STATE OF MAINE
KENNEBEC, ss.

MAINE BOARD OF TAX APPEALS
DOCKET NO. BTA-2015-9

[INDIVIDUAL TAXPAYER],

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

I. Introduction

[Individual Taxpayer (the "Taxpayer")] appeals from an assessment of sales tax issued against him by Maine Revenue Services ("MRS") pursuant to 36 M.R.S. § 177(1) as a person responsible for the trust fund tax liability of [Company]. We find that [the Taxpayer] is not responsible for the liability contained in the assessment and therefore cancel the assessment against him in full.

II. Facts

At all relevant times, [the Taxpayer] was the majority owner and managing member of [the Company], a limited liability company engaged in construction. On [date], [the Company] entered into a contract (the "Contract") with [the Purchaser] to construct and deliver 20 [Containers][1] to [the Purchaser] in Maine. The Contract provided that the sale price of the 20 [Containers] was $[amount] ($[amount] per Container), with one-half of the sale price—$[amount]—to be paid at the time the Contract was signed. The balance of the sale price of the [Containers] was due from [the Purchaser] "at the time of shipping for each [Container] in the

[1] [Footnote omitted].

amount of $[amount]." Contract, Exhibit C. The Contract also provided that the construction and delivery of the [Containers] would be "substantially completed on or before [date]." Contract ¶ 3.

On [date], [the Company] registered with MRS to collect and remit sales tax as required by 36 M.R.S. § 1754-B(1) and proceeded to construct the [Containers] at its [ ], Maine, facility. [The Company] delivered the first nine of the 20 [Containers] to [the Purchaser] on or about [date]. By the time of delivery, numerous additions and work changes requested by [the Purchaser] had caused a per-[Container] cost increase of $[amount], for a per-[Container] cost total of $[amount]. [The Company] also submitted its nine corresponding invoices to [the Purchaser] at the time that it delivered the nine [Containers]. Each invoice was for $[amount], allowed credit for $[amount] previously paid at the time of Contract, and included sales tax of $[amount],[2] resulting in a per-[Container] balance due amount of $[amount] and a total balance due of $[amount] ($[amount] times 9).

[The Purchaser] did not make any payment on the invoiced balances. Rather, citing [the Company]'s failure to make timely delivery of the nine [Containers], [the Purchaser] exercised its right to stop work under the Contract on [date], and then declared the Contract terminated on [date]. Except for some "repeated demands" for payment averred by [the Taxpayer], there is no evidence of any further contact between the parties.

On [date], following an audit of [the Company]'s books and records, MRS issued an assessment against [the Company] for sales tax of $[amount] and associated interest and penalties. A portion of the assessed tax—$[amount]—related to [the Company]'s sale of the

[2] Due to a clerical or computational error, sales tax was understated on each invoice by $[amount].

nine [Containers] to [the Purchaser].[3] On [date], [the Company] requested reconsideration of the assessment, and on [date], MRS upheld the assessment in full. [The Company] did not appeal the reconsideration decision to either the Superior Court or the Maine Board of Tax Appeals.

On [date], MRS issued a separate assessment of tax, interest, and penalties in the total amount of $[amount] against [the Taxpayer] as a person responsible for the sales tax liability of [the Company] pursuant to 36 M.R.S. § 177(1). [The Taxpayer] requested that MRS reconsider that assessment on [date], and on [date], MRS upheld the assessment in full.[4] This appeal followed.

On appeal, [the Taxpayer] argues that he is not responsible for payment of [the Company]'s sales tax liability because [the Company] did not collect any sales tax from [the Purchaser]. It is [the Taxpayer]'s burden to show that it is more likely than not that MRS erred in making the assessment. 36 M.R.S. § 151-D(10)(F).

III. Discussion

A brief summary of the law applicable to sales tax liability is in order. Maine sales tax is imposed on retail sales in this state of tangible personal property, such as the [Containers] at issue in this case. 36 M.R.S. § 1811. Sales tax is a levy on the consumer—in this case [the Purchaser]—but is required to be collected by the retailer, [the Company]. *Id.* §§ 1753, 1812. As a registered retailer, [the Company] was required to pay the tax to MRS at the time of sale, but no later than monthly. *Id.* §§ 1951-A, 1952. Liability for the tax is a debt of the retailer to the state and a debt of the purchaser to the retailer until paid. *Id.* §§ 1953, 1812. Thus, [the

[3] Although the total price that [the Company] charged for all nine [Containers], without tax, was $[amount], ($[amount] times 9), MRS issued the assessment against [the Company] using a total sale price of $[amount]. MRS arrived at this figure by dividing the initial amount paid under the Contract—$[amount]—by 1.05, and deeming the remainder ($[amount]) to be sales tax paid to [the Company] by [the Purchaser].

