

NO. CV 05 4004842S : SUPERIOR COURT  
RAINFOREST CAFÉ INC. : TAX SESSION  
 : JUDICIAL DISTRICT OF  
v. : NEW BRITAIN  
COMMISSIONER  
OF REVENUE SERVICES : JUNE 21, 2007

MEMORANDUM OF DECISION  
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The plaintiff, Rainforest Café, Inc. (Café), brings this tax appeal, after an audit of the Café, challenging the assessment of sales and use taxes by the commissioner of revenue services (commissioner) for the period July 1, 1999 through December 31, 2000. Both parties have filed cross motions for summary judgment, each claiming to be entitled to judgment as a matter of law.

In its amended complaint dated August 15, 2005, the plaintiff alleges that a predecessor to the Café, known as Rainforest Café, Inc.-Mist (Mist), entered into a lease agreement for restaurant space at the Westfarms Mall in Farmington, Connecticut on October 22, 1998. Mist engaged PCL Construction Services, Inc. (PCL) as its general contractor to build out the restaurant space to certain specifications between June 1999 and February 2000.<sup>1</sup> At the time PCL was engaged as contractor, it was a nonresident

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The contracts titled “Application and Certificate for Payment”, attached as exhibits to the plaintiff’s cross motion for summary judgment, dated March 16, 2007, list “Rainforest Café,

business located in Minnesota. The plaintiff further alleges that Mist commenced operating the restaurant on or about February 8, 2000 and that the plaintiff acquired the restaurant from Mist on December 1, 2000.

The plaintiff also alleges that the construction contract between Mist and PCL provided for Mist to pay to PCL the construction costs and any Connecticut sales or use taxes incurred. The plaintiff's allegations further recite that PCL agreed to pay any sales and use taxes collected from Mist directly to the commissioner.

Although Mist paid PCL the contract price, including money for sales and use taxes due to the state of Connecticut, PCL did not remit any money to the commissioner.<sup>2</sup> As a result, the commissioner imposed a deficiency assessment against the plaintiff as successor to Mist.

In its cross motion for summary judgment, the plaintiff objects to the commissioner's deficiency assessment for the following reasons: (1) the plaintiff paid the

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Inc." as the owner contracting with PCL, not Mist. See e.g., Exhibit A, dated October 12, 1999, referencing the contract date of June 17, 1999.

<sup>2</sup>

"PCL was responsible for purchasing all materials to be used in the Property and for contracting with and paying any subcontractors. The Contract provided that Rainforest would pay PCL a sum certain, which sum would include applicable sales and use tax. Rainforest complied with the Contract and paid the sums owed thereunder, including taxes, to PCL. PCL gave Rainforest a receipt for the amount of taxes Rainforest paid to PCL, and PCL confirmed in writing that it was responsible for paying the tax it received from Rainforest over to the Department. PCL substantially completed its obligations under the Contract (aside from remitting tax payments to the Department) in early February 2000 and Rainforest's restaurant began operating on February 8, 2000." (Citations omitted.) (Plaintiff's memorandum of law in opposition, dated December 14, 2006, pp. 2-3.)

sales and use taxes to PCL, and therefore, had no tax liability and (2) the statute of limitations in General Statutes § 12-415 (f) precludes the commissioner from imposing the deficiency sales and use tax assessment against the plaintiff. The plaintiff argues that the commissioner is “barred from collecting any use tax accruing before March 1, 2000, because it did not send a notice of assessment to Rainforest until April 30, 2003.” (Plaintiff’s memorandum of law, dated March 16, 2007, p. 8.)<sup>3</sup>

When a state resident engages a nonresident contractor to perform work within the state and sales and use taxes result, a state resident could escape personal liability for the payment of the resulting taxes by complying with the terms of General Statutes § 12-430. Section 12-430 provides, in relevant part, that “(1) . . . [t]he commissioner, whenever [she] deems it necessary to insure compliance with this [sales and use taxes] chapter, may require any person subject thereto to deposit with [her] such security as the commissioner determines.” In addition, subparagraph (B) of § 12-430 (7) provides that any person doing business with a nonresident contractor<sup>4</sup> and making payments of the contract price to the

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The plaintiff filed its first tax return with the department of revenue services on March 23, 2000. See affidavit of Steve Proper, dated December 14, 2006.

