NO. CV 116012617	:	SUPERIOR COURT
TOWN OF GROTON	:	JUDICIAL DISTRICT
v.	:	OF NEW BRITAIN
DEPARTMENT OF REVENUE SERVICES, KEVIN B. SULLIVAN, COMMISSIONER	:	JULY 29, 2013

MEMORANDUM OF DECISION

The plaintiff, town of Groton (town), commenced this proceeding pursuant to General Statutes § 12-422, in order to contest a sales and use tax assessment made against it by the commissioner (commissioner) of the department of revenue services (DRS) for the period May 1, 2007 through September 30, 2010.[1] The town alleged that the commissioner erred in determining that the town had improperly failed to collect or remit sales tax on gross receipts received for performing refuse removal services provided to industrial, commercial and income-producing real property in the town.[2]

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1 The court finds that the town is aggrieved by this assessment.

2 "Refuse removal" services provided to industrial, commercial and income-producing real property located in Connecticut are specifically enumerated as subject to sales tax. See Regs., Conn. State Agencies § 12-407 (2) (i) (I)-1 (g) (1).

A de novo trial of the matter was held on February 5, 2013. The court makes the following findings of fact:

1. The town is a municipal corporation organized under the laws of the State of Connecticut with a principal address at 45 Fort Hill Road. The town manager is Mark Oefinger.

2. The commissioner is Kevin B. Sullivan with an office address of 25 Sigourney Street, Hartford, Connecticut.

3. The appellate division (appellate division) of DRS is charged with responsibility for making the agency's final determination with respect to interpretation and application of the tax laws of the State of Connecticut.

4. On or about June 14, 2010, the town received written notice that it had been selected for a sales and use tax audit by the audit division (audit division) of DRS relating to the dollar amount of billings to industrial, commercial or income-producing real property for refuse and sanitary waste removal for the period of May 1, 2007, through April 30, 2010 (hereinafter referenced as the audit).

5. By its town manager, the town executed a special consent to extend the statute of limitations period from May 1, 2007, through September 30, 2010.

6. At the conclusion of the audit, the audit division issued a Notice of Assessment to the town on January 19, 2011, for sales tax and interest due for the period from May 1, 2007, through September 30, 2010, in the amount of $240,866.06 (hereinafter referenced as the assessment).

7. The town filed a timely protest by Form APL-002 dated

February 9, 2011, with the appellate division, contesting the validity of the assessment (case identification #510435).

8. At or near the time of the town's filing of the protest to the appellate division, the town made a deposit in nature of a cash bond by filing Form APL-004 and making payment of the entire assessment while reserving all rights to contest the validity thereof.

9. By notice dated September 14, 2011, Scot R. Anderson, the director of the appellate division, denied the town's protest.

10. On or about November 13, 1985, the town became a charter member of the Southeastern Connecticut Regional Resources Recovery Authority (SCRRRA), which was formed pursuant to General Statutes § 7-273aa et seq.

11. SCRRRA operates a waste-to-energy (WTE) facility in Preston, Connecticut, certified as approved for such facility by the commissioner of the Department of Energy and Environmental Protection.

12. The town signed a Municipal Service Agreement (MSA) with SCRRRA, thereby gaining access to the WTE facility for its disposal needs. See Exhibit L. This agreement imposed a minimum commitment on the town to deliver refuse to SCRRRA.

13. The town, by ordinance adopted August 18, 1998 (Ordinance No. 239) and pursuant to §§ 7-273aa to 7-273oo, created a municipal resource recovery authority to be known as the Town of Groton Resource Recovery Authority (GRRA) with offices at the town hall.

14. Pursuant to Ordinance No. 239, effective January 1, 1999, the removal, transport and/or disposal of solid waste from

commercial, industrial and/or income-producing businesses within the geographical area of the town (hereinafter referenced as the end users) came under the town's management.

15. At all times during the audit period, the town maintained a contract with a trash hauler (hauler) to take refuse from the real property of the end users to the SCRRRA facility.

16. The end users submitted written applications for service, eventually received by the hauler, where each user may elect the size of the trash receptacle (measured in cubic yards), as well as the frequency of pickups from their properties. The selections made by the end users may be amended at any time.

17. The hauler provides the level of service selected by the end user and generates its fee through the rental of the receptacle and its pickup service.

18. All refuse and waste collected by the hauler from end users is taken to the SCRRRA facility.

19. At all times during the audit period, SCRRRA charged $60/ton of solid waste deposited at the Preston facility.

20. The hauler's fees and SCRRRA's fees are billed to the town on a monthly basis.

21. The town incurs for itself an overhead expense of $3.58/ton of solid waste to administer the program.

22. The town pays the invoices of the hauler and SCRRRA in full each month.

23. Subsequent to its payment to the hauler and SCRRRA, the

town bills each end user for its share of the hauler's fees, SCRRRA's fees and the town's overhead.