[4] MRS subsequently clarified that the correct amount of the assessment against [the Taxpayer] is tax of $[amount], interest of $[amount], and penalties of $[amount]; a total of $[amount].

Company] is liable to MRS for the sales tax due on its sale of the [Containers], regardless of whether it collected the tax from [the Purchaser]. "Although the ultimate economic burden falls upon the consumer, the legal incidence of the tax rests squarely on the retailer." *State v. Marcotte,* 418 A.2d 1118, 1122 (Me. 1980) (citation omitted). The tax under 36 M.R.S. §§ 1951-A, 1952 is assessed "not on the basis of actual sales tax receipts but on the basis of 5% of the retailer's gross sales." *Id*.

Under Maine tax law, an individual may be responsible for the sales tax liability of another person under certain circumstances. As is applicable to this case, 36 M.R.S. § 177(1) provides that

> [a]ll sales and use taxes *collected* by a person . . . constitute a special fund in trust for the State Tax Assessor. The liability for the taxes or fees and the interest or penalty on taxes or fees is enforceable by assessment and collection . . . against the person and against any officer, director, member, agent or employee of that person who, in that capacity, is responsible for the control or management of the funds or finances of that person or is responsible for the payment of that person's taxes.

(Emphasis added). Thus, as asserted by [the Taxpayer], if [the Company] did not collect sales tax from [the Purchaser] on the sale of the nine [Containers], there were no taxes held in trust for the State Tax Assessor for which he may be held personally liable under section 177.

MRS contends that the legal doctrine of res judicata estops [the Taxpayer] from arguing that [the Company] did not collect the sales tax from [the Purchaser] because that issue had been previously decided in proceedings upholding the assessment against [the Company], and that the only issue remaining on appeal is whether [the Taxpayer] is liable for [the Company]'s sales tax debt as a person who "is responsible for the control or management of the funds or finances of [the Company] or is responsible for the payment of [the Company]'s taxes" under section 177.

1. Res Judicata

The doctrine of res judicata is discussed in detail in *Macomber v. MacQuinn-Tweedie*, 2003 ME 121 ¶ 22, 834 A.2d 131.

> The doctrine of res judicata is a court-made collection of rules designed to ensure that the same matter will not be litigated more than once. The doctrine has developed two separate components, issue preclusion and claim preclusion. Issue preclusion, also referred to as collateral estoppel, prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment, and . . . the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding. Claim preclusion bars relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action.

(Citation omitted). The *Macomber* court went on to explain that "[t]he collateral estoppel prong of res judicata is focused on factual issues, not claims, and asks whether a party had a fair opportunity and incentive in an earlier proceeding to present the same issue or issues it wishes to litigate again in a subsequent proceeding." *Id.*[5]

In *Kurtz & Perry, P.A. v. Emerson*, 2010 ME 107, 8 A.3d 677, a client sued her prior divorce attorney for malpractice, alleging that she and the attorney had entered into an oral agreement whereby she would not pay her own attorney fees and that her fees would be paid by her ex-husband as part of the divorce settlement, but that the attorney had failed to incorporate a provision to that effect into the settlement. The malpractice proceedings were stayed pending fee

[5] MRS contends that the "claims preclusion" component of the res judicata doctrine also estops [the Taxpayer] from arguing that [the Company] did not collect the subject sales tax. This contention is incorrect. MRS's legal "claim" against [the Company] for the assessed tax is not at issue in the proceedings against [the Taxpayer]. Furthermore, because MRS correctly based its assessment against [the Company] on the amount of [the Company]'s sales ($[amount], according to MRS) rather than on the amount of its collections, *see State v. Marcotte*, 418 A.2d 1118, 1122 (Me. 1980), the amount of sales tax collected by [the Company] is irrelevant to the assessment and could not have been properly raised on reconsideration. Additionally, because [the Taxpayer]'s personal interests were adverse to those of [the Company] on reconsideration, as discussed below, [the Taxpayer] was not in privity with [the Company] for purposes of the reconsideration proceedings as required for estoppel under the "claims preclusion" component of res judicata. *See Dep't of Human Servs. o/b/o Boulanger v. Comeau*, 663 A.2d 46 (Me. 1995) (holding that, in successive paternity actions, the interests of the mother differed from those of the daughter so as to "preclude any finding of privity").

arbitration that the client previously initiated pursuant to Rule 9 of the Maine Bar Rules. The Fee Arbitration Panel issued a written determination, concluding that the attorney had met his burden of showing that there was an agreement that the client would pay her divorce attorney's fees and that the fees and expenses charged by the attorney were reasonable. The malpractice court subsequently barred the client from relitigating the issue of whether she had not agreed to pay her own divorce attorney's fees because the Fee Arbitration Panel "necessarily was required to make factual findings as to whether [the client] agreed to pay attorney fees . . . and had the opportunity and incentive to litigate this issue." *Kurtz* ¶ 24, 8 A.3d 677. In so holding, the court stated that "collateral estoppel prevents a party from relitigating factual issues already decided 'if the identical issue necessarily was determined by a prior final judgment, and the party estopped had a fair opportunity' and incentive to litigate the issue in the prior proceeding." *Id.* (citations omitted).

