testimony of the witness for the Petitioner, Hugh L. Tollack II. The Tax Commissioner granted Petitioner’s Motion to Amend the Certified Transcript and entered an Order on Post Hearing Motion on March 31, 2017.

affirm, reverse, or modify the decision of the agency or remand the case for further proceedings.
NEB. REV. STAT. § 84-917(6)(b).

ANALYSIS

Petitioner contends the Tax Commissioner erred as a matter of law in denying Petitioner's petition for redetermination of sales tax based on a finding that the LDW and "pay-by-phone" fees are subject to the Nebraska sales tax. Petitioner argues that the LDW and "pay-by-phone" fees are not "tangible personal property," and thus, are not taxable under NEB. REV. STAT. § 77-2703(1). Petitioner further argues that these fees are not part of the "sales price" included in the "gross receipts" from the lease of tangible personal property, and thus, are not subject to sales tax under the statute. The central issue before the Court, therefore, is whether the LDW and "pay-by-phone" fees imposed on certain customers renting property from Petitioner are subject to Nebraska sales tax under the statute.

1. Statutory Interpretation

"Statutory language is to be given its plain and ordinary meaning in the absence of anything indicating to the contrary." *PSB Credit Servs. Inc. v. Rich*, 251 Neb. 474, 477 (1997). "A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless." *State ex rel. Lanman v. Bd. of Cnty. Comm'rs*, 277 Neb. 492, 500 (2009). It is the court's duty "to construe the statute with a fair, unbiased and reasonable interpretation, without favor to the taxpayer or the state, to the end that the legislative intent is effectuated." *Gottsch Feeding Corp. v. State*, 261 Neb. 19, 31 (2001). A court should not "read a meaning into a statute that is not warranted by the legislative language," nor "read anything plain, direct, and unambiguous out of a statute." *Cent. States Found v. Balka*, 256 Neb. 369, 376 (1999). A court should "construe statutes relating to the

same subject matter together so as to maintain a consistent and sensible scheme.” *Japp v. Papio-Missouri River Natural Res. Dist.*, 271 Neb. 968, 973 (2006). “The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible.” *Id.*

a. The Measure of the Nebraska Sales Tax Imposed Under § 77-2703(1) is Determined by the Definitions of “Gross Receipts” and “Sales Price,” and is Not Limited to “Tangible Personal Property,” or Intangible Personal Property or Services Enumerated Under § 77-2701.16.

Nebraska “impose[s] a tax . . . upon the **gross receipts** from all sales of tangible personal property sold at retail in this state.” NEB. REV. STAT. § 77-2703(1) (emphasis added). “Retail sale or sale at retail means any sale, lease, or rental for any purpose other than for resale, sublease, or subrent.” NEB. REV. STAT. § 77-2701.31. “Sale” is defined as “any transfer of title or possession . . . exchange, barter, lease, or rental . . . , in any manner or by any means, of property for a consideration or the provision of a service for a consideration.” NEB. REV. STAT. § 77-2701.33(1). It is “presumed that all gross receipts are subject to the tax until the contrary is established.” NEB. REV. STAT. § 77-2703(1)(f). “The burden of proving that a sale of property is not a sale at retail is upon the person who makes the sale” *Id.*

“**Gross receipts** means the **total amount of the sale or lease or rental price**, as the case may be, of the retail sales of retailers.” NEB. REV. STAT. § 77-2701.16(1) (emphasis added).

“Lease or rental means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration.” NEB. REV. STAT. § 77-2701.18(1). “**Sales price** applies to the measure subject to sales tax and means **the total amount of consideration, including cash, credit, property, and services**, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise” NEB. REV.

STAT. § 77-2701.35(1) (emphasis added). “Sales price” is determined “without any deduction for: (a) The seller’s cost of the property sold; (b) The cost of materials used, the cost of labor or service, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller; [and] (c) Charges by the seller for any services necessary to complete the sale” NEB. REV. STAT. § 77-2701.35(1)(a)-(c) (emphasis added).

