No. 87

In the Matter of EchoStar Satellite Corporation,
Appellant,
v.
Tax Appeals Tribunal of the State of New York et al.,
Respondents.

Paul H. Frankel, for appellant.
Kathleen M. Arnold, for respondents.

GRAFFEO, J.:

On this appeal we are asked to determine whether a satellite television provider's purchases of equipment that is used to deliver programming to its customers were exempt from sales and use taxes under New York's Tax Law.

Petitioner EchoStar Satellite Corp. (EchoStar), a

national satellite television provider, better known as "DISH Network," operates a number of orbital satellites that broadcast television signals directly to the homes of millions of its subscribers. In order to deliver the programming, EchoStar supplies a customer with a satellite dish and other equipment, including a "low-noise block feedhorn" (LBNF), a set-top box receiver, a switch and a remote control. The LNBF is a component part, attached to the dish, that receives the satellite signals and converts them to a lower frequency for transmittal to a receiver. The receiver, in turn, translates the data and projects images onto a television screen. The switch allows a subscriber to watch different programs on multiple receivers.

Prior to 2000, EchoStar required a subscriber to purchase the necessary equipment at the commencement of a service contract. In May 2000, it changed this practice and began renting the equipment to subscribers through customer lease agreements. Under this new procedure, EchoStar would take possession of the equipment upon the termination of a customer's programming service and refurbish the equipment for use by another subscriber.[1] Although EchoStar did not issue separate bills for the equipment rentals, its invoices separately listed a $5.00 monthly "equipment fee" for each receiver. The lease

[1] According to EchoStar's senior accounting manager, the company continued to offer the purchase option to its subscribers but approximately 90% of them elected to lease the equipment during the time period relevant to this proceeding.

agreement also indicated that the annual cost for an additional receiver was $60.00, or $5.00 per month.

Between March 2000 and February 2004, EchoStar did not pay sales or use taxes on its equipment purchases from the manufacturers. Instead, EchoStar collected sales taxes from its customers at the time the equipment was leased to them. The sales taxes collected from the subscribers -- totaling approximately $2 million -- were remitted to the Department of Taxation and Finance (the Department). Following a lengthy audit in 2005, the Department issued a notice of determination assessing EchoStar an additional $1.8 million in use taxes for the same period on the basis that EchoStar owed taxes at the time it purchased the equipment from manufacturers. When the Department refused to credit the $2 million EchoStar had previously remitted toward the new assessment, EchoStar paid the additional taxes under protest.[2]

After a hearing, the administrative law judge agreed with the Department's analysis and, on appeal, respondent Tax Appeals Tribunal (the Tribunal) upheld the notice of determination. Although EchoStar charged its customers an equipment fee, the Tribunal did not consider this arrangement the equivalent of a "lease" and it viewed the equipment as "purely incidental" to EchoStar's primary business of selling satellite

[2] Together with interest, this second payment totaled more than $2.4 million.

television programming.

The Appellate Division confirmed the Tribunal's determination in a subsequent CPLR article 78 proceeding, similarly holding that "the equipment was provided as a part of petitioner's services and the additional charge in its monthly bills was merely an 'add-on' for the use of the equipment, not a true rental" (Matter of EchoStar Satellite Corp. v Tax Appeals Trib. of the State of N.Y., 79 AD3d 1307, 1309 [3d Dept 2010] [some internal quotation marks and alterations omitted]). We granted EchoStar's motion for leave to appeal.

Article 28 of the Tax Law sets forth the definitions of a "retail sale" and a "resale" and creates an exemption from sales and use taxes for purchases made for resale. Specifically, Tax Law § 1110 (a) states that "[e]xcept to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state . . . of any tangible personal property purchased at retail" (emphasis added).[3] A "retail sale" is described as "[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such" (Tax Law § 1101 [b] [4] [i] [A] [emphasis

[3] The use tax is generally employed "to complement the sales tax by taxing property brought into and used within the State under circumstances that prevent collection of the sales tax" (Matter of Datascope Corp. v Tax Appeals Trib. of State of N.Y., 196 AD2d 35, 39 [3d Dept 1994]). In this case, EchoStar's purchases of the equipment at issue occurred outside the state.

added]).[4] In other words, the statute imposes a use tax on EchoStar's purchases except for property that is bought for "resale as such." The resale exemption is the focus of EchoStar's challenge to the Tribunal's determination.

Although the statute does not define the term "resale," we have deemed its definition to be coextensive with that of "sale" (see Matter of Albany Calcium Light Co. v State Tax Commn., 44 NY2d 986, 987 [1978]). Tax Law § 1101 [b] [5] broadly provides that the term "sale" includes "[a]ny transfer of title or possession or both, . . . rental, lease or license to use or consume . . . in any manner or by any means whatsoever for a consideration, or any agreement therefor." Hence, we have made clear that "a purchaser who acquires an item for the purpose of sale or rental . . . purchases it for resale within the meaning of the statute" (Matter of Albany Calcium Light Co., 44 NY2d at 987).

