

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,  
PENNSYLVANIA

WILLIAMSPORT CITY AND SCHOOL : No. 00-01213  
DISTRICT MERCANTILE & :  
PRIVILEGE TAX OFFICE, :  
Plaintiff :  
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 :  
vs. :  
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NORTH BRANCH TRANSFER, INC., :  
Defendant :

OPINION AND ORDER

This matter came before the Court on the defendant's Motion for Summary Judgment and the Plaintiff's Cross Motion for Summary Judgment. The relevant facts are as follows:

Plaintiff is the Williamsport City and School District Mercantile & Privilege Tax Office (hereinafter Tax Office). It has a business address of 205 West Third Street, Williamsport, Pennsylvania. The Tax Office is operated by and for the benefit of the Williamsport Area School District and the City of Williamsport. Defendant, North Branch Transfer, Inc. (hereinafter North Branch), engaged in a trucking business during the calendar years of 1993 through 1998. North Branch's office address is 100 Rose Street, Williamsport, Pennsylvania. Its mailing address is PO Box 3775, Williamsport, Pennsylvania. It is

physically located at Reading Avenue and Reach Road, Williamsport, Pennsylvania.

On July 28, 2000, the Tax Office filed a Complaint against North Branch seeking to collect business privilege taxes for tax years 1994 through 1999. During this time period, the City of Williamsport had a tax ordinance in effect imposing a business privilege tax upon persons who perform services within the city. The Williamsport Area School District had a taxing resolution in effect through January 1, 1998, which imposed a business privilege tax upon persons who performed services within the area of the School District. In response to the Tax Office's complaint, North Branch filed an Answer with New Matter on October 20, 2000. North Branch admitted it never appealed or questioned the estimates of gross receipts for tax years 1994 through 1999 prepared by the Tax Office. However, it asserted it was the holder of PUC and ICC permits and therefore not subject to the business privilege taxes. North Branch did not raise preemption nor did it claim the business privilege tax was duplicative of the Utilities Gross Receipts Tax in its Answer and New Matter.

On November 15, 2001, the Honorable Clinton W. Smith entered a stipulated Scheduling Order for this case.

The Scheduling Order set a discovery cut-off date of March 15, 2001 and listed this case for trial in the June 2001 term.

In January 2001, the Tax Office served Interrogatories and a Request for Production of Documents on North Branch. North Branch failed to respond to the Tax Office's discovery request. On April 6, 2001, the Tax Office filed a motion for sanctions. This motion was heard during the pre-trial conference on April 23, 2001. The Court continued the case to the October/November 2001 trial term because discovery was not complete and, upon agreement of counsel, the Court ordered North Branch to respond to the Tax Office's discovery request on or before May 31, 2001. North Branch again failed to respond to the discovery request and the Tax Office filed a second motion for sanctions on June 8, 2001. In an Order dated July 12, 2001, the Court granted the Tax Office's motion.<sup>1</sup> The Court ordered North Branch to pay the Tax Office's attorney \$500 and to fully comply with their discovery obligation within thirty days. If North Branch failed to fully comply, the Tax Office could request that the Court enter judgment against North Branch. North Branch again failed to respond and on August 14, 2001 the Tax Office filed a praecipe with

the Prothonotary to enter judgment in its favor, which the Prothonotary did.

On December 17, 2001, North Branch filed a motion to strike the judgment, claiming the Order of July 12, 2001 did not authorize the Prothonotary to enter judgment; rather, it required the Court to do so. On January 17, 2002, the Court granted the motion and struck the judgment.

The Court treated the praecipe as a request for a hearing by the Court to enter default. The Court further indicated that North Branch could obviate the need for a hearing by providing the requested discovery prior to the hearing scheduled for February 15, 2002.

On February 12, 2002, North Branch provided a response to the Tax Office's discovery request. Although the tax returns and invoice requested by the Tax Office were available, North Branch did not copy them and send them with their response to the Tax Office.<sup>2</sup> Therefore, the Tax Office never received any documents to dispute their estimates of gross receipts for tax years 1994 through 1999.

On June 26, 2002, North Branch filed a motion for summary judgment claiming it was not subject to mercantile

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1 This Order was docketed July 14, 2001.

2 North Branch's responses to the request for tax returns and invoices were that these documents were available for copying and inspection. Given the history of North Branch's failure to respond, the Court finds such a

and business privilege taxes because it is a public utility with PUC and ICC permits and because the Local Tax Enabling Act does not allow local taxing authorities to tax public utilities. The motion for summary judgment does not raise preemption or double taxation as a result of the Utilities Gross Receipts Tax.<sup>3</sup> On June 28, 2002, the Tax Office filed a cross-motion for summary judgment asserting the PUC and ICC did not impose rates or tariffs on North Branch and therefore North Branch was not insulated from local taxation.<sup>4</sup>

The Court begins its analysis with the Local Tax Enabling Act, which states in relevant part:

local authorities shall not have authority by virtue of this act:

(2) To levy, assess or collect a tax on the gross receipts from utility service of any person or company **whose rates are fixed and regulated by the Pennsylvania Public Utility Commission** or on any public utility services rendered by any **such** person or company or on any privilege or transaction involving the rendering of any **such** public utility service;

53 P.S. §6902 (emphasis added). North Branch asserts it

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response inadequate.

<sup>3</sup> North Branch filed a brief in support of its motion for summary judgment on August 14, 2002. In this brief, North Branch discusses, **for the first time**, the concepts of preemption and double taxation due to the Utilities Gross Receipts Tax, 72 P.S. §8101(a)(1).