24. The town's bill to the end user is based on a chart (see Exhibit N) that contains a monthly charge to the end user. The chart is developed from the bills submitted to the town by the hauler and SCRRRA, as well as the town's overhead costs.

25. The town received payments from the end users, based on Exhibit N, that cover all "up-front" or advance payments that the town makes.

26. The town's outlays and receipts from the end users produce a "break even" situation for the town.

27. During the audit period, while implementing the above-described program, the town did not apply state sales tax to its invoices to end users.

28. The town purchased a service from SCRRRA in its recycling program under Ordinance No. 239.

The town claims that the commissioner's assessment was erroneous for three reasons. See plaintiff's 4/30/13 brief, p. 7. The first claim is that the transaction that the commissioner has denominated as a sale of services (refuse removal provided by the town) is not a "sale" under General Statutes § 12-407 (a) (2) (I). The second claim is that the provisions of General Statutes § 12-412 (95)[3] specifically exclude the town from the

[3] General Statutes § 12-412 provides, in relevant part, as follows: "Taxes imposed by this

imposition of sales tax. The final claim is that, because the town is carrying out a governmental function in refuse removal, which is also a statutory mandate, the commissioner may not impose a sales tax.

"[I]ssues of statutory construction raise questions of law . . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain

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chapter shall not apply to the gross receipts from the sale of and the storage, use or other consumption in this state with respect to the following items: (95) . . . The sales or use of any services or tangible personal property to be incorporated into or used or otherwise consumed in the operation of a solid [WTE] facility, certified as approved for such purpose by the Commissioner of Energy and Environmental Protection, whether such purchases are made directly by an authority or an operating committee, or are reimbursed by an authority or operating committee to the lessee or operator of such facility."

and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Ugrin* v. *Cheshire*, 307 Conn. 364, 379-80, 54 A.3d 532 (2012).[4]

"The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . We presume that the legislature did not intend to enact meaningless provisions. . . . [S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . ." (Internal quotation marks omitted.) *State* v. *Drupals*, 306 Conn. 149, 159, 49 A.3d 962 (2012).

In the context of a tax appeal, the town "bore the burden of proving at trial that the commissioner's deficiency assessment was in error. In satisfying that burden, the [town] was required to present clear and convincing evidence that the assessment [was] incorrect or that the method of audit or amount of tax assessed was erroneous or unreasonable." (Citation omitted; internal quotation marks omitted.) *Sikorsky Aircraft Corp.* v. *Commissioner of Revenue Services*, 297 Conn. 540, 568, 1 A.3d 1033 (2010), citing

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[4] See also *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 214, 38 A.3d 1183 (2012).

Leonard v. *Commissioner of Revenue Services*, 264 Conn. 286, 303-304, 823 A.2d 1184 (2003).

Addressing the town's first claim, the court relies on § 12-407 (a) (2) (I) which applies sales tax to certain services rendered for a consideration. Section 12-407 (a) (37) (I) provides that "services" include, as here, those furnished to "industrial, commercial or income-producing real property." As indicated above, § 12-407 (2) (i) (I)-1 (g) (1) of the Regulations of Connecticut State Agencies includes refuse removal as a type of service. The town does not dispute that the commissioner met the requirement of consideration with regard to the exchange of cash by the "end users" to the town. See also *Mandell* v. *Gavin*, 262 Conn. 659, 668-69, 816 A.2d 619 (2003).

The town argues that under *AirKaman*, *Inc*. v. *Groppo*, 221 Conn. 751, 764, 607 A.2d 410 (1992), a "mere conduit" exists here, and the court under these circumstances cannot conclude that a sale of services has occurred. See plaintiff's 4/30/13 brief, p. 8. The court does not differ with the town that under the facts as found, the town merely passes its charges back to the end users in providing refuse services. The court differs, however, with the proposition that there is no sale of services where the town provides services and receives by way of consideration a reimbursement of its own expenses in

providing such services.

AirKaman must be distinguished on its facts. It does not stand for a general rule that all "conduit" situations are not subject to sales tax. Rather the case holds that under a specific lease under which one company agrees to operate another company's business, and this sublessee becomes the agent of the other company, reimbursements paid to the first company (sublessee-operator-agent) by the principal are not subject to the sales tax. This sublessee-operator-agent company "realized no recompense for its services simply by being reimbursed by [the principal] for its outlay." Id.[5]

The town argues that it is an agent of the end users. There is nothing is writing between the parties to establish an agency relationship. In addition, mere payment is not enough to establish the element of control by the end users so that they become the principal and the town the agent. See *Housatonic Valley Publishing Co.* v. *Citytrust*, 4

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[5] At oral argument, the commissioner gave the following example: a principal operating an airport contracts with an agent to operate the airport and the agent arranges to pave an airport parking lot. The agent thereupon submits an invoice to the principal for reimbursement. Under *AirKaman*, the agent would not be subject to sales tax on the reimbursement as the agent was a "mere conduit" in the transaction. Here, however, the town has not proved that it is an agent of the end users, even if the payment from the end users is merely reimbursement.

