NO. CV 05 400 6475S	:	SUPERIOR COURT
MESSAGE CENTER MANAGEMENT, INC.	:	TAX SESSION
	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
PAM LAW, COMMISSIONER OF REVENUE SERVICES	:	AUGUST 29, 2006

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MEMORANDUM OF DECISION

The plaintiff, Message Center Management, Inc. (MCM), brings the present tax appeals from the decision of the defendant, the commissioner of revenue services (commissioner), imposing a sales and use tax assessment, pursuant to the Sales and Use Tax Act, General Statutes § 12-406 et seq., upon MCM for wireless business activities it conducted during the periods January 1, 1996 through July 31, 1998 and August 1, 1998 through December 31, 2001.

During the subject time periods, MCM executed or had in effect with property owners various contracts that specified MCM's business activities. A typical contract was named "management agreement" (see Plaintiff's Exhibits A, C) but contracts also existed

under titles such as "master lease agreement" (see Plaintiff's Exhibit E) and "antenna license agreement" (see Plaintiff's Exhibit F). Hereinafter the court will refer to these MCM agreements collectively as management agreements.[1]

It is the commissioner's contention that MCM's business activities pursuant to the management agreements are taxable because they come within the enumerated services provided in § 12-407 (a) (37) (I).[2] The commissioner contends that, as MCM "neither collected nor remitted sales tax on the consideration it received for performing its services under the contracts", she "determined said amounts to be additional gross receipts subject to tax." (Defendant's Post-Trial Brief, p. 2.) However, it is MCM's

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[1] Ms. Maria Scotti (Scotti), MCM's director, testified at trial that it was MCM's position that "[a]s long as the business terms and conditions are fundamentally the same, it really doesn't matter to us what [the contracts are] called." (March 29, 2006 Transcript, hereinafter Tr., p. 26.)

[2] General Statutes § 12-407 (a) (37) provides, in relevant part, as follows: "'Services' for purposes of subdivision (2) of this subsection, means: . . . (I) Services to industrial, commercial or income-producing real property, *including, but not limited to, such services as management* . . . and excluding any such services rendered in the voluntary evaluation, prevention, treatment, containment or removal of hazardous waste, as defined in section 22a-115, or other contaminants of air, water or soil, provided income-producing property shall not include property used exclusively for residential purposes in which the owner resides and which contains no more than three dwelling units, or a housing facility for low and moderate income families and persons owned or operated by a nonprofit housing organization, as defined in subdivision (29) of section 12-412[.]" (Emphasis added.)

Section 12-407 (a) (2) is also relevant here and provides, in part, that "'[s]ale' and 'selling' mean and include: . . . (I) The rendering of certain services, as defined in subdivision (37) of this subsection, for a consideration, exclusive of such services rendered by an employee for the employer[.]"

position that "MCM is a developer and operator of wireless communication sites for its own account. MCM is not a manager of the property of third parties." (Plaintiff's Post-Trial Brief, p. 1.) Therefore, the issue here is whether MCM's business activities under the management agreements constitute property management services, as provided in § 12-407 (a) (37) (I), to property owners' income-producing real property.

While the commissioner relies upon the language of the various management agreements to claim that MCM's activities are property management, MCM defines its role under the management agreements by the discrete activities it performs vis-à-vis property owners and wireless carriers. MCM maintains that the wireless carriers exist independent of the management agreements between MCM and the property owners.

MCM's typical business operations during the time periods in issue are as follows. MCM would identify areas with gaps in coverage within existing wireless networks. Seeking to fill these so-called gaps by constructing wireless towers or placing antennas, MCM surveyed these areas by car, employed engineering software and located sites with height such as towers, flagpoles, rooftops, water towers, silos and trees.

As an example of MCM's typical business operation, sections of MCM's 2003 application to the Connecticut Siting Council for a certificate of environmental compatibility and public need are of particular significance here. The application was filed in order to construct, maintain and operate a facility consisting of a telecommunications tower, antennas and associated equipment that could be shared by at least three added carriers. In this application, MCM stated that "[t]he primary purpose of

the Facility is to fill AT&T's and other carriers existing coverage gaps to increase wireless call handling capacity in the East Haddam area." (Plaintiff's Exhibit BB, p. 24.) MCM also stated in the application that the facility site would not only enable carriers to cover seven unserved areas but also maximize the call carrying capacity of their systems.

