

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

CHRISTOPHER J. HEAVEN	:	JANUARY TERM 2000
	:	
v.	:	No. 0596
	:	
RITE AID CORPORATION	:	Commerce Program

MEMORANDUM OPINION

Plaintiff Christopher Heaven alleges that defendant Rite Aid charged him too much sales tax on his purchases. Heaven sued Rite Aid for violations of the Unfair Trade Practices and Consumer Protection Law (“CPL”) and for common law fraud, and Rite Aid filed preliminary objections. Because the court lacks subject matter jurisdiction over Heaven’s claims, the court will dismiss the complaint and overrule Rite Aid’s preliminary objections as moot.

FACTS

On December 16, 1999, Heaven bought \$11.48 worth of items from a Rite Aid store in Philadelphia. He gave Rite Aid a manufacturer’s coupon for a \$2.00 discount on one of the items. Rite Aid calculated the applicable 7% sales tax from the \$11.48 total, then subtracted the \$2.00 discount. Heaven paid Rite Aid \$0.80 in sales tax.

Heaven argues that Rite Aid’s math is at odds with the tax code. Heaven argues that the tax code requires Rite Aid to subtract the coupon discount before calculating the sales tax. 61 Pa.Code §

33.2(b)(2) (“Regulation 300”). Under this interpretation of the tax code, Heaven should have paid \$0.66 in sales tax. If Heaven’s interpretation is correct, he overpaid by \$0.14.

Heaven filed a class action complaint against Rite Aid. Count I of the complaint claims that Rite Aid violated the CPL. Heaven seeks treble damages, costs, interest and attorney fees. Heaven also seeks a declaration that Rite Aid’s conduct is unlawful and an injunction ordering Rite Aid to comply with Regulation 300. Counts II and III contain common law claims for fraudulent nondisclosure and intentional concealment. Heaven seeks compensatory and punitive damages under Counts II and III.

Rite Aid filed preliminary objections. The main argument in the objections is that the complaint did not allege all the elements of a CPL violation or of common law fraud. After Heaven filed an answer to the preliminary objections, Rite Aid filed a reply. In the reply, Rite Aid argued for the first time that there is no civil action for a violation of the sales tax code, and that Heaven must seek an administrative remedy instead.

DISCUSSION

I. BECAUSE EXHAUSTION OF REMEDIES IS AN ISSUE OF SUBJECT MATTER JURISDICTION, RITE AID DID NOT WAIVE THIS ARGUMENT.

Rite Aid raised what is essentially an exhaustion argument for the first time in its reply brief. Heaven argues that Rite Aid waived the exhaustion argument by not raising exhaustion in its preliminary objections. But “failure to exhaust administrative remedies is jurisdictional in nature, in which case it is one of the exceptions to Rule 1032, and can be raised at any time, either by the parties or by the court *sua sponte*.” Brog v. Commonwealth, 43 Pa. Commw. 27, 401 A.2d 613, 615 (1979). See also Pa.R.C.P. 1032(b); LeFlar v. Gulf Creek Indus. Park #2, 511 Pa. 574, 515 A.2d 875, 879 (1986)

(holding that parties or court may raise issue of subject matter jurisdiction at any stage of the proceedings). Therefore, the court must consider this argument.

II. THE COURT MUST DISMISS THIS ACTION FOR LACK OF SUBJECT MATTER JURISDICTION.

Because Heaven has an adequate statutory remedy for recovery of the overcharged sales tax, the court must dismiss the action for lack of subject matter jurisdiction. Where an adequate administrative remedy is provided by statute, a court lacks jurisdiction to entertain a suit either in law or equity. Lilian v. Commonwealth, 467 Pa. 15, 354 A.2d 250, 252 (1976); Brog, 401 A.2d at 615. The tax code provides an administrative remedy for refund of sales taxes. 72 P.S. §§ 7251 et seq. To obtain a refund of sales tax, a purchaser must file a petition for refund with the Department of Revenue. 72 P.S. §§ 7253, 10003.1. The decision of the department is appealable to the Board of Finance and Revenue, then to the Commonwealth Court, and then to the Supreme Court. 72 P.S. §§ 7254, 7255; 42 Pa.C.S.A. §§ 723(b), 763 (a).