Conn. App. 12, 16, 492 A.2d 203 (1985). See also 1 Restatement (Third), Agency § 1.01, comment (c), p. 19 (2006) ("[n]ot all relationships in which one person provides services to another satisfy the definition of agency").

Therefore, the court concludes that while the town sends an invoice for its costs to the end users, and the end users comply by paying this invoice, there is still justification to find that there was a sale of services by the town. The court further concludes that this sale for services was for a consideration.

In addition, the town contends that if the transactions between it and the end users constitute a sale of services, then an exemption applies pursuant to § 12-412 (95).

Under its construction of the exemption, the town maintains it is entitled to claim an exemption for payments made to it by the end users because the town's trash constitutes part of the trash that is material to the operation of the SCRRRA facility which is delivered pursuant to a contract with SCRRRA.

The court, however, agrees with the commissioner's construction of the exemption, utilizing the standards discussed above. There is no question that SCRRRA's receipts are not subject to the sales tax. That the town has a contractual duty to deliver trash to the SCRRRA premises is insufficient to exempt the town from the payment of sales tax.

Such contractual requirement does not constitute *operating*[6] the SCRRRA facility.

"In construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended.. It is not the function of courts to read into clearly expressed legislation provisions which do not find expression in its words . . . nor is it our function to substitute our own ideas of what might be a wise provision in the place of a clear expression of the legislative will." (Citations omitted; internal quotation marks omitted.) *Germain* v. *Manchester*, 135 Conn. App. 202, 209-10, 41 A.3d 1100 (2012).

The town's final argument is that it is exempt from the sales tax because the function of trash removal is a traditional governmental function. As such, the town claims that it is exempt from the sales tax as imposed by the commissioner. For this contention, the town relies on several out-of-state cases, including *City of Phoenix* v. *State*, 85 P.2d 56 (Ariz. 1938), a case approving of Arizona's imposition of a sales tax on a city's sale of water to customers. See plaintiff's 4/30/13 brief, p. 20. The Arizona court held that the city was engaged in a business of dealing in a commodity and subject to the sales tax. In

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Merriam-Webster's Collegiate Dictionary (10th Ed. 1998) provides that "operation" requires "an exertion of power or influence."

dicta, the court stated that "[t]he law does not require the city to pay a tax on water furnished itself in the discharge of its governmental functions, such as affording fire and health protection and sanitation[.]" Id., 58. The court also announced an exception from taxation for municipalities "when they are exercising purely governmental functions." Id.

The *City of Phoenix* court drew these conclusions, however, from its interpretation of a provision of the Arizona constitution. Id. There is no general rule that exempts municipalities performing government functions from taxation. See, e.g., *Oxford* v. *Housing Authority of the City of Barnesville*, 123 S.E.2d 175, 176 (Ga. App. 1961); *City of Portland* v. *Kozer*, 217 P. 833, 836 (Or. 1923) (inherent exemption from property taxes does not extend to other taxes).

In Connecticut, for example, General Statutes § 12-81 (4) exempts municipal corporations from the property tax. By § 12-412 (1), sales tax does not apply to sales of services "*to* . . . any political subdivisions" of the state.[7] (Emphasis added.) See, e.g., *Rich-Taubman Associates* v. *Commissioner of Revenue Services*, 236 Conn. 613, 621, 674 A.2d 805 (1996). See also *In re City of Enid*, 158 P.2d 348 (Okla. 1945)

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[7] This provision noticeably does not provide for services *by* any political subdivision of the state.

(constitutional prohibition on imposing sales tax on municipality did not prohibit excise tax); *Thomas* v. *City of Elizabethtown*, 403 S.W.2d 269 (Ky. 1965) (constitutional provision exempting municipalities from sales tax prohibited "ad valorem tax" on automobiles purchased by city for municipal use.)

The plaintiff has not demonstrated that Connecticut has a constitutional or statutory provision exempting municipalities that sell services, even if related to government functions, from the imposition of the state sales tax. The court concludes that such exemption does not exist in this state.

For the reasons stated above, judgment may enter in favor of the defendant, dismissing the plaintiff's appeal, without costs to any party.

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Henry S. Cohn, Judge