The plain language of the relevant statutes provides that the sales tax is imposed upon the “gross receipts from all sales of tangible personal property sold at retail in this state,” which is determined by “the total amount of [sale price] of the retail sales of retailers.” NEB. REV. STAT. §§ 77-2703(1); 77-2701.16(1). Thus, under the statutory language, the measure of the sales tax imposed under NEB. REV. STAT. § 77-2703(1) is determined by the definitions of “gross receipts” and “sales price.” This interpretation gains support from the Nebraska court cases addressing the measure of the sales tax. For instance, in *Affiliated Foods Coop., Inc. v. State*, 259 Neb. 549 (2009), the Nebraska Supreme Court considered whether charges for U.S. postage are a “cost of transportation” subject to Nebraska sales tax. In analyzing the taxability of these charges, the Supreme Court specifically relied on the statutory definitions of “gross receipts” and “sales price,” and found that the postage charges are subject to sales tax because they are included in the “sales price” and “gross receipts” under the statute.⁵ This decision thus established that the measure of the sales tax imposed under NEB. REV. STAT. § 77-2703(1) is determined by the definitions of “gross receipts” and “sales price.” *Id.*

Petitioner nonetheless argues that the LDW and “pay-by-phone” fees are not subject to

⁵ See also *Enterprise Rent-A-Car Co. Midwest, LLC v. Neb. Dep’t of Revenue*, CI 11-3101 (Lancaster Cnty. Dist. Ct. 2012) (relying on the definitions of “gross receipts” and “sales price” in determining whether the damage waiver and refueling charges related to the lease of motor vehicles were subject to sales tax); *Farmers Cooperative v. Neb. Dep’t of Revenue*, CI 13-2325 (Lancaster Cnty. Dist. Ct. 2014) (relying on the definitions “gross receipts” and “sales price” in finding that the disposal fees were taxable services); *Norris Pub. Power Dist. & Seward Pub. Power Dist. v. State*, CI 07-837 & CI 07-1069 (Lancaster Cnty. Dist. Ct. 2007) (applying the definitions of “gross receipts” and “sales price” to determine the taxability of the gross revenue of the districts).

Nebraska sales tax because those fees are not “tangible personal property” as defined in NEB. REV. STAT. § 77-2701.39. Petitioner contends that “tangible personal property” is the controlling term in the Nebraska sales tax statute, and as such, the sales tax imposed by the statute applies only to “tangible personal property.” In support of its argument, Petitioner relies on the recent Kentucky Board of Tax Appeals decision in *Rent-A-Center East, Inc. v. Finance & Admin. Cabinet Dep’t of Revenue*, 2016 WL 5339418 (Ky. Bd. Tax App. 2016). In that case, the Kentucky Board of Tax Appeals found “that the waiver agreement, for which a separately stated fee is charged, is not tangible personal property as defined by Kentucky law,” and thus, “the fees paid for it are not subject to sales tax.” *Id.* at *2.

The Court, however, does not find this ruling persuasive. First, both the Nebraska Supreme Court and the district court decisions have uniformly recognized that the measure of Nebraska’s sales tax is derived from the definitions of “gross receipts” and “sales price,” not the term “tangible personal property.” Second, the Kentucky Board of Tax Appeals’ decision ignores Kentucky’s definitional statute, which provides that both “gross receipt” and “sale price mean the total amount or consideration, including cash, credit, property, and services, for which tangible personal property, digital property, or services are sold, leased, or rented” KY. REV. STAT. ANN. § 139.010(12)(a). For the same reason, this Court cannot adopt Petitioner’s argument that the sales tax applies only to “tangible personal property,” because such interpretation reads the term “gross receipts” out of the statute. By failing to consider the term “gross receipts,” Petitioner also impermissibly fails to consider the meaning of the term “sales price” referenced in the definition of “gross receipts” under NEB. REV. STAT. § 77-2701.16(1).