The statutory sales tax refund is an adequate remedy, and a taxpayer may not bring an individual or class action for a sales tax refund. Lilian, 354 A.2d at 252 (1976), aff'g 11 Pa.Comm. 90, 311 A.2d 368 (1973). In Lilian, the plaintiffs paid a 6% sales tax on the purchase of a new car. Id. at 251. The purchase price from which the Commonwealth computed the sales tax included the federal excise tax, i.e., the Commonwealth taxed the federal excise tax. Id. at 251-52. After the purchase, Congress retroactively repealed the excise tax and refunded it to the plaintiffs. Id. at 251. The plaintiffs

filed a class action complaint in equity in the Commonwealth Court¹ against the Commonwealth seeking a refund of the sales tax paid on the refunded excise tax. Id. at 252. The Commonwealth Court held it had no jurisdiction, and the Supreme Court affirmed. Id. at 252, 254. The Supreme Court held that the statutory refund procedure was the exclusive means to obtain a refund of the tax and that the small amounts of the claims did not change this result. Id. at 253-54.

Under Lilian, the sole remedy for refund of sales tax is the statutory refund procedure. Id. But Heaven's suit is arguably different from Lilian. First, Heaven's defendant is the vendor; the defendant in Lilian was the Commonwealth. Second, Rite Aid may not have turned over the sales tax to the Commonwealth; there was no issue in Lilian as to whether the automobile vendor turned over the sales tax to the Commonwealth. Third, Heaven alleges that Rite Aid's collection of excess sales tax was intentional or deceptive; the overcharge in Lilian was not the vendor's fault, but resulted from a retroactive change in a federal statute.

Heaven argues that these differences make Lilian inapplicable to this suit. The court disagrees and holds that a purchaser may not bring an individual action or a class action against a vendor for refund of overcharged sales tax, regardless of whether the vendor remitted the overcharge to the Commonwealth, and regardless of whether the vendor acted intentionally or deceptively. The court reaches this result based on principles set forth in Lilian and its progeny, the tax code and the tax regulations.

¹ The plaintiffs filed their suit in Commonwealth Court presumably because the Commonwealth Court has original jurisdiction over claims against the Commonwealth. 42 Pa.C.S.A. § 761(a).

A. Rite Aid Holds in Trust for the Commonwealth the Sales Tax That Heaven Paid.

A vendor that collects sales tax in the Commonwealth does so as an agent of the Commonwealth. Silberman v. Commonwealth, 738 A.2d 508, 509 (Pa.Comm. 1999); Gray v. Commonwealth, 714 A.2d 1124, 1125 (Pa.Comm. 1998). The vendor holds in trust for the Commonwealth the sales taxes it collects. 72 P.S. § 7225; 61 Pa.Code 34.3(b)(1)(ii). Therefore, the sales tax belonged to the Commonwealth as soon as its agent, Rite Aid, collected it and regardless of whether Rite Aid sent the money to the Commonwealth. Silberman, 738 A.2d at 509 (stating that, “[w]hen a purchaser pays sales tax to a vendor, by paying the Commonwealth’s agent, he has effectively paid the Commonwealth. . . .”); Gray, 714 A.2d at 1125 (same).

B. The Amount of Sales Tax that Rite Aid Holds in Trust and the Amount That It Must Turn Over to the Commonwealth Include the Overcharge.

A vendor collecting sales taxes must remit those taxes to the Commonwealth. 72 P.S. 7237(b). The vendor must turn over to the Commonwealth all sales taxes collected, even if the amount of collected taxes exceeds the amount actually due. 61 Pa.Code § 34.2(d) (stating that “a vendor shall remit the amount of tax due or the amount actually collected, whichever is greater.”); 61 Pa § 34.3(b)(1)(stating that vendors “shall remit to the Commonwealth the entire amount of taxes collected from purchasers . . . , even though the money collected is in excess of 6% of the total purchase price of the vendor’s sales or leases subject to tax.”). Therefore, the extra 14¢ that Rite Aid collected from Heaven belongs to the Commonwealth, Rite Aid holds the 14¢ in trust for the Commonwealth, and Rite Aid must remit the 14¢ to the Commonwealth.

C. Heaven May Petition the Commonwealth for a Refund Regardless of Whether Rite Aid Remitted the Overcharged Tax to the Commonwealth.

