IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

DAVID HUTTON,	)	
	)	
Plaintiff/Appellee,	)	
	)	**Giles Chancery**
	)	**No. 8901**
VS.	)	
	)	**Appeal No.**
	)	**01-A-01-9601-CH-00023**
RUTH E. JOHNSON, Commissioner of	)	
Revenue for the State of Tennessee,	)	
	)	
Defendant/Appellant.	)	

O R D E R

Upon consideration of the petition to rehear filed by the appellant and the response thereto filed by appellee, it is ordered that the opinion filed on August 30, 1996, be withdrawn and that the opinion filed contemporaneously with this order be substituted for said August 30, 1996, opinion.

It is further ordered that the judgment entered on August 30, 1996, be vacated.

ENTER ________________

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HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

____
BEN H. CANTRELL, JUDGE

DISSENTS IN SEPARATE OPINION
WILLIAM C. KOCH, JR., JUDGE

DAVID HUTTON,	)	
	)	
Plaintiff/Appellee,	)	
	)	**Giles Chancery**
	)	**No. 8901**
VS.	)	
	)	**Appeal No.**
	)	**01-A-01-9601-CH-00023**
RUTH E. JOHNSON, Commissioner of Revenue for the State of Tennessee,	)	
	)	
Defendant/Appellant.	)	

FILED

November 8, 1996

Cecil W. Crowson
Appellate Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF GILES COUNTY
AT PULASKI, TENNESSEE

HONORABLE JAMES L. WEATHERFORD, JUDGE

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AFFIRMED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
BEN H. CANTRELL, JUDGE

DISSENTS IN SEPARATE OPINION
WILLIAM C. KOCH, JR., JUDGE

DAVID HUTTON,	)	
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Plaintiff/Appellee,	)	
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VS.	)	
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RUTH E. JOHNSON, Commissioner of Revenue for the State of Tennessee,	)	
	)	
Defendant/Appellant.	)	

OPINION

The defendant/Commissioner has appealed from a summary judgment of the Trial Court requiring the Commissioner to refund to plaintiff $75,832 use tax paid under protest. The facts are uncontroverted. The question before the Trial Court and before this Court is the application of the law to the factual situation.

On and prior to June 25, 1993, plaintiff was the owner of a Model F90 Beech aircraft which he desired to replace with a jet aircraft. The desired aircraft was not immediately available. On June 25, 1993, plaintiff entered into an eight page written agreement with Bell Aircraft, Inc. which provided that the value of the Beech aircraft was $1,142,000, but that the agreed value of plaintiff's equity in the Beech aircraft was $629,086.52 because of an existing lien thereon; that plaintiff would convey the Beech aircraft to Bell on the date of the contract; that plaintiff would buy the replacement jet from or through Bell when a satisfactory jet was found; that Bell would deposit $629,086.52 with a named escrow agent to be used in the purchase of the jet when found; and that plaintiff would not have access to the escrow fund for any other purpose except to pay for the replacement and receive the surplus, if any, after the replacement.

The contract contained the following verbatim provision:

> SECOND
> A. The consideration for the conveyance of the property shall be the exchange by Bell of title to personal

> property of "like kind" within the meaning of § 1031 of the Internal Revenue Code which shall hereafter be acquired by Bell and which shall be acceptable to owner (referred to herein as "Exchange Property").
>
> B. Owner shall enter into a contract for the acquisition of the Exchange Property which shall be assigned to Bell for use as the Exchange Property. The assignment shall be made in the form attached as Exhibit B, and notice of such assignment shall be given to the third party seller of the Exchange Property, prior to the deferred exchange closing date, in the form attached as Exhibit C.

The import of this provision is that, if plaintiff should find a suitable aircraft and contract for its purchase, plaintiff would assign the purchase contract to Bell so that the performance of the sale contract by the third party seller would be considered a performance by Bell of its agreement to acquire and sell the replacement aircraft to plaintiff.

Plaintiff learned that the desired aircraft could be bought from Cessna Aircraft Company and executed a contract with Cessna, whereby Cessna would sell the Cessna Aircraft to plaintiff for $2,250,000. Plaintiff assigned the contract to Bell; Bell released the escrow fund to Cessna in part payment of the $2,250,000 purchase price and instructed Cessna to convey the replacement aircraft to plaintiff. Plaintiff paid or financed the remainder of the $2,250,000 and Cessna conveyed the aircraft to plaintiff.

Plaintiff paid use tax upon the entire $2,250,000, but that part of the tax which was attributable to the $1,142,000 value of the Beech aircraft was paid under protest.

As stated, the Trial Court awarded plaintiff summary judgment for $75,832, which was the amount of tax which would have been due upon $1,142,000. The commissioner appealed.

The issues on appeal are whether plaintiff is entitled to any refund under the above stated undisputed facts and, if so, the correct amount of the refund. TCA §67-6-510. At the time of the transaction, T.C.A. § 67-6-510 read as follows:

> **Computation on trade-ins.** Where used articles are taken in trade, or in a series of trades, as a credit or part payment on the sale of new or used articles, the tax levied by this chapter shall be paid on the net difference, that this, the price of the new or used article sold less the credit for the used article taken in trade. [Acts 1947, ch. 3, subsec. 6; mod. C. Supp. 1950, § 1248.62 (Williams, § 1328.28); T.C.A. (Orig. Ed.), § 67-3015.]