Once potential antenna sites were identified, MCM would review documents at the local municipality in order to identify the property owners and to ascertain whether the municipality would have a favorable position on the placement of antennas there. If the municipality appeared to have a favorable position, MCM would then contact the property owner and request use of that part of the property needed for its business.[3]

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[3] For example, a management agreement between MCM and a property owner recites the following specific terms:

"Whereas, Owner is the lessee under a master lease for the building located at 411 West Putnam Avenue, Greenwich, Connecticut (hereinafter referred to as the **'Building'**). The Building and the land of which it is situated is referred to herein as the **'Property'**. The rooftop penthouse (**'Penthouse'**) at the Building is hereby deemed suitable by MCM for the placement of communications antennae and equipment.

"Whereas, Owner wished to utilize a section of the Penthouse to create an equipment shelter for communications equipment and to utilize the Penthouse walls and rooftop to facilitate the installation of communications antennae. Such shelter and Penthouse areas (as depicted in Exhibit 'A' attached hereto) and other portions of the Building in which Owner may allow Licensees (as defined in Paragraph 2(a)) to install equipment (including without limitation, a portion of the 'C' level in the garage at the Building), are hereinafter collectively referred to as the **'Site'**."

(Plaintiff's Exhibit F, Antenna License Agreement.)

A sub-license agreement is defined therein as a "[w]ritten agreement entered into by MCM and a third party . . . and approved by Owner in accordance with this

For an antenna site, MCM usually negotiated a five-year exclusive use of the site with an option for two or more five-year renewals or extensions. MCM often recorded these management agreements on the land records.[4] This signed agreement would appoint MCM as the exclusive managing agent for the property owner of the site. Under a typical agreement, the property owner agrees to receive as consideration a percentage of licensing revenue MCM collects from a wireless carrier that enters into a sub-license agreement with MCM. Generally, a property owner agrees to receive fifty percent of the revenue, when received by MCM, for use of the property by a wireless carrier, although the percentage could vary.[5] MCM bears the financial risk in developing and marketing the

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Agreement, granting the third party the right to maintain antennas and related equipment at the Site." (Plaintiff's Exhibit F, Antenna License Agreement.)

[4] See, e.g., Plaintiff's Exhibits G, H and I. Alternatively, if a site is suitable for the construction of a tower, MCM negotiates with the property owner for the right to construct the tower.

[5] See Tr., pp. 27-28. Compensation is calculated under a typical management agreement as follows: "(a) MCM shall pay to the Owner, on a monthly basis, an amount (**'Monthly License Fee'**) equal to the following percentage of the Gross Collected Receipts (**'GCR'**) that were received by MCM during the immediately preceding calendar month from or on behalf of each Licensee at the Site:

> (i) 50% during the first five years of the term (as the same may be extended) of the Licensee's Sub-License Agreement;
> (ii) 60% during the second five years of the term (as the same may be extended) of the Licensee's Sub-License Agreement; and
> (iii) 70% during any period after the first ten (10) [years] of the term (as the same may be extended) of the Licensee's Sub-License Agreement."

(Plaintiff's Exhibit F, Antenna License Agreement, ¶ 4.)

sites to wireless carriers.[6] MCM's hit rate in marketing sites is between 1.5% and 4% of properties in its inventory.[7] The sales cycle for marketing sites to carriers could be as long as three years.[8] In some cases, MCM incurred unreimbursed expenses.[9]

In addition, the terms of a typical management agreement would require MCM to conduct the following activities:

> 1. Promote the licensing of the site for the location of communications antennae and related equipment;
>
> 2. Negotiate license agreements and renewals with new and existing licensees;
>
> 3. Conduct the billing and collecting of licensing payments;

Once MCM obtains payments from wireless carriers, MCM retains its percentage, as designated in the management agreements, and then pays the balance due to the property owners. The property owners do not have any contact with the wireless carriers. Ms. Scotti testified at trial that "[o]nly if a carrier is operating at our wireless site, do we pay the property owner [a] percentage of that rental revenue." (Tr., p. 30.)

6 See Tr., p. 31.

7 See Tr., p. 89.

8 Ms. Scotti testified at trial that "[i]t could be two or three years before a carrier may decide that they really do want to invest in a particular market over the long term. Or we may get one to start over the course of the year, but not see any further tenants on that site for two or three years later." (Tr., p. 31.)

9 See, e.g., Tr., p. 32, where Ms. Scotti testified that "[w]e actually have a site in Salem, Connecticut that we built a tower on. And ultimately [it] did not get used by the carrier who originally had interest in it." MCM also pays the property tax bills for sites and is not reimbursed by property owners. See, e.g., Plaintiff's Exhibit X; see also Tr., p. 57.