The Department of Revenue must refund all sales taxes collected under the tax code “to which the Commonwealth is not rightfully entitled.” 72 P.S. § 7252. “[T]he refund of tax . . . shall be made only where the person who has actually paid the tax files a petition for refund with the department” 72 P.S. § 7253. A purchaser may obtain a refund from the Commonwealth even if the vendor failed to turn over to the Commonwealth the overcharged sales tax. Silberman, 738 A.2d at 509 n. 3; Gray, 714 A.2d at 1125 n. 3. See also 72 P.S. § 10003.1(a) (permitting a purchaser to petition for a refund if he has “*actually paid* tax, interest or penalty to the Commonwealth or to *an agent or licensee of the Commonwealth authorized to collect taxes . . .*”) (emphasis added); Silberman, 738 A.2d at 509 (stating that, for the purpose of triggering the 3-year limitations period for filing a refund petition, “actual payment” occurs when the purchaser pays the sales tax to the vendor); Gray, 714 A.2d at 1125 (same). Therefore, Heaven may petition the Commonwealth for a refund even if Rite Aid kept the 14¢ for itself.

D. Heaven May Not Sue a Vendor for a Sales Tax Refund.

Vendors can play no role in the refund of sales taxes to purchasers. Aldine Apartments, Inc. v. Commonwealth, 32 Pa.Commw. 296, 379 A.2d 333, 336 (1977). Reading the held-in-trust provision (§ 7225), the remittance provision (§ 7237), and the refund provision (§ 7252) together, the Commonwealth Court held in Aldine Apartments that a purchaser cannot bring a class action suit against a vendor for a refund of sales taxes. Aldine Apartments, 379 A.2d at 336.

In Aldine Apartments, the petitioners were the owners of an apartment building. Id. at 334. They filed a class action petition in Commonwealth Court² seeking an injunction against the collection of sales tax on their utility services and seeking a refund of excess taxes paid. Id. The respondents were the Commonwealth and three utility companies that collected the tax. Id. at 335. Following Lilian, the court held that the statutory refund procedure was the petitioners' sole remedy and that, therefore, the court lacked jurisdiction. Id. at 335-336. The court dismissed the action. Id. at 336. Significantly, the court stated that it lacked jurisdiction over the entire action, even the claims against the utility companies. Id. The court also sustained the three utility companies' demurrers to the petitioners' claims:

[I]t is clear from [72 P.S. §§ 7225, 7237 and 7252] that only the Department of Revenue could refund the taxes which petitioners seek. Respondents are merely collecting agents and, legally, can play no role in the refund of these taxes. Therefore, the petition for review fails to state a cause of action as to these three respondents.

Id.³ Under Aldine Apartments, this court has no subject matter jurisdiction over a sales tax refund claim, whether the defendant is the Commonwealth or the vendor that collected the taxes.

E. Heaven Cannot Confer Subject Matter Jurisdiction by Alleging Class Status.

The impracticality of requiring all of Rite Aid's overcharged customers to file a petition for a

² As in Lilian, the petitioners seem to have alleged that the Commonwealth Court had original jurisdiction because the Commonwealth was a defendant. 42 Pa.C.S.A. § 761(a).

³ Technically, Rite Aid cannot take advantage of this second Aldine Apartments holding at the P.O. stage, because the holding deals with legal sufficiency -- not jurisdiction -- and Rite Aid did not raise this argument in its original P.O.s. But the second Aldine Apartments holding reinforces the idea that a trial court has no jurisdiction over tax refund claims, whether the defendant is the Commonwealth or the vendor.

refund does not relieve Heaven of the exhaustion requirement. Lilian, 354 A.2d at 254. That impracticality would be relevant to class certification. Id. at 253. It would not be relevant to whether Heaven may bring an action at all:

“[C]lass status or the lack of it is irrelevant to the question whether an action is to be heard in equity or at law or whether, indeed, either form is available in light of the statutory remedy. With no independent basis for equity jurisdiction, [plaintiffs] cannot generate it simply by alleging class status.”

Id. at 254. See also Aronson v. City of Pittsburgh, 98 Pa.Comm. 1, 510 A.2d 871, 873 (1986)

(stating that “where the Legislature has provided a specific statutory remedy, a class action may not be used to provide a different remedy.”). The court would have no jurisdiction over an individual suit by Heaven; Heaven cannot generate that jurisdiction simply by alleging class status. Lilian, 354 A.2d at 254.

F. Heaven May Not Avoid the Statutory Refund Procedure By Alleging That Rite Aid’s Conduct Was Intentional or Deceptive.

Heaven cites Latman v. Costa Cruise Lines, 758 So.2d 699, 703 (Fla.App. 2000), for the proposition that a purchaser may bring a consumer fraud class action against a vendor who intentionally overcharges sales tax and keeps the money for itself. In Latman, three cruise lines added “port charges” to their ticket prices. Id. at 701. The plaintiffs alleged that the charges were greater than the actual charges by the ports, and that the cruise lines kept the excess for themselves. Id. The appeals court held that the plaintiffs’ class should be certified. Id. at 704.