The Commissioner insists that the trade-in exemption is inapplicable because the transaction between Cessna and plaintiff did not involve a trade-in; indeed the sales contract between Cessna and plaintiff stated the purchase price as $2,250,000 and contained the following:

> Less trade-in allow: -0-

Plaintiff responds that, under his contract with Bell quoted above, he was required to and did, assign his contract with Cessna to Bell, so that Cessna's action in selling and conveying the aircraft to plaintiff was done at the direction of Bell and in satisfaction of Bell's agreement to sell such an aircraft to plaintiff.

Unquestionably, if Bell had purchased the replacement aircraft from Cessna and reconveyed it to plaintiff, the value of the Beechcraft would be exempt from use tax as a "trade-in" under the quoted statute.

Considering the Cessna contract alone, plaintiff is not entitled to a trade-in allowance. On the other hand, if the Bell contract is considered, it is possible to consider the Cessna contract as a fulfillment of the Bell contract as to which there was a "trade-in."

The Commissioner cites *State v. Slieger,* Tenn. 1993, 846 S.W.2d 262, wherein the Supreme Court declined to extend the "flagrant non-support statute" to include a parent who has never resided in Tennessee and remains outside the state to avoid being forced to support a child. The Court did indicate an aversion to "unduly restricting or expanding the legislative intent."

The Commissioner cites the definition of "trade-in," and asserts correctly that Cessna did not receive title to the Beechcraft aircraft as a trade-in. On the other hand, Bell did receive title to the Beechcraft aircraft as a trade-in and did place its net equity value in escrow to be used as part payment of the jet aircraft plaintiff had agreed to buy from Bell, and said net value did reduce the cost of the Cessna purchased by plaintiff.

The Commissioner next argues that the contract between Cessna and plaintiff cannot be varied by extraneous evidence. This rule is applicable between the parties to the contract; but, where the contract is assigned by one of the parties, the circumstances of the performance of the contract may be considered in determining tax liability upon the contract.

The Commissioner next argues that plaintiff did not comply with regulations promulgated by the Commissioner requiring the model and serial number of the trade-in to be listed in the invoice evidencing the transaction. The Beechcraft trade-in was described with particularity in the exhibit attached to the Bell contract. Although not a precise compliance with the regulation, the exhibit was a substantial compliance, and the commissioner does not point out wherein the State was prejudiced thereby or why, in equity and good conscience plaintiff should be required to pay use tax on that part of the purchase price of the Cessna which was not paid by plaintiff but by the escrowed value of the trade-in.

In *McDonald's Restaurant of Ill. v. Commissioner*, 7th Cir. 1982, 688 F.2d 520, the McDonald restaurant chain purchased a chain of restaurants for which the sellers demanded cash. McDonald's issued stock to the sellers but registered the stock so that the sellers could readily sell the stock and obtain the cash they desired. The Appeals Court held that the transaction could be treated as a cash purchase for income tax purposes under "pooling of interests." The Court said:

> The step-transaction doctrine is a particular manifestation of the more generous tax law principle that purely formal distinctions cannot obscure the substance of a transaction.

> . . . .
>
> [U]nder the "end result test," "purportedly separate transactions will be amalgamated with a single transaction when it appears that they were really component parts of a single transaction intended from the outset to be taken for the purpose of reaching the ultimate result" (Citations omitted).
>
> . . . .
>
> A second test is the "interdependence" test, which focuses on whether "the steps are so interdependent that the legal reactions created by one transaction would have been fruitless without a completion of the series." (Citations omitted)
>
> . . . .
>
> The "binding commitment" test forbids use of the step-transaction doctrine unless "if one transaction is to be characterized as a 'first step' there [is] a binding commitment to take the later steps."

Although the foregoing relates to tax other than use tax, its reasoning is appropriate to the circumstance of the present case and is adopted by this Court.

The Commissioner argues that his findings of fact are entitled to a presumption of correctness. The issue in this appeal involves a finding of law applicable to undisputed facts. This Court respectfully differs with the Commissioner's finding of law, and agrees with the Trial Court that the amount of the "trade-in," should be deducted from the total sale price to determine the net taxable amount of the sale.

It appears, however, that the Trial Court miscalculated the amount of the "trade-in exemption" by computing 6% tax on $1,142,000, the gross value of the "trade-in." This was incorrect, for the amount credited to the sale price of the Cessna aircraft was the net value of the trade in after deduction of the lien, which was $629,006.52, the amount of the escrow funds delivered to Cessna, and actually credited to the sale price. The taxable amount of the sale of the Cessna was $2,250,000 minus $629,006.52, or $1,620,993, on which 6% tax would be $97,259.61.

The judgment of the Trial Court is therefore vacated and the casue is remanded for recomputation of the amount of penalty and attorneys fees and the entry of a judgment for refund in comformity with this opinion including prejudgment interest on the amount of the revised judgment from the date of payment under protest, and attorneys fee on the revised amount of the judgement. Statutory interest will accrue on the revised judgment from November 27, 1995, the date of the judgment of the Trial Court.

As modified, judgment of the Trial Court is affirmed. One half of the costs of this appeal will be paid by each party. The cause is remanded to the Trial Court for any necessary further proceedings.

AFFIRMED AND REMANDED.

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HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

____
BEN H. CANTRELL, JUDGE

DISSENTS IN SEPARATE OPINION
WILLIAM C. KOCH, JR., JUDGE