4. Manage the technological and human relations aspects of the site;

5. Manage the installation, removal and maintenance of licensee equipment at the site;

6. Manage the site consistent with applicable FCC and FAA rules and regulations as well as observe the legal requirements of any governmental agency with jurisdiction over the site;

7. Coordinate the use of the frequency spectrum to maximize the use of the site while minimizing interference problems and

8. Ensure licensee compliance with the reasonable rules and regulations governing the site concerning the site's security and accessibility.

See, e.g., Plaintiff's Exhibit A, Management Agreement, ¶ 3.

Notably, there are provisions in a typical management agreement that provide for MCM to carry and maintain, at its own expense, comprehensive commercial general liability insurance with general aggregate coverage of $2,000,000 that list the property owner and others reasonably requested by the owner to be named as additional insureds. See, e.g., Plaintiff's Exhibit F, Antenna License Agreement. Furthermore, typical management agreements provide for MCM to indemnify the owner and other related parties, including shareholders, directors, employees, contractors, agents and affiliates, as well as successors and assigns, against all claims of liability and damages as well as indemnification against any suits, claims and demands of every kind.

As discussed above, after finalizing a management agreement with a property owner, MCM seeks wireless carriers to enter into sub-license agreements for use of the site. See Plaintiff's Exhibits K, L and M. Once MCM obtains a carrier for a particular

site, MCM negotiates a license agreement between itself, the property owner and the wireless carrier. At this time, MCM also charges the carrier a one-time facility coordination fee which MCM solely retains. See Tr., p. 77. MCM collects additional fees from the carrier for providing engineering studies for governmental compliance requirements. Notably, MCM charges the carrier sales tax on the facility coordination fee and on the engineering studies because it views them as taxable services.

Our Supreme Court recognized in AirKaman, Inc. v. Groppo, 221 Conn. 751, 757, 607 A.2d 410 (1992) that "'management services' was not defined in the Sales and Use Taxes Act", and therefore, "[turned] to the dictionary definition of the operative word, 'management,' to find its commonly approved meaning. 'Management' has been defined as 'the conducting or supervising of something (as a business); esp: the executive function of planning, organizing, coordinating, directing, controlling, and supervising any industrial or business project or activity with responsibility for results.' Webster's Third New International Dictionary. Because actual operation of something is a commonly approved meaning of the word 'management,' the words 'management services' in [General Statutes § 12-407 (a) (37) (J)] logically comprehend such an activity." In AirKaman, the Court concluded that the "actual [day-to-day] operation of a business is included within the term 'management services'" under the Sales and Use Tax Act. Id., 762.

After an initial examination of a typical management agreement between MCM and a property owner, it might appear at first blush that the language therein describes the

performance of management services as provided in § 12-407 (a) (37) (I). However, as the plaintiff argues in its post-trial brief, the commissioner's own regulations, namely, Conn. Agencies Regs. § 12-407 (2) (i) (J)-1 (c) (1), takes the position that she will not elevate form over substance. See Plaintiff's Post-Trial Brief, p. 18. This regulation provides, in relevant part, that "[i]t is the nature of the services being rendered, and not what those services are called or termed by the service provider or service recipient, that determines whether services described in section [12-407 (a) (37) (J)] of the general statutes are being rendered. . . ."

Although the commissioner argues that the plaintiff's reliance on this regulation is misplaced (see Defendant's Post-Trial Brief, p. 29), this court finds that this regulation and the discussion in T.W.L.S. Management Co. v. Gavin, 46 Conn. Sup. 401, 404, 754 A.2d 222 (1999), aff'd per curiam, 253 Conn. 452, 753 A.2d 361 (2000) are pertinent in the present appeals. In T.W.L.S. Management, the trial court stated that "[t]o resolve the issue in this case we must determine just what the services were that were provided by the plaintiff to the owner. [T]he applicability of the tax in this case depends upon a determination of the true object of the underlying transaction. [T]he commissioner's own administrative interpretations of related statutory provisions have regularly invoked an 'essence of the service' test to determine the applicability of the sales and use tax." (Citation omitted; internal quotation marks omitted.) Id.

In its presentation of the evidence, the plaintiff offered the testimony of Ms. Scotti and Joseph DeMaio (DeMaio), the chief financial officer of Cornerstone Properties which

manages shopping centers and apartment buildings, to distinguish the duties it performed under its management agreements with those duties performed by a typical property manager. Of the eighteen comparisons that Ms. Scotti and Mr. DeMaio discussed (see Plaintiff's Post-Trial Brief, pp. 23-24), the most significant comparisons differentiated between the services that a typical property manager would provide and the plaintiff's property interests and business activities on the relevant sites. A typical property manager: 1) is engaged by and is paid by the property owner; 2) does not provide insurance protection for the property owner; 3) has a short-term arrangement for the management of the property; 4) does not pay for operational expenses, marketing expenses or improvements to the property and 5) does not contract in his or her own name with vendors.