<sup>4</sup> On September 6, 2002, the Tax Office filed a brief in support of its cross-motion for summary judgment. In addition to arguing its position that North Branch is not immune from local taxation, the Tax Office asserts the issues related to the Gross Utilities Receipts Tax have been waived.

provides a public utility service and therefore is not subject to tax based on the second or third phrases in paragraph (2). This Court cannot agree. North Branch's argument ignores the word "such" in both phrases. In the context of this statute, the word "such" refers to the phrase "whose rates are fixed and regulated by the Pennsylvania Public Utility Commission." Therefore, in order for North Branch to come within the prohibition in the Local Tax Enabling Act, North Branch's rates must be fixed and regulated by the PUC. They are not. In response to interrogatories, North Branch stated, "[i]n determining what the customers of Defendant will be charged with respect to services provided by Defendant, the Defendant and the customers negotiate a contract with an agreed upon price and services." Defendant's Answers to Interrogatories, para. 3.

In addition, the Appendix to the Tax Office's brief indicates the PUC regulates trucking companies for safety and insurance requirements only. Therefore, the Court finds the Local Tax Enabling Act does not prohibit the Tax Office from imposing taxes upon North Branch.

North Branch also contends it is not subject to the taxes in question because it is a "public utility." Again, the Court cannot agree. The term "public utility"

means

any business activity regulated by a government agency in which the business is required by law to: (1) serve all members of the public upon reasonable request; (2) charge just and reasonable rates subject to review by a regulatory body; (3) file tariffs specifying all of its charges; and (4) modify or discontinue its service only with the approval of the regulatory agencies.

Crown Communications v. Zoning Hearing Board of the Borough of Glenfield, 550 Pa. 266, 274, 705 A.2d 427, 431 (1997).

As previously discussed, the PUC does not regulate the rates charged by North Branch; instead, the charges are negotiated between North Branch and its customers. North Branch submitted an affidavit from its vice president claiming it is a public utility; however, there are no facts to support this conclusion. The affidavit does not allege facts to support any of the prongs set forth above. It merely states in conclusory fashion that it is a public utility and that it conducts its business under the authority of a PUC permit and/or license. Since the PUC only regulates trucking companies for safety and insurance, North Branch does not meet the definition of public utility set forth above.

In its brief North Branch argues the taxes in question are precluded by the Utility Gross Receipts Tax, either due to preemption or because the taxes are duplicative. Any such claim was waived by failing to

properly raise it. North Branch did not plead the Utility Gross Receipts Tax in its Answer and New Matter nor did it raise this issue in its motion for summary judgment.<sup>5</sup>

The Tax Office filed a cross motion for summary judgment. In light of the forgoing discussion, the Court will grant that motion on liability, but not on damages. The Tax Office argued that, since North Branch never filed an appeal to the estimates, the Tax Office was entitled to the amount claimed in the complaint. Although North Branch admitted in paragraph 9 of its answer that it never filed an appeal, it did not admit the previous paragraphs that the Tax Office sent notices to North Branch regarding filing a return, appearing for an audit, or responding to its estimates. In its answer, North Branch also asserted the estimates were not accurate because they included all

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<sup>5</sup> Even if this issue were properly raised, North Branch would not be entitled to summary judgment. It has neither alleged any facts nor provided any evidence that it ever paid a Utilities Gross Receipt Tax. Furthermore, without such facts, the Court cannot compare the taxes to determine if they are duplicative.

At oral argument counsel for North Branch argued that if this issue was not properly raised there was no prejudice to the Tax Office. This Court cannot agree. First, prejudice relates to a request to amend pleadings. No such request has been made. Second, the Court believes there would be some prejudice from the delay. This case was supposed to go to trial over a year ago, but did not due to the defendant's and/or their previous counsel's failure to respond to discovery requests. Allowing the issue of the Utilities Gross Receipts Tax to be raised would require re-opening discovery to allow the Tax Office to investigate whether North Branch paid any such taxes and whether the taxes are duplicative. Given North Branch's failure to support this claim with any facts and the history of delay in this case, the Court believes it would be patently unfair to allow North Branch to raise this issue at this late date.



business conducted by North Branch and not just the business conducted within the taxing district. North Branch's New Matter, para. 10. The Tax Office did not submit any documentation regarding damages in support of its motion. Therefore, with regard to damages, the Tax Office's motion is more in the nature of judgment on the pleadings than summary judgment. Since the pleadings evince an issue of fact regarding the amount of taxes owed, it would be inappropriate for the Court to enter judgment in the amount claimed by the Tax Office at this time. Given the age of this case and the fact that the scheduling order originally set it for trial in November 2001, the Court will place this case on its March 2003 trial term. **Counsel are directed to appear for a pre-trial conference on February 13, 2003 at 1:30 p.m. before the undersigned.**

**ORDER**

AND NOW, this \_\_\_ day of January 2003, the Court DENIES North Branch's motion for summary judgment and GRANTS the Tax Office's cross-motion for summary judgment on the issue of liability only. On the issue of damages, **the Court places this case on its March 2003 trial term. Counsel are directed to appear for a pre-trial conference on February 13, 2003 at 1:30 p.m. before the undersigned.**

By The Court,

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Kenneth D. Brown, Judge

cc: Fred Holland, Esquire  
Marc Lovecchio, Esquire  
Work file