Petitioner further contends that the Department’s reliance upon certain regulations is contrary to Nebraska law, because these regulations impermissibly “extend taxable items out to

intangible personal property” associated with a taxable sale or rental of tangible personal property. Pet’r’s Br. 11-12. Specifically, Petitioner objects to 316 Neb. Admin. Code § 1-002.01, which provides in part: “The sales tax and the use tax complement each other and together provide a uniform tax upon the sale, lease, rental, storage, use, distribution, or other consumption of tangible personal property and certain specified labor and services.” Petitioner also objects to 316 Neb. Admin. Code § 1-001.02, which provides, in part: “This tax is not upon the article sold, but upon the transaction called sale.”

As discussed above, Petitioner’s objections are based on an erroneous interpretation of the measure of Nebraska sales tax. Petitioner incorrectly argues that the Nebraska sales tax statute applies only to “tangible personal property,” or limited intangible property or services enumerated in NEB. REV. STAT. § 77-2701.16. According to Petitioner, the LDW and “pay-by-phone” fees are not taxable because these fees are not “tangible personal property” and are not specifically listed as taxable services in § 77-2701.16. This argument, however, was specifically considered and rejected in *Farmers Cooperative v. Neb. Dep’t of Revenue*, CI 13-2325 (Lancaster Cnty. Dist. Ct. 2014), in which the court stated:

[T]he measure of taxable “gross receipts” is dependent on the definition of “sales price.” . . . The definition of “sales price” has always included the total amount of consideration transferred in exchange for tangible personal property, including service costs or expense of the seller. However, the definition of “gross receipts” has not always included taxable services This demonstrates that the services described in paragraph (1) of NEB. REV. STAT. § 77-2701.35 refer to services that are part of a sale of tangible personal property. If this was not the case, the portion of the statute referencing the “total amount of consideration, including . . . services,” would have no meaning, as the services enumerated as part of “gross receipts” in NEB. REV. STAT. § 77-2701.16(4) are taxable regardless of whether or not they are part of a sale of tangible personal property.

“Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.” *Swift v. Neb. Dep’t of Revenue*, 278 Neb. 763, 767 (2009).

“Although construction of a statute by a department charged with enforcing it is not controlling,

considerable weight will be given to such a construction.” *Capitol City Telephone, Inc. v. Neb. Dep’t of Revenue*, 264 Neb. 515, 527 (2002). Because the Department did not exceed the scope of its rulemaking authority, the Court finds these regulations are entitled to considerable weight.

b. The LDW and Pay-By-Phone Fees Are Part of the Taxable “Sales Price,” and Thus, Properly Included in the “Gross Receipts” as Defined in NEB. REV. STAT. § 77-2701.16(1).

Petitioner next argues that the LDW and “pay-by-phone” fees are not part of the “sales price,” and thus, are not included in the “gross receipts” subject to sales tax under the statute. Specifically, Petitioner argues that the LDW and “pay-by-phone” fees are not part of the “total amount of consideration” charged for the rental of tangible personal property. Petitioner argues that in order for the LDW and “pay-by-phone” fees to be part of the total “sales price,” those fees must have been part of the “total consideration,” or “part of the payment or price that motivated Petitioner to lease property to its customers.” Pet’r’s Br. 14-15.

In making this argument, Petitioner relies on a definition of “consideration” which focuses on “[t]he cause, motive, price or impelling influence which induces a contracting party to enter into a contract.” *Id.* (citing Black’s Law Dictionary 306 (6th ed. 1990)). However, even if the payment for LDW does not induce Petitioner to lease property to its customers, the availability of LDW is clearly a motive for the customers to enter into the lease transaction. This is evidenced by the fact that the customers elect to purchase LDW in conjunction with entering into the agreement. As the Department argues, it is not merely Petitioner’s motive that is at issue in determining whether a certain term can constitute consideration, but also the motive of the customer making the purchase.

