

ALABAMA TAX TRIBUNAL

NEWEGG, INC.,	§	
Taxpayer,	§	DOCKET NO. S. 16-613-JP
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND FINAL ORDER

In 2015, the Alabama Department of Revenue adopted an administrative rule that requires certain out-of-state sellers to collect and remit use tax on their sales of tangible personal property into Alabama. See Ala. Admin. Code r. 810-6-2-.90.03. As a threshold matter, the rule applies only to “out-of-state sellers who lack an Alabama physical presence but who are making retail sales of tangible personal property into the state. . .” r. 810-6-2-.90.03(1). The rule narrows its focus even further by limiting its application to sellers (a) whose retail sales into this state exceed \$250,000 per year based on the previous calendar year’s sales, and (b) who conduct at least one of the activities described in Ala. Code § 40-23-68. See r. 810-6-2-.90.03(1)(a) and (b). Sellers who meet the terms of the rule are considered by the Revenue Department to “have a substantial economic presence in Alabama for sales and use tax purposes,” and thus are required to collect use tax and remit the tax to this state. See r. 810-6-2-.90.03(1). The rule applies to transactions occurring on or after January 1, 2016.

On May 12, 2016, the Revenue Department entered a final assessment of seller’s use tax against Newegg, Inc., for the months of January and February 2016. The assessment totaled \$186,791.45, consisting of nearly \$155,000 in tax, \$1,000 in interest,

and nearly \$31,000 in penalties (for Newegg's failure to timely file a return and failure to timely pay the tax claimed due).

As stated, the Revenue Department's rule, by its own terms, applies only to certain sellers who conduct at least one of the activities listed in § 40-23-68. That statute subjects retailers of items that are stored, used, or consumed in Alabama to Alabama's use tax laws, if the retailer engages in at least one of ten enumerated activities.

Here, the Revenue Department initially claimed, in its Answer, that Newegg conducted two of those activities. According to the Department's initial claim, Newegg maintained "any other contact with this state that would allow this state to require the seller to collect and remit the tax due under the provisions of the Constitution and laws of the United States" ((b)(9)), and Newegg distributed "catalogs or other advertising matter and by reason thereof receives and accepts orders from residents within the State of Alabama" ((b)(10)).

Concerning (b)(9), the Revenue Department also stated the following: "The authority of the state under the United States Constitution to require Newegg to collect and remit use tax on sales of tangible personal property into the state is admittedly dependent on the overturning of Quill." Concerning (b)(10), which lists the distribution of catalogs or other advertising matter, Newegg claimed that the Department's assertion as to Newegg conducting these activities was factually incorrect.

In the Opinion and Preliminary Order entered in this case on May 11, 2018, the Tax Tribunal addressed several matters raised by the parties. First, throughout this case, the Revenue Department has claimed that the continued validity of the physical-presence rule, as stated in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), was a central issue in

Newegg's appeal. And when the U.S. Supreme Court agreed to review *South Dakota v. Wayfair, Inc., et al.*, Docket No. 17-494, in which the State of South Dakota has requested the court to overturn its decision in *Quill*, the Revenue Department asked the Tax Tribunal to hold Newegg's appeal in abeyance. The Revenue Department's request was denied, however, because of Newegg's claim that it did not conduct any § 68(b)(10) activities in Alabama. See Opinion and Preliminary Order, pp. 1 – 4.

Second, Newegg filed motions to exclude the reports and testimony of the two individuals whom the Department had designated as experts, because Newegg argued that the reports and testimony were not relevant to the issues before the Tribunal. In response, the Revenue Department stated that the testimony and opinions of its experts were necessary to show that *Quill's* physical-presence rule had become unworkable. The Tax Tribunal granted Newegg's motions because of the fact that the asserted unworkability of *Quill* was not a material fact in controversy in Newegg's appeal. See Opinion and Preliminary Order, pp. 4 – 6.