In dicta, the appeals court analogized the situation to a hypothetical situation where a vendor overcharged sales tax:

Suppose that a company systematically overcharges its customers on sales tax. The hypothetical company pays the state the sales tax that it owes, and then keeps the overcharge for itself. We would not hesitate to say that an intentional overcharge of sales tax, which is kept by the company itself, is an unfair and deceptive trade practice and that the consumer must be repaid. That is so even though the consumers clearly were willing to pay the price charged--in the hypothetical example, they actually paid the sales tax overcharges--nor would it make a difference that the consumers paid no attention to the sales tax amount. We think such a claim would be actionable under [the Florida Deceptive and Unfair Trade Practices Act].

Id. at 703.

Though Latman seems to be persuasive support for Heaven's argument, Latman is distinguishable. First, Latman dealt only with port charges. The sales tax discussion was dicta. Second, Latman was a class certification case. There was no issue as to whether the court had jurisdiction to hear the plaintiff's cause of action. See Lilian, 354 A.2d at 253 (holding that plaintiff cannot assert a class action claim if he cannot assert an individual claim). Third, Florida's statutory sales tax refund scheme is different than Pennsylvania's. See Fla.Stat. Ann. § 215.26. Compare, e.g., P.R. Mrktg. Group, Inc. v. GTE Florida, Inc., 747 So.2d 962, 964 (Fla.App. 1999) (stating that purchaser may bring class action against State and vendor for sales tax refund if all class members filed for administrative refunds) with Smolow v. Commonwealth, 131 Pa.Commw. 276, 570 A.2d 112, 122 (1990) (holding that purchaser may not bring class action against Commonwealth for a sales tax refund), aff'd, 527 Pa. 371, 592 A.2d 40 (1991).

Heaven cites another port charge case. Pickett v. Holland America Line-Westours, Inc., 6 P.3d 63 (Wash. App. 2000). Like Latman, Pickett is inapplicable because (1) it deals with a port charge, not a sales tax, and (2) it deals with class certification, not jurisdiction.

Heaven argues that Lilian should not apply because requiring the Commonwealth to administer

the refund program would shift the cost of remedying Rite Aid's unlawful conduct onto the Commonwealth. The court disagrees. The tax code sets forth a comprehensive scheme for collection and refund of sales taxes, including provisions giving the Commonwealth recourse against dishonest vendors. The tax code imposes criminal penalties on vendors who file fraudulent returns. 72 P.S. § 7268 (a) and 61 Pa.Code § 35.2 (d)(1)(i) (filing fraudulent sales tax return); 72 P.S. § 7268(b) and 61 Pa. Code § 35.2(d)(1)(ii)(G), (I) and (J) (filing false return, not fully disclosing the amount of taxable sales, and making false statements as to payment of tax); 18 Pa.C.S.A. § 4113 and 61 Pa.Code § 35.2(d)(2)(ii) (misapplication of government property); 18 Pa.C.S.A. §§ 3921 and 3927 and 61 Pa.Code § 35.2(d)(2)(iii)(theft). The tax code imposes civil penalties on vendors who underpay or understate sales tax. 61 Pa.Code § 35.2(b) and (c) (underpayment, understatement and intentional conduct). By enacting this comprehensive scheme, the legislature has vested exclusive jurisdiction over sales tax matters in the Department of Revenue. The court will not create a common law remedy to add to this comprehensive statutory scheme. See 1 Pa.C.S.A. § 1504 and Lilian, 311 A.2d at 369 (requiring strict application of tax refund statutes).

CONCLUSION

Because the court lacks subject matter jurisdiction over Heaven's claims, the court will file an order dismissing Heaven's complaint and overruling Rite Aid's preliminary objections as moot.

BY THE COURT:

JOHN W. HERRON, J.

Date: October 27, 2000

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CHRISTOPHER J. HEAVEN	:	JANUARY TERM 2000
	:	
v.	:	No. 0596
	:	
RITE AID CORPORATION	:	Commerce Program

ORDER

AND NOW, this 27th day of October 2000, in accordance with the contemporaneously-filed memorandum opinion in support of this order, IT IS HEREBY ORDERED that

- (1) The complaint is DISMISSED for lack of subject matter jurisdiction, and
- (2) Rite Aid's preliminary objections are OVERRULED as moot.

BY THE COURT:

JOHN W. HERRON, J.