Petitioner urges this Court to adopt the rationale of *Rent-A-Center West, Inc. v. Utah State Tax Comm’n*, 367 P.3d 989 (Utah 2016), in which the Utah Supreme Court held that the

liability waiver fees are not subject to sales tax. *Id.* at 992. In Utah, sales tax is imposed on “amounts paid or charged for leases or rentals of tangible personal property if within this state the tangible personal property is: (i) stored; (ii) used; or (iii) otherwise consumed.” *Id.* at 991 (quoting UTAH CODE ANN. § 59-12-103(1)(k)). The court found the liability waiver fee was not an amount “paid or charged for” the lease or rental of tangible personal property because it “d[id] not have any effect on the customer’s possession, use, or operation of the property.” *Id.* at 993.

The Utah case, however, is clearly distinguishable from the present case because it involves a narrow statute that taxes only fees “paid or charged for” the lease of tangible personal property. In Nebraska, sales tax is imposed on the “gross receipts” from all sales or leases of tangible personal property.” NEB. REV. STAT. § 77-2703(1). “Gross receipts means the total amount of the [sale price],” which is broadly defined as “the total amount of consideration . . . for which personal property or services are sold, leased, or rented.” NEB. REV. STAT. §§ 77-2701.16(1); 77-2701.35(1). The application of Nebraska’s sales tax is thus far broader than Utah’s, as it is measured not just by amounts “paid or charged for” leases of tangible personal property, but to “the total amount of consideration” charged for the lease of personal property or services. In fact, the Utah Supreme Court acknowledged that its statute does not “specifically include ‘services, for which tangible personal property’ is leased.” *Rent-A-Center West, Inc.*, 367 P.2d at 993. The court further rejected the Tax Commissioner’s argument that other states tax liability waivers, because those states, such as Louisiana, had statutes “much broader than Utah’s,” as it imposed sales tax on “the gross proceeds derived from the lease or rental of tangible personal property.”⁶ *Id.*

⁶ *Rent-A-Center East, Inc. v. Lincoln Parish Sales & Use Tax Comm’n*, 60 So.3d 95 (La. Ct. App. 2011) (holding the liability damage waivers are subject to sales tax because the waivers can only be made available if the customer rents or leases a tangible personal property, and the waiver does not exist without the lease of the property); *see also Rent-A-Center East, Inc. v. S. Carolina Dep’t of Revenue*, 2016 WL 1391998 (S.C. Admin. Law Judge Div. 2016)

In Nebraska, the statute clearly states that the sales tax is imposed on the “gross receipts” from all sales or leases of tangible personal property, which means the total amount of the “sales price” defined as “the total amount of consideration . . . for which personal property or services are sold, leased, or rented.” NEB. REV. STAT. §§ 77-2701.16(1); 77-2701.35(1). According to the statute, the LDW and “pay-by-phone” fees received in connection with the rental of tangible personal property are part of the “sales price” included in the taxable “gross receipts.”

A similar issue was addressed by the district court in *Enterprise Rent-A-Car Company-Midwest, LLC v. Neb. Dep’t of Revenue*, CI 11-3101 (Lancaster Cnty. Dist. Ct. 2012) (“*Enterprise*”). In *Enterprise*, the issue was whether the optional damage-waiver and refueling charges associated with the lease or rental of motor vehicles were part of “gross receipts” subject to sales tax. The court in *Enterprise* held that these charges were subject to sales tax because “sales price” included “charges for delivery, installation and ‘any other expense of the seller’ when computing the sales price subject to sales tax.” (Tr. 165). The court noted that this broad definition indicated “the Legislature intended to include all consideration paid for the sale or rental of tangible personal property, including those items incidental to the actual transfer of the property.” (Tr. 165). In reaching this conclusion, the court found support in the Nebraska Supreme Court’s decision in *Omaha Pub. Power Dist. v. Neb. State Tax Comm’r*, 210 Neb. 309 (1982) (“*OPPD*”), which held that management fees and loss reimbursement payments were not subject to sales tax because they “could not be traced to any specific sale.” *Id.* at 315. The court recognized that, “[u]nlike the management fees and loss reimbursement payments in [*OPPD*], the [d]amage [w]aiver and refueling charges paid by Enterprise customers selecting those options can be traced readily to individual lease transactions.” (Tr. 166). Relying on *OPPD*, the court