<sup>4</sup>

Subparagraph (A) of § 12-430 (7) provides that “(i) ‘[n]onresident contractor’ means a contractor who does not maintain a regular place of business in this state; (ii) ‘regular place of business’ means any bona fide office, factory, warehouse or other space in this state at which a contractor is doing business in its own name in a regular and systematic manner, and which place is continuously maintained, occupied, and used by the contractor in carrying on its business through its employees regularly in attendance to carry on the contractor’s business in the contractor’s own name, except that ‘regular place of business’ does not include a place of business for a statutory agent for service of process, or a temporary office

nonresident contractor shall deduct and withhold five percent of the contract payments unless the nonresident contractor has furnished a certificate of compliance as set forth in subparagraph (E) of § 12-430 (7).<sup>5</sup>

Pursuant to subparagraph (C) of § 12-430 (7), a nonresident contractor shall request within a certain time period that the commissioner audit the nonresident contractor's records when money was deducted and withheld from the contractor as provided for in subparagraph (B). After completing the audit, the commissioner shall issue to the nonresident contractor a certificate of no tax due or a certificate of tax due. If the commissioner finds that no tax is due, the commissioner must then return to the nonresident contractor the money deducted and withheld under subparagraph (B) of § 12-430 (7). If the commissioner finds that there is tax due, the commissioner may return to the nonresident contractor the amount deducted and withheld that exceeds the amount of tax due. In this case, there is no evidence that PCL ever requested that the commissioner audit its records or that the commissioner issued to PCL either a certificate of no tax due or a certificate of tax due.

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or location used by the contractor only for the duration of the contract, whether or not at the site of construction, or an office maintained, occupied and used by a person affiliated with the contractor[.]”

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Subparagraph (E) of § 12-430 (7) apparently applies only to contracts with the state and provides as follows: “When a nonresident contractor enters into a contract with the *state*, said contractor shall provide the Labor Department with evidence demonstrating compliance with the provisions of chapters 567 and 568, the prevailing wage requirements of chapter 557 and any other provisions of the general statutes related to conditions of employment.” (Emphasis added.)

With no taxes paid over to the commissioner and no guarantee bond or cash bond provided to the commissioner in an effort to comply with the above statutory section, the plaintiff cannot be relieved from personal liability for the payment of the outstanding sales and use taxes due. The mere payment of the sales and use taxes to the nonresident contractor does not relieve the person engaging the nonresident contractor of the liability for the payment of the applicable taxes. There is simply no statutory provision in § 12-430 that relieves the plaintiff of his tax liability simply by paying the tax to the nonresident contractor or obtaining an acknowledgment of liability from the contractor.<sup>6</sup>

Lastly, the plaintiff claims that the statute of limitations in § 12-415 (f) precludes the commissioner from pursuing Café for the payment of sales and use taxes that it claims it paid to PCL. General Statutes § 12-415 (f) provides, in relevant part, as follows:

“Except in the case of fraud, intent to evade this chapter or authorized regulations, [or] failure to make a return[,] . . . every notice of a deficiency assessment shall be mailed within three years after the last day of the month following the period for which the amount is proposed to be assessed or within three years after the return is filed, whichever period expires later.”

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Subparagraph (D) of § 12-430 (7) provides, in relevant part, as follows: “When a person doing business with the nonresident contractor pays over to the [c]ommissioner . . . amounts deducted and withheld pursuant to subparagraph (B) of this subdivision, such person shall not be liable for any claim of the nonresident contractor for such amounts or for any claim of the commissioner for any taxes of the nonresident contractor arising from the activities of the nonresident contractor on the project for which the amounts were paid over.”