Similarly, in *Macomber*, the co-owners of eight acres of land and a Motel located in Bar Harbor, Maine, were the subject of a foreclosure action. One of the co-owners sought to segregate a portion of the land on the ground that the other co-owners had violated their duty of good faith and certain other covenants between the parties. The trial court granted the foreclosure after hearing; the Law Court affirmed, and the property was subsequently sold. The co-owner then brought a breach of contract action against the other co-owners based on the violations referenced in the foreclosure action. The trial court entered summary judgment against the co-owner on res judicata grounds, stating that the "issues set out in the plaintiff's complaint were resolved in [the earlier foreclosure] litigation." *Id.* ¶ 11, 834 A.2d 131. The Law Court reversed, stating that [a]lthough the record demonstrates that [the co-owner] had a fair opportunity to present the issue of the [other co-owners'] alleged breach of the 1996 agreement

in the foreclosure proceeding before the District Court, it does not establish whether the issue was actually decided. . . . Collateral estoppel arises 'only if the identical issue necessarily was determined by a prior final judgment.' [Citation omitted]. A party asserting collateral estoppel has the burden of demonstrating that the specific issue was actually decided in the earlier proceeding. 18 Charles Alan Wright, et al., Federal Practice and Procedure, § 4420, at 516-18 (2d ed. 2002). Because it is not possible to discern whether the issue of the [co-owners'] breach of the parties' contract was actually decided in the foreclosure proceeding, the Superior Court erred when it concluded that the foreclosure judgment collaterally estopped the relitigation of that issue in this proceeding." *Id.* ¶ 24-25, 834 A.2d 131 (emphasis added).

In the present case, MRS contends that the issue of whether [the Company] collected sales tax from [the Purchaser] was decided as part of the reconsideration proceedings between MRS and [the Company], and that res judicata bars the relitigation of that issue by [the Taxpayer]. However, the decision on reconsideration contains only the following findings and conclusions:

> Pursuant to 36 M.R.S. § 151, the Taxpayer has requested reconsideration in connection with the above-referenced assessment dated [date], the amount in controversy being $1,000 or more. The issues presented for review are: (1) whether the assessment is overstated; and (2) whether the Taxpayer is entitled to waiver or abatement of the assessed interest and penalties pursuant to 36 M.R.S. § 186 and187-B(7).
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> On reconsideration, the assessment is upheld in full.

MRS's reconsideration decision does not disclose whether [the Company]'s sales tax liability was based upon its collection of the tax or was based solely upon [the Company]'s responsibility as a registered retailer under 36 M.R.S. §§ 1951-A, 1952. Thus, we are unable to conclude that [the Taxpayer] is collaterally estopped from litigating on appeal the issue of whether [the Company] collected sales tax from [the Purchaser].

Even if we were to assume, *arguendo*, that [the Company]'s reconsideration proceedings did address the issue of whether [the Company] collected the sales tax at issue, we find that those proceedings did not provide [the Taxpayer] "a fair opportunity and incentive to litigate the issue" of [the Company]'s collection of the sales tax sufficient to invoke res judicata. See *Macomber* ¶ 22, 834 A.2d 131. [The Taxpayer] could only participate in the proceedings on [the Company]'s liability in his representative capacity and not in furtherance of his own interests. Because of the method used by MRS to compute the assessment against [the Company],[6] [the Taxpayer] could not argue that [the Company] had not collected sales tax from [the Purchaser] without also arguing—contrary to [the Company]'s interests—that the assessment against [the Company] was understated, having been prepared using an understated sale price. Based on the evidence presented, we conclude that the doctrine of res judicata does not prevent [the Taxpayer] from arguing that he is not personally liable for [the Company]'s sales tax liability because sales tax was not collected.