(holding the liability damage waivers are subject to sales tax because although waiver is optional, once purchased, it is merged into and become inextricable from the transaction and has no value apart from the underlying transaction).

concluded that “where charges or fees can be linked to individual sales or lease transactions,” “those charges should be included in the ‘gross receipts’ from such transactions and subject to sales tax.” (Tr. 166).

Here, like the optional damage waiver and refueling charges in *Enterprise*, the LDW and “pay-by-phone” fees are associated with and linked to individual transactions involving a taxable rental of tangible personal property. Contrary to Petitioner’s argument, the LDW and “pay-by-phone” fees are not a separate agreement. The LDW fee is specific to each property rented and is stated on each RPA. The “pay-by-phone” fee is also specific to each rental transaction, and is stated on the RPA. Although it is optional for customers to elect whether they will purchase LDW or incur “pay-by-phone” fees, once elected, these charges are merged into and become part of the transaction. These fees cannot be separated from the principal rental because they cannot exist without the rental of the property. Thus, consistent with the decision in *Enterprise*, the LDW and “pay-by-phone” fees are part of the total consideration paid to lease the property and are properly included in the “gross receipts” subject to sales tax.

Petitioner attempts to distinguish the *Enterprise* decision from this case on the ground that the court incorrectly applied the holding in *OPPD*. A review of the decision and the applicable statutes, however, demonstrates that Petitioner’s criticisms are without merit. Contrary to Petitioner’s claim, the *Enterprise* decision is consistent with *OPPD* and properly applied the statutory definition of “sales price” in determining that the damage waiver and refueling charges were included in the “gross receipts.” As such, the decision in *Enterprise* fully supports this Court’s finding that the LDW and “pay-by-phone” fees are subject to sales tax.

c. The LDW and “Pay-By-Phone” Fees Fall Within the Components of “Sales Price” Enumerated in NEB. REV. STAT. § 77-2701.35(1)(b)-(c).

The Nebraska statutes provide that “gross receipts” subject to sales tax includes “the total

amount of consideration . . . for which personal property . . . [is] sold” **without deduction** for the cost of materials, labor or service, “**any other expense of the seller,**” or any “[c]harges . . . for **any services necessary to complete the sale.**” NEB. REV. STAT. §§ 77-2701.16(1); 77-2701.35(1)(b)-(c) (emphasis added); *see also* 316 Neb. Admin. Code § 1-018.02B (“The sales tax is computed on the total amount for which the property is leased or rented . . . **without any deduction or exclusion** of any cost components **such as . . . [t]he cost of material used, labor or service costs, interest charged, insurance, losses, or any other expenses.**”) (emphasis added).

In this case, the LDW and “pay-by-phone” fees constitute cost of service, loss or “any other expense of the seller” under NEB. REV. STAT. § 77-2701.35(1)(b). *See also* 316 Neb. Admin. Code § 1-018.02B. By imposing a fee for payment by phone, Petitioner is able to recoup some of the cost associated with employing customer service representatives to take these payments. Likewise, by imposing the LDW fees, Petitioner offsets the loss, cost, and expense in the event the property is lost or destroyed for a covered loss. As such, the LDW and “pay-by-phone” fees are part of the total “sales price” and fall directly within the meaning of NEB. REV. STAT. § 77-2701.35(1).

