

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

COX CABLE OF OMAHA, INC., )  
 )  
 ) Appellant, )  
 )  
 ) vs. )  
 )  
 ) DONNA KARNES, Tax Commissioner )  
 ) of the State of Nebraska, and )  
 ) THE NEBRASKA DEPARTMENT OF )  
 ) REVENUE, an Agency of the State )  
 ) of Nebraska, )  
 )  
 ) Appellees. )

Docket 405

Page 104

Dept. of Justice

ORDER AUG 7 1987

State of Nebraska

This matter is on appeal to this court from an order of the State Tax Commissioner. After hearing, the State Tax Commissioner determined that plaintiff-appellant Cox Cable of Omaha, Inc., was not entitled to a refund of sales or use taxes paid on the difference in the purchase price of Oak and Sylvania brand cable television converter boxes with remote control capability and the same or similar units without remote control capability.

The order of the Tax Commissioner is affirmed.

The facts are not in dispute. Cox Cable is engaged in business as a cable television service operator in Douglas County, Nebraska. Customers subscribe to this service and pay a monthly fee. Cox supplies a converter box to each of its customers who pay a monthly fee depending on the types of services subscribed to. Without a converter box a customer cannot receive any services provided by Cox Cable. For an additional monthly fee, an electronic module is added to the converter box and a hand-held remote control device is provided to the customer.

The issue decided adverse to Cox Cable is that Cox Cable is not entitled to a refund of use tax paid based on the price differential between converter units possessing remote control capability and converter units which did not possess the remote control feature.

Cox Cable's argument is that its purchases of the converter box is a sale for resale and exempt under the provision of section 77-2702(14) Reissue of 1986 which states in substance: "Sale for resale shall mean a sale of tangible personal property to any purchaser who is purchasing such tangible personal property for the purpose of reselling it in the normal course of his or her business, either in the form or condition in which it is purchased or as an attachment to or integral part of other tangible personal property. A sale for resale shall include a sale of tangible personal property to a purchaser for the sole purpose of that purchaser's renting or leasing such tangible personal property to another person, with rent or lease payments set at a fair market value . . .".

Nebraska statute section 27-2703(1) R. S. Supp. 1984 imposed a sales and use tax on gross receipts in the following language: "There is hereby imposed a tax . . . upon the gross receipts from all sales of tangible personal property sold at retail in this state, the gross receipts of every person engaged as a public utility, as a community antenna television service operator, or as a retailer of intellectual or entertainment properties referred to in subdivision (4)(c) of section 77-2702, and the gross receipts from the sale of admissions in this state . . .".

Section 77-2702(4)(b) R. S. Supp. 1984 defines gross receipts of a community antenna television service operator as follows: "The gross receipts of every person engaged as a public utility or as a community antenna television service operator shall mean . . . (iv) In the furnishing of community antenna television service, the gross receipts received in the furnishing of such community antenna television service as regulated under section 18-2201 through 18-2205. . ."

In the time period of the claim for refund, a complementary use tax was imposed pursuant to the terms of Neb. Rev. Stat. section 77-2703(2) R. S. Supp. 1984: "A use tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased, leased, or rented from any retailer or of intellectual or entertainment properties. . . for storage, use, or other consumption in this state at the rate set as provided in subsection (1) of this section on the sales price of the property or, in the case of leases or rentals, of said lease or rental prices."

Storage is defined in section 77-2702(17) to include: "Any retention in this state for any purposes except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer. . .".

Use is defined in section 77-2702(20): "Use shall mean the exercise of any right or power over tangible personal property . . .".

In the case of White v. Storer Communications, Inc., Court of Civil Appeals #5635, April 22, 1987, the Supreme Court

of Alabama held that "converters had no function apart from giving Storer subscribers access to the cable service. That is, they were useless in and of themselves. The substance of the transaction was cable service; the converters were merely a means servicing that end." Although the Alabama court was dealing with a differently worded statute, the ultimate issue was the same as the case before this court. The Alabama court, in arriving at its decision, further stated: "We think the issue to be one of determining the purpose of the transaction and what role the property in question plays in the transaction. We are concerned in this case with determining whether Storer's converters or its cable television service is the substance of the transaction. One writer summarizes how such cases are to be analyzed: 'If the article sold has no value to the purchaser except as a result of services rendered by the vendor, and the transfer of the article to the purchaser is an actual and necessary part of the services rendered, then the vendor is engaged in the business of rendering services, and not in the business of selling at retail. If the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail . . . '"

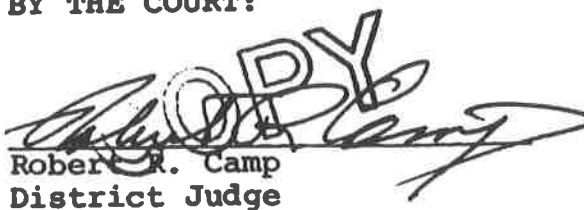
This Court concludes that the converter units are used in providing cable services by Cox and are not tangible personal property in the hands of Cox for resale. Cox Cable has not established that it falls within the exemption from tax as provided in section 77-2702(14).

IT IS THEREFORE ORDERED that the decision and order of the State Tax Commissioner, dated April 4, 1986, is hereby affirmed.

Costs are taxed to plaintiff-appellant Cox Cable of Omaha, Inc.

DATED this 5 day of August, 1987.

BY THE COURT:

  
Robert R. Camp  
District Judge