2. Collection of sales tax

We now turn to the issue of whether [the Company] did collect sales tax on its sale of the nine [Containers] to [the Purchaser]. The pertinent facts on this point include (1) the original Contract dated [date] was for the construction of 20 [Containers], (2) [the Purchaser] paid [the Company] one-half of the contract price—$[amount]—at the time the Contract was signed, (3) the remaining balance due under the Contract was to be paid in fractional shares at the time of

[6] As set forth above in footnote 3, MRS determined that the sale price of the nine [Containers] was $[amount] by subtracting sales tax from the initial amount paid to [the Company] under the Contract—$[amount]. If sales tax were not collected by [the Company], as argued by [the Taxpayer], then the taxable sale price of the [Containers] would be the higher number and the assessment would be increased.

delivery of each [Container], (4) the Contract made no provision for payment of sales tax, (5) the Contract was terminated on or about [date], when [the Company] delivered the nine [Containers] to [the Purchaser], and (6) [the Purchaser] made no further payment to [the Company] beyond the initial one-half of the Contract price.

Under the Contract, [the Company] completed the sale of the nine [Containers] to [the Purchaser] by delivery. *See, e.g.*, Contract ¶¶ 1 and 2 (requiring delivery), and Contract, Exhibit C (providing for payment of the balance due under the Contract upon delivery). There was no occasion for [the Company] to collect sales tax from [the Purchaser] prior to the date of delivery of the nine [Containers]. This conclusion is in accord with the relevant provisions of Maine sales tax law, *see* 36 M.R.S. §§ 1811,[7] 1752(13),[8] as well as with the guidance provided by MRS in its relevant Sales Tax Instructional Bulletin ("Bulletin No. 39"). Although not binding on the Board, MRS's Bulletin No. 39 is useful to a discussion of the sale price upon which sales tax is based. As is relevant to the present case, Bulletin No. 39 discusses the difference between an "installment sale" in which purchase payments occur over time following the sale, and a "layaway sale" in which deposit payments are made until the time of sale, that is, when the property purchased is delivered. In pertinent part, Bulletin 39 provides as follows:

> A sale is treated as being completed when delivery of the property is made (even if full payment has not been made at that time). With an installment sale, the property is delivered to the customer, and then the customer makes payment over time. *Sales tax must therefore be collected in full when delivery is made*.
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> In the layaway sale context where the property has not yet been delivered to the purchaser, a layaway payment is just a deposit, so tax is not collected each time a payment is made. The sale price includes the total amount of all layaway

[7] "A tax is imposed on the value of all tangible personal property . . . *sold* at retail in this State." (Emphasis added).

[8] "'Sale' means any *transfer, exchange or barter*, in any manner or by any means whatsoever, for a consideration . . . ." (Emphasis added).

> payments, but *sales tax is not collected unless and until the final payment is made and the product is delivered to the purchaser*. . . .

Bulletin No. 39(2)(C)(October 1, 2013) (emphasis added).[9]

Additionally, the invoices that [the Company] tendered to [the Purchaser] when it delivered the nine [Containers] were for the balance due on the [Containers] delivered, together with sales tax on the entire sale price. There is no evidence that [the Company] collected sales tax from [the Purchaser], either prior to or following its delivery of the [Containers].

[The Taxpayer] has met his burden of proof by a preponderance of the evidence under 36 M.R.S. §151-D(10)(F) that [the Company] did not collect sales tax on its sale of the nine [Containers] to [the Purchaser]. Consequently, because liability for sales tax under 36 M.R.S. § 177(1) only extends to sales tax that was collected, we do not reach the issue of whether [the Taxpayer] is responsible for the sales tax liability of [the Company] under section 177 as an "officer, director, member, agent or employee of that person who, in that capacity, is responsible for the control or management of the funds or finances of that person or is responsible for the payment of that person's taxes." We therefore cancel the assessment against [the Taxpayer] in full.

IV. DECISION

Finding that no sales tax was collected in trust for the State Tax Assessor, we cancel the assessment against [the Taxpayer].

The Board may, in limited circumstances, reconsider its decision on any appeal. If either party wishes to request reconsideration, that party must file a written request with the Board within 20 days of receiving this decision. Contact the Appeals Office at 207-287-2864 or see the

[9] Bulletin No. 39(2)(C)(October 1, 2013) was the Bulletin in effect at the time of the assessment against [the Taxpayer]. With minor stylistic variations, this same language appears in the December 10, 2010, version of Bulletin No. 39 at paragraph (3)(C).

Board's rules, available at http://www.maine.gov/boardoftaxappeals/lawsrules/, for more information on when the Board may grant reconsideration. If no request for reconsideration is filed within 20 days of the date of this proposed decision, it will become the Board's final administrative action. If either party wishes to appeal the Board's decision in this matter to the Maine Superior Court, that party must do so within 60 days of receiving this decision.

Issued by the Board: April 7, 2016