Petitioner nonetheless argues that LDW does not constitute an expense under the “sales price” definition because it is contingent. Petitioner argues that the LDW fees do not involve costs incurred “prior to or concurrent” with the sale of tangible personal property, and thus, are not expenses of the seller. Pet’r’s Br. 24. However, nothing in the statutes imposes such a temporal requirement. Moreover, Petitioner’s argument overlooks the fact that shifting the risk of loss to Petitioner constitutes an expense. Although a covered loss is not guaranteed to occur each time a customer purchases LDW, the expense to Petitioner lies in the fact that it may occur, and that without the LDW, the customer would be responsible for the item in the event of a

covered loss. Thus, it does not matter whether an actual loss will occur is contingent on future events because the increased expense lies in the risk of loss.

“Pay-by-phone” fees also constitute a charge by Petitioner for a “service necessary to complete the sale” within the meaning of NEB. REV. STAT. § 77-2701.35(1)(c). The “pay-by-phone” fees impose an obligation on the customer to pay for the phone payment service provided by Petitioner in conjunction with the rental of the tangible personal property. Although customers may elect to remit payment in another manner, if they elect to remit payment through the “pay-by-phone” process, they must pay the “pay-by-phone” fee, and it is a necessary part of the sales transaction.

2. The State’s Membership in the Streamlined Sales and Use Tax Agreement

For the sake of completeness, the Court addresses whether Nebraska’s membership in the Streamlined Sales and Use Tax Agreement (“SSUTA”) affects this Court’s analysis. *See* NEB. REV. STAT. §§ 77-2712.02 to 77-2712.07. Petitioner argues that as a member of the SSUTA, Nebraska must administer its sales tax laws according to SSUTA and in a consistent manner with other member states, such as Utah and Kentucky, which have determined that the LDWs are not subject to sales tax. The Court disagrees.

First, the SSUTA is not intended to benefit individual taxpayers, but “binds and inures only to the benefit of Nebraska and the other member states.” NEB. REV. STAT. § 77-2712.07(1). Second, Petitioner is precluded from asserting any claims against the Department under the SSUTA. NEB. REV. STAT. § 77-2712.07(2) specifically provides:

No person shall have any cause of action or defense under the agreement or by virtue of this state’s approval of the agreement. No person may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of Nebraska, or any political subdivision of Nebraska, on the ground that the action or inaction is inconsistent with the agreement.

Further, “[n]o law of Nebraska, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the agreement.” NEB. REV. STAT. § 77-2712.07(3). Nevertheless, Nebraska has statute with language much broader than Utah and Kentucky. Thus, the Court cannot find that Nebraska is bound by SSUTA to accept the interpretations of the sales tax statutes of Utah and Kentucky.

CONCLUSION

Upon examination of the entire record, the Court finds that the LDW and “pay-by-phone” fees are part of the taxable “sales price,” and thus, properly included in the “gross receipts” from the lease or rental of tangible personal property subject to Nebraska sales tax.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Tax Commissioner’s final decision upholding the Department’s sales tax deficiency assessment issued to Petitioner Rent-A-Center West is hereby **AFFIRMED**.

DATED this 12th day of November, 2017.

BY THE COURT:


Lori A. Maret
District Court Judge

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

NOTICE OF JUDGMENT

Rent-A-Center West, Inc v. Department of Revenue

Case ID: CI 17 1291

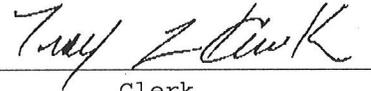
Judgment has been entered.

Judgment Date: 11/13/2017

If a money judgment other than child support is owed to the court, payment may be made directly to the court or on-line at: ne.gov/go/paycourts. For information regarding child support payments contact 1-877-631-9973.

Date: NOVEMBER 14, 2017

BY THE COURT:



Clerk



L J Bartel
Assistant Attorney Genreal
2115 State Capitol
Lincoln, NE 68509