

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

BARNES & NOBLE SUPERSTORES,)
INC., d/b/a BOOKSTAR,)

Plaintiff/Appellee)

VS.)

JOE B. HUDDLESTON,)
COMMISSIONER OF REVENUE,)
STATE OF TENNESSEE,)

Defendant/Appellant)

) Davidson Chancery No. 94-2778-III

) Appeal No. 01A01-9604-CH-00149

FILED

October 18, 1996

Cecil W. Crowson
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE
THE HONORABLE ELLEN HOBBS LYLE, CHANCELLOR

CHARLES W. BURSON
Attorney General & Reporter

SEAN P. SCALLY
Assistant Attorney General
Nashville, Tennessee
Attorneys for Defendant/Appellant

MARIAN F. HARRISON
ALAN D. JOHNSON
WILLIS & KNIGHT
Nashville, Tennessee
Attorneys for Plaintiff/Appellee

AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

BEN H. CANTRELL, J.

In this case, the Tennessee Commissioner of Revenue (“Commissioner”) appeals from the trial court’s grant of summary judgment in favor of Bookstar. The primary issue with which we are presented is whether Bookstar’s sale of cards that entitle its customers to a discount on merchandise is subject to Tennessee sales tax. We hold that these sales are not subject to taxation. Consequently, we affirm the judgment of the court below.

I.

The pertinent facts are undisputed. Between 1991 and 1993, Bookstar sold “Readers Choice” cards to its customers. For a \$10.00 annual fee, customers received a card that indicated their membership in the Readers Choice Club, which entitled them to a 10% discount on Bookstar merchandise in all Bookstar stores across the country. Presentation of the card was not necessary in order for a customer to receive the discount if the customer knew his or her membership number and the expiration date of the card.

In June 1994, the Commissioner issued a notice of tax assessment to Bookstar in the amount of \$45,562.00 for sales taxes owed on the sales of the discount cards. Bookstar filed suit in the Davidson County Chancery Court contesting the assessment of the taxes. Bookstar alleged that the \$10.00 fee represented payment for membership in a discount buying club, which is not subject to sales tax because the transaction does not involve the sale of tangible personal property. Instead, Bookstar argued, the fee was paid in exchange for the intangible privilege of receiving a discount on merchandise, which is not taxed under the applicable statutes.

The Commissioner advanced two arguments in support of his assessment. First, the Commissioner argued that the cards themselves were tangible personal property subject to sales tax. Alternatively, the Commissioner asserted, the sale of the cards for \$10.00 constituted prepayment for merchandise.

Following a hearing on Bookstar’s motion for summary judgment, the trial court held that the \$10.00 membership fee was not capable of being identified with any specific sale

of goods and that the membership cards themselves were not tangible personal property. Furthermore, the trial court held that because the members were not obligated to purchase any Bookstar merchandise, the \$10.00 fee could not be considered part of the purchase price. Accordingly, the trial court granted Bookstar's motion for summary judgment, holding that Bookstar carried its heavy burden of demonstrating by clear and convincing evidence that the Commissioner erred in imposing sales tax on the \$10.00 club membership fees.

On appeal, the Commissioner's position is that payment of the \$10.00 fee constitutes prepayment for merchandise because Bookstar customers are in effect applying \$10.00 toward the later purchase of Bookstar inventory. According to the Commissioner, customers will not receive a true 10% discount until they have recovered their \$10.00 by purchasing \$100.00 worth of merchandise. The Commissioner concedes that any purchases over \$100.00 results in a true 10% discount which is not subject to sales tax.

II.

This case comes to us on summary judgment, which should be rendered where the evidence shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. T.R.C.P. 56.03. There does not appear to be any conflict in the evidence as to the material facts of the present case. Therefore, we deem the issue on appeal to be entirely one of law.

Tennessee imposes a sales tax on the sale of tangible personal property within the state. Specifically, T.C.A. § 67-6-201 provides in part:

It is declared to be the legislative intent that every person is exercising a taxable privilege who:
(1) Engages in the business of selling tangible personal property at retail in this state.

T.C.A. § 67-6-201 (1994).

"Tangible personal property" includes personal property that "may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses."

T.C.A. § 67-6-102(28) (1994). T.C.A. § 67-6-202(a) provides that a sales tax is levied on the sale of tangible personal property at a rate of 6% of the sales price. “Sales price” is defined as “the total amount for which a taxable service or tangible personal property is sold...provided, that cash discounts allowed and taken on sales shall not be included....T.C.A. § 67-6-102 (25) (1994).

The determinative inquiry in this case is whether the sale of discount cards constitutes a prepayment for merchandise. In order to resolve this issue, we look first to the language of the statute in order to ascertain and effectuate the intent of the General Assembly. State ex rel Metropolitan Gov't. v. Spicewood Creek Watershed Dist., 848 S.W.2d 60, 62 (Tenn. 1993). It is a general rule of construction that sales and use taxes will not be extended by implication beyond the clear import of the language used and will not be enlarged to embrace matters not specifically named. Morton Pharmaceuticals, Inc. v. McFarland, 368 S.W.2d 756, 760 (Tenn. 1963).

After evaluating the applicable statutes in light of the circumstances of the case *sub judice*, it is our opinion that Bookstar's sale of discount club memberships is not subject to sales tax. The Commissioner's prepayment argument must fail for the simple reason that a member has no obligation ever to purchase any merchandise. The true object of the subject transactions between Bookstar and its customers is to bestow upon club members the intangible right to receive a discount on merchandise. The membership card is merely an indicia of that intangible right and incidentally aids in the exercise of that right. The club member may ultimately elect not to avail himself of the privilege of buying anything.

The Commissioner has also raised certain burden of proof issues for our consideration. Specifically, the Commissioner argues that Bookstar bore the burden of proving that certain customers were either exempt from sales tax or that the full \$10.00 was not applied toward the purchase of merchandise. Additionally, the Commissioner asserts that Bookstar bore the burden of proving that some customers purchased merchandise outside Tennessee. Both of these contentions, however, assume that the

imposition of the sales tax was proper at the outset and that Bookstar must prove entitlement to an exemption. Because we have determined that sales tax may not properly be imposed on Bookstar's sale of discount cards, these issues are pretermitted.

The judgment of the trial court is affirmed. Costs on appeal are adjudged against appellant.

HIGHERS, J.

CONCUR:

CRAWFORD, P.J., W.S.

CANTRELL, J.