EchoStar asserts that it obtained the satellite equipment in order to resell or lease it to its customers, qualifying its equipment purchases for the resale exemption. Consistent with this position, it contends that it properly collected taxes upon the subsequent leases of the equipment to its subscribers. The Department concedes that in those instances

[4] A "[p]urchase at retail" is similarly defined as "[a] purchase by any person for any purpose other than" for resale as such (Tax Law § 1101 [b] [1]).

when EchoStar's customers exercised the option to purchase the equipment, the transactions were eligible for the resale exclusion. But it maintains that the other arrangement -- the furnishing of equipment for a monthly fee -- did not qualify as a "lease" and, consequently, was not a resale under the Tax Law. The dispositive issue then is whether EchoStar "leased" the equipment to its customers within the meaning of the statute. We agree with EchoStar that it did and therefore reverse the order of the Appellate Division.

Our analysis begins with Matter of Galileo Intl. Partnership v Tax Appeals Trib. of Dept. of Taxation & Fin. of State of N.Y. (31 AD3d 1072 [3d Dept 2006]), which informs the outcome of this appeal. In Galileo, the Appellate Division upheld the Department's assessment of sales and use taxes on a company's provision of computer equipment to its service subscribers (id. at 1075). The company operated a proprietary computer reservation system through which its clients (mostly travel agencies) could obtain information and make reservations for flights, car rentals, hotels and cruises. Together with the software, the company furnished the subscribing agencies with computer equipment for use in accessing the system. The company retained title to the equipment and, presumably, the right to repossess it upon termination of the service agreement. In confirming the Department's determination that the provision of the equipment constituted a lease arrangement, the Appellate

Division emphasized that the subscriber agreements were structured as leases, the contracts referred to the computers as being "leased," the monthly charges were proportional to the volume of the equipment provided, and the travel agents could use the terminals for business purposes other than connection to the company's reservation system (id. at 1074-1075). As a result, the tax was properly imposed on the company's leasing of the equipment to its customers rather than at the time it purchased the equipment from manufacturers.

The Department's imposition of a use tax on EchoStar's initial procurement of the satellite equipment in this case is difficult to reconcile with Galileo, where it assessed the tax on the subsequent equipment leases. Moreover, nearly all of the factors considered in Galileo to denote a lease are present here.[5] Competent evidence adduced at the administrative hearing indicates that EchoStar's customer agreements were structured as leases, distinguishing the service component from the provision of equipment; the equipment rental fees were directly proportional to the number of receivers provided; and the equipment charges were separately delineated on monthly invoices. The record demonstrates that EchoStar plainly satisfied its burden of proving that, as in Galileo, "the transfer of equipment

[5] The Department attempts to distinguish Galileo on the basis that EchoStar's customers could not use the satellite equipment for any other purpose. However, we do not consider this distinction to be dispositive.

was a lease and that such was a significant part of the transaction, not merely a trivial element of a contract for services" (id. at 1075). Hence, we conclude that EchoStar purchased the equipment for "resale" consistent with the definition of the tax exemption afforded by Tax Law § 1101 (b) (4) (i) (A).

Contrary to the Department's position, we see no distinction, for the purpose of the resale exclusion, between the outright purchase of equipment and its temporary transfer for valuable consideration. Both types of transactions fit comfortably within the statutory definition of "sale" as they involve either the transfer of title or possession (see Tax Law § 1101 [b] [5]). Furthermore, EchoStar's provision of satellite equipment is far from "incidental." Unlike the petitioner in Matter of Albany Calcium Light Co. (44 NY2d at 988), whose rental charges were conditioned on the customers' failure to timely return its property, EchoStar's equipment charges were consistently part of its business model, either in the context of purchases or incorporated within its lease agreements.

Finally, it cannot be overlooked that the result sought by the Department -- the State's retention of the $2 million in sales tax that EchoStar collected from its customers when it leased the equipment in addition to the levy of $1.8 million in use taxes on EchoStar's equipment purchases from the manufacturers -- would amount to an unwarranted windfall to the

State (see Matter of Burger King v State Tax Commn., 51 NY2d 614, 623 [1980] [the general purpose underlying our sales tax law "is to impose the tax only upon the sale to the ultimate consumer, at which time the price paid for the taxable item would presumably be at its highest"]; Matter of Pantelopoulos v Commissioner of Taxation & Fin., 213 AD2d 768, 769 [3d Dept 1995]). As such, the determination of the Tax Appeals Tribunal must be annulled and EchoStar is entitled to a refund of the $1.8 million payment plus interest.

Accordingly, the judgment should be reversed, with costs, respondent Tax Appeals Tribunal's determination annulled and the matter remitted to the Appellate Division, Third Department, with directions to remand to respondent Tax Appeals Tribunal for further proceedings in accordance with this opinion.

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Judgment reversed, with costs, determination of respondent Tax Appeals Tribunal annulled, and matter remitted to the Appellate Division, Third Department, with directions to remand to respondent Tax Appeals Tribunal for further proceedings in accordance with the opinion herein. Opinion by Judge Graffeo. Chief Judge Lippman and Judges Ciparick, Read, Smith and Pigott concur.

Decided December 18, 2012