Third, Newegg attached an affidavit to its brief by which Newegg's Chief Operating Officer testified that Newegg did not conduct any § 68(b)(10) activities within Alabama during the assessment period. The Revenue Department moved to strike the affidavit and corresponding portions of Newegg's brief because Newegg failed to follow the procedures in Ala. Admin. Code r. 887-X-1-.5 concerning the submission of affidavits in lieu of testimony. In response, Newegg argued that its submission did not come within the scope of the evidentiary rule relied upon by the Revenue Department.

In the Opinion and Preliminary Order, the Tax Tribunal noted the Revenue Department's initial claim that Newegg conducted § 68(b)(10) activities in Alabama, but also noted that the Revenue Department failed to reassert that claim in any of its later filings. Therefore, the Tax Tribunal directed the Revenue Department to address the following:

- 1) Whether the Department still contends that Newegg conducted the activities described in § 68(b)(10) within Alabama during the assessment period.
- 2) If the Department's response to 1) is yes, the Department is directed to summarize, with specificity, the evidence that the Department claims supports its contention.
- 3) Further, if the Department's response to 1) is yes, the Department is directed to explain how its assessment is valid when *Quill's* physical-presence standard is the law currently and when the Department has stipulated that "Newegg lacks a physical presence in Alabama."

The Tribunal stated that a ruling on the Revenue Department's Motion to Strike Affidavit would be made after the Department responded. See Opinion and Preliminary Order, pp. 6 – 12.

The Revenue Department responded, not by addressing the three items listed in the Opinion and Preliminary Order, but by filing a Motion for Entry of Final Order. Although the Revenue Department restated its belief that *Quill* was "wrongly decided," the Revenue Department acknowledged "that the [U.S. Supreme] Court has not yet abrogated Quill. Because Quill remains extant as of this date, the Department agrees that its assessment is due to be voided at this time." The Revenue Department continued:

On or before June 25, 2018, the Court is expected to rule in South Dakota v. Wayfair, et al. on the correctness and viability of Quill. The Court's decision in Wayfair will provide definitive guidance for the Department and for taxpayers regarding the proper standard to apply when reviewing state sales

and use tax obligations under the requirements of the dormant Commerce Clause. The Department intends to amend Ala. Admin. Code r. 810-6-2-.90.03 to conform to the decision of the Court in Wayfair and does not plan to further enforce the rule until after it is amended, if needed, to conform to the Wayfair decision.

With the Court poised to rule on the primary issue in this appeal, and with the Department preparing to amend its rule to conform to that decision, there is no continuing reason for the Tribunal, the Taxpayer, or the Department to expend further time or resources on this appeal. Therefore, the Department requests that this Tribunal enter a final order voiding the final assessment entered by the Department that is the subject of this appeal.

Motion, p. 2. Newegg assented to the Revenue Department's motion.

The Tax Tribunal then entered its Seventh Preliminary Order, acknowledging that Newegg had requested an award of attorneys' fees and costs throughout its appeal. Therefore, Newegg was directed to provide the Tribunal with legal authority and arguments to support its request. See Seventh Preliminary Order, p. 2. The next day, however, Newegg waived its request.

As stated, the Revenue Department did not answer the question of whether it still contends that Newegg conducted § 68(b)(10) activities within Alabama during the assessment period. Instead, the Revenue Department requested that an order be entered voiding the final assessment. Thus, the Department's Motion to Strike Affidavit is denied.

Clearly, the Revenue Department's assessment lacks an essential element that the remote-seller rule requires; *i.e.*, that a seller must conduct at least one of the activities listed in § 40-23-68(b). Consequently, the Revenue Department's final assessment of seller's use tax entered against Newegg is voided. Judgment in favor of Newegg is entered accordingly. It is unnecessary, therefore, to address *Quill*.

This Opinion and Final Order may be appealed to circuit court within 30 days,

pursuant to Ala. Code § 40-2B-2(m).

Entered June 14, 2018.

JEFF PATTERSON
Chief Judge
Alabama Tax Tribunal

jp:dr

cc: Martin I. Eisenstein, Esq.
Matthew P. Schaefer, Esq.
Larry B. Childs, Esq.
Craig A. Banks, Esq.
Mary Martin Mitchell, Esq.