



TAX APPEAL BOARD OF THE STATE OF DELAWARE

CASTLE VIDEO, INC.,	:	
	:	
Petitioner,	:	
	:	
v.	:	Docket No. 826
	:	
DIRECTOR OF REVENUE,	:	
	:	
Respondent.	:	

S.
2905

Paul D. Rossiter, CPA, Cover & Rossiter, P.A. for Petitioner
Joseph Patrick Hurley, Jr., Esquire, Deputy Attorney General for Respondent.

DECISION AND ORDER

Joseph S. Yucht, Esquire Chairman: The parties to this case have stipulated the facts as follows:

1. Petitioner is licensed as a retailer under 30 Del. C. §2905 and has paid gross receipts taxes applicable to sales and leases of equipment, movie tapes and game cartridges.

2. Petitioner leases video cassette recorder machines, video movie cameras, movie cassette tapes and game cartridges to the public.

3. Petitioner offers members of the public the option of joining Petitioner's club for a fee which in exchange entitles club members to reduced rates.

4. Petitioner's minimum lease time requirement is one day and the maximum lease time is 5 days. The great majority of Petitioner's leases are overnight, lasting approximately 1.3 days.

5. Petitioner acquires its film cassette inventory and game cartridges from distributors by purchase.

6. The film cassettes consist of a coated tape encased in plastic. The tape receives impressions from a master tape which are capable of play back on a television screen in combination with the video cassette recorder machine. The film cassettes are manufactured by the original film producers or their licensees.

7. The game cartridges consist basically of a computer program specially encoded on computer chips encased in plastic, which cartridge when placed in a converter (computer), permits a display (graphics) to appear on a screen (television) which display is further augmented by control devices which allow movement over or within a particular set of graphics according to the program.

8. The video cassette recorder machine is a device capable of recording on coated tape signals from a television broadcast or video camera for later replay. Both video and audio signals may be recorded. The machine can also replay pre-recorder tapes. The movie cassettes are such pre-recorded tapes. No limitation is placed on the leasee's use of the equipment nor is there a requirement that the cassettes or cartridges be used at the leasee's home. However, copyrights on the pre-recorded tapes prohibit their use in establishments that charge admission or ones that use the tapes to prolong the stay of a customer.

9. The video cassette recorder machine and video camera are portable equipment.

10. Petitioner depreciates the tape cassette movies and the game cartridges under §167 of the Internal Revenue Code over a 6 month period.

11. Petitioner depreciates the video cassette recorder machines and video cameras under §168 of the Internal Revenue Code over a 60 month period.

As a result of the Petitioner's leasing of the video cassette tapes of movies, video game cartridges, video cassette recorders, and video cameras Respondent imposed a deficiency assessment against Petitioner for its failure to pay taxes on said rentals. Respondent contends that Petitioner failed to pay the 2% lease tax required by 30 Del. C. §4302.

30 Del.C. §4302 provides:

"There is hereby imposed by this section on every lease a use tax, for the use within this State, under a lease of tangible personal property (other than household furniture, household fixtures or household furnishings...) equal to 2% of the rent under such lease."

The Petitioner contends that it is exempt from paying this tax on the rental of the four items as follows:

A. Video cassette tapes of movies are intangible personal property and not subject to the tax.

B. Video game cartridges are intangible personal property and not subject to the tax.

C. Video cassette recorders are exempt as household furniture, household fixtures or household furnishings.

D. Video cameras are exempt as household furniture, household fixtures or household furnishings.

The issues presented to this Board were (1) whether the lease of video tape movie cassettes and/or computer game cartridges is the lease of tangible or intangible property and (2) whether the lease of video tape cassette movies, computer game cartridges, video cassette recorders, or video cameras is exempt from the application of 30 Del. C. §4302 as a lease of household furniture, household fixtures or household furnishings? Both parties agreed that this is a case of first impression in Delaware and that there are no Delaware decisions on point.