The true object of the plaintiff's business operations is to identify antennae sites and eliminate gaps in the wireless network in order to enhance wireless carriers' business operations. Even though the plaintiff negotiates for the limited use of a particular site by way of a license agreement, the property owner continues to have use and control of his or her property subject only to a future, limited use by wireless carriers. Under these circumstances, a two-step agreement is created in which the property owner grants MCM a license to place an antenna on the property and MCM enters into a sub-license agreement with wireless carriers for use of the site for wireless transmissions.[10] If MCM

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The court disagrees with the commissioner's argument that the agreements between the plaintiff and the wireless carriers are third-party agreements that are not relevant

is unable to obtain a wireless carrier for the site, MCM has no obligation to pay the property owner. It is significant that consideration under the typical license agreement flows from the wireless carrier to MCM and that MCM then splits payments of consideration with the owner. In contrast, under a typical property management agreement, the consideration (consisting of payment for services performed) flows from the property owner to the property manager.

In considering the legal relationships between the property owner, MCM and the wireless carrier, it is necessary to define what these relationships are. MCM characterizes the relationship between itself and the property owner as a license agreement and the relationship between itself and the wireless carrier as a sub-license. These relationships are also defined, for example, in the Antenna License Agreement. See Plaintiff's Exhibit F.

"[A] license in real property is a mere privilege to act on the land of another, which does not produce an interest in the property . . . ." (Internal quotation marks omitted.) Woodhouse v. McKee, 90 Conn. App. 662, 674, 879 A.2d 486 (2005). "On the other hand, [a] lease is a contract under which an exclusive possessory interest in property is conveyed. . . . A lease is more than a mere license; it is a contract for the possession and profits of lands and tenements on the one side, and a recompense of rent or other

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in the present appeals. It is the commissioner's position that the sole issue in these appeals is the taxability of the transactions between MCM and the property owners. See Defendant's Post-Trial Brief, footnote 12.

income on the other; or, in other words, a conveyance to a person for life, or years, or at will, in consideration of a return of rent or other recompense. . . . Its distinguishing characteristic is the surrender of possession by the landlord to the tenant so that he may occupy the land or tenement leased to the exclusion of the landlord himself." (Citations omitted; internal quotation marks omitted.) Murphy, Inc. v. Remodeling, Etc., 62 Conn. App. 517, 522-23, 772 A.2d 154, cert. denied, 256 Conn. 916, 773 A.2d 945 (2001).

In Murphy, the court found that the unambiguous language of an agreement titled "lease agreement" did not indicate any intention to surrender exclusive possession of the premises despite containing words customarily used in a lease, i.e., lessor, lessee and lease, and therefore, was not a lease but a license. Id., 524. Under the agreement in Murphy, the plaintiff obtained the "'exclusive right of servicing . . . Signs, and to hang scaffolds, or to construct, post, paint, illuminate, repair or remove its advertisements on the Signs'" on the rooftop of the property owner's building and "'the right of ingress and egress into and over the Premises to gain access to the Signs.'" Id., 523. Because the agreement in Murphy did not expressly grant possession of the premises and was merely limited to the right to service the signs and a right of ingress and egress over the premises to gain access to the signs, the court found that a license was created. Id., 524. Consistent with the concept of possession, a typical MCM management agreement, as exemplified by Plaintiff's Exhibit F, the Antenna License Agreement, specifically provides that MCM will have a non-exclusive license with the owner for possession of the site to place and operate telecommunications equipment.

Upon analysis of the facts in this case, it is clear to the court that the dominant economic characteristics of the transaction between MCM and the property owner is the development by MCM, at its own expense and risk, of a portion of an owner's property into a wireless communication site for the benefit of wireless carriers. MCM's activities cannot be classified as "management services" as provided for in § 12-407 (a) (37) (I) because MCM does not provide management services to the property owner. Instead, MCM is a source of income for the non-exclusive use of a portion of the owner's property paid for by a wireless carrier.

Accordingly, because the court does not find that the activities of MCM are "management services" as provided in § 12-407 (a) (37) (I), judgment may enter in favor of the plaintiff sustaining its appeal without costs to either party.

Arnold W. Aronson
Judge Trial Referee