The plaintiff maintains that it did, in fact, pay the sales and use taxes to PCL and obtained a receipt of payment from PCL as a retailer, in compliance with § 12-411 (2), which provides that “[s]uch person’s liability is not extinguished until the tax has been paid to this state, except that a receipt from a retailer engaged in business in this state . . . given to the purchaser pursuant to subdivision (3) of this section is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.” Contrary to the plaintiff’s claim that the receipt for payment to PCL relieves it of any tax liability, this statutory section deals only with a retailer that is “engaged in business in this state.” According to the statutory definition of “nonresident contractor”, PCL was not engaged in business in this state, and therefore, the terms of § 12-411 (2) are inapplicable to the facts in this case.

Because the commissioner issued a notice of deficiency, dated April 20, 2003, following the audit period of July 1, 1999 to December 31, 2000, the plaintiff further argues that only the period of March 1, 2000 to December 31, 2000 is within the three-year period of limitations. The commissioner counters that the three-year period of limitations commenced from the filing date of the first tax return, which in this case, should have been filed prior to the restaurant opening at the Westfarms Mall, when the plaintiff first purchased services from PCL.

The issue involving the statute of limitations in § 12-415 (f) is resolved neither by considering the date of the notice of deficiency nor by the applicable filing date of the first tax return. The key here is to construe the exception contained in § 12-415 (f),

related to the plaintiff's obligation to comply with § 12-430 requirements. The starting point, in analyzing the plaintiff's obligation to pay the deficiency imposed by the commissioner, begins with the language in § 12-415 (f) that precludes the use of the statute of limitations "in the case of fraud [or] intent to evade this chapter."

Our analysis is guided by the Supreme Court's construction of § 12-415 in Leonard v. Commissioner of Revenue Services, 264 Conn. 286, 823 A.2d 1184 (2003), where the court considered the intent to evade exception as applied to the tolling of the statute of limitations. In Leonard, the court noted that "[§] 12-415 does not require proof of an intent to evade *sales tax*; it requires proof of intent to evade the *Sales and Use Tax Act* or authorized regulations; General Statutes (Rev. to 1991) § 12-415 (7); and those laws require accurate reporting and record keeping." (Emphasis added and in original.) *Id.*, 299.

The responsibility of a purchaser who deals with a nonresident contractor, within the context of § 12-430, comes within the framework of the Sales and Use Tax Act. As noted above, § 12-430 requires the purchaser of services in Connecticut to perform specific actions when dealing with a nonresident contractor for the protection of the state's interest with regard to the collection of taxes. The plaintiff did not comply with any of the § 12-430 requirements, although it was required to do so pursuant to the terms of § 12-430 (7). Neither a guarantee bond nor a cash bond was required of PCL by the plaintiff. The plaintiff also did not withhold any payments from PCL or turn these payments over to the commissioner. See § 12-430 (7) (B), (D) and (F).

In interpreting the meaning of “intent to evade” as a basis for tolling the statute of limitations recited in § 12-430, a fair reading of Leonard applies to the facts in this case. For instance, the plaintiff had an obligation to protect the interests of the state by complying with certain conditions set forth in § 12-430, but failed to do so. If the plaintiff had followed the requirements of § 12-430 when contracting with a nonresident contractor, the issue of nonpayment of sales and use taxes would not have arisen. Failure to comply with the requirements of § 12-430 evinces an intent to evade under § 12-415 (f). See Leonard v. Commissioner of Revenue Services, 264 Conn. 299.

The plaintiff’s basic claims, that it had no liability to the commissioner because it paid the taxes directly to PCL and that the statute of limitations bars the commissioner from imposing the deficiency claim, lack merit.

Accordingly, the commissioner’s motion for summary judgment is granted and the plaintiff’s cross motion for summary judgment is denied. Therefore, judgment may enter in favor of the commissioner, without costs to either party.

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Arnold W. Aronson  
Judge Trial Referee