The question as to whether or not video tape cassettes are tangible personal property has been considered in other jurisdictions. The majority of the jurisdictions have held video tapes to be tangible personal property. See Chilivis v. Turner Communications Corporation, Ga. App. 231 S.E.2d 425 (1976); and on appeal Turner Communications Corporation v. Chilivis, Ga. Supreme Ct., 236 S.E.2d 251 (1977); Mount Mansfield Television, Inc., v. Vermont Commissioner of Taxes, 133 Vt. 284, 336 A.2d 193 (1975); Boswell v. Paramount Television Sales, Inc., v. Harvey, 253 Ark.1010, 490 S.W.2d 796 (1973); Florida Association of Broadcasters v. Kirk, Fla. App., 264 So.2d 437; Saenger Realty Corporation v. Grosjean, 194 Lou. 470, 193 So. 710 (1940) pertaining to the rental of film, which most states consider to be the same as video cassettes; Crescent Amusement Co. v. Carson, 187 Tenn. 112, 213 S.W.2d 27 (1948); and the annotation found in

10 ALR 4th 1209 pertaining to the Applicability of Sales and Use Taxes to Motion Picture and Video Tapes.

Petitioner's only authority for its contention is the Internal Revenue Code Regulation 1.48-1(f) pertaining to the Investment Tax Credit. In other jurisdictions those in favor of having films or video cassettes of movies deemed to be intangible personal property have argued that the value of the tangible film or video cassette is minimal when compared to the artistic impressions imposed on the film or tape. The artistic impressions are not subject to tax and thus the finished product is not subject to tax. This argument has not been persuasive in the majority of the jurisdictions that have considered it. When consequential services are entwined with tangible personal property, the critical factor is whether the buyer or lessor intended to buy or lease an individual's skills or a tangible end product of those skills. The majority have held that it is the buyer or lessor's intent to obtain possession of the tangible end product, the film or video cassette movie. Columbia Pictures, Etc. v. Tax Commissioner, Supr. Ct. Conn, 410 A2d 457 (1979). Thus, the rental of video cassette movies is the rental of an item of tangible personal property.

The issue as to whether or not video game cartridges are tangible or intangible personal property is likewise a case of first impression in Delaware. The majority of the states that have considered the question have held the same way as with the rental of video cassette movies. The same reasoning was involved in both cases. Video game cartridges are considered to be a form of computer software.

This we find to be the rental of an item of tangible property, since it is the finished product (game cartridge) that is the item being rented. Thus it is subject to the tax.

The last issue is whether or not the lease of video cassette tapes, video game cartridges, video cassette recorders, and/or video cameras are exempt from the tax imposed by 30 Del.C. §4302 because one or all are deemed to be an item of household furniture, household fixture or household furnishing? This issue, like the two preceding ones, is a case of first impression in Delaware.

Petitioner contends that these items are not taxable because they are exempt under the statute. Since these items are not specifically stated to be exempt, we must construe the statute to see if one or all of the items qualify as "household furniture, household fixture or household furnishing". The rule of statutory construction pertaining to a tax exemption, requires us to give strict interpretation against the assertions of the taxpayer urging an exemption and in favor of the taxing power. State Tax Commissioner v. duPont, Del. Supr. 118 A.2d 469 (1953). In addition, 30 Del. C. §4303(b) provides:

"For the purpose of the proper administration of this chapter and to prevent evasion of the tax imposed by §4302 of this title, it shall be presumed that all rental payments under leases are subject to the tax until the contrary is established and the burden of proving that any rental payment is not taxable under §4302 of this title shall be upon the person required to collect the tax or the lease."

Petitioner has not produced any authority for its contention that the listed items are exempt. Its only argument was that these items are generally found in a home and thus it or they would be deemed to be "household furniture, household fixtures or household furnishings". Petitioner, by this general language has not met its burden.

An examination of Delaware law indicates that property such as a camera, tripod, projector and movie reels were not considered to be "furniture and furnishings" within the meaning of a separation agreement. Rafal v. Rafal, Del. Ch. 198 A2d 177 (1964). Since the items in question are similar or akin to the items in Rafal, there is no reason why the same ruling should not apply. Also, these items should not be deemed to "household fixtures" since a fixture is a chattel which is attached to realty. Black's Law Dictionary, 4th Ed. (1951). Black's goes on to infer that a fixture is an item which is permanently affixed to the realty and not removable. Since these items are portable they do not qualify as fixtures. Therefore we conclude that these items are not exempt as "household furniture, household fixtures or household furnishings".

For the foregoing reasons we hold that the items are taxable as tangible personal property and that they are not exempt as household furniture, household fixtures or household furnishings. The Director's decision is affirmed.

Dated: January 9, 1986

Joseph S. Yucht
Nettie C. Reilly
Harry B. Roberts Jr