ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS

NOKIA SIEMENS NETWORKS US LLC,	)	
Petitioner,	)	
v.	)	**Case No. 14-TT-10**
	)	**Chief Judge James M. Conway**
ILLINOIS DEPARTMENT	)	
OF REVENUE,	)	
Respondent.	)	

Department's Motion for Summary Judgment

Respondent, Illinois Department of Revenue (the "Department"), by and through its attorney, Michael Coveny, Special Assistant Attorney General, respectfully submits this motion for Summary Judgment and in support of its Motion states as follows:

Background

The Parties have entered into a stipulation of agreed facts pursuant to Tribunal Regulation § 5000.340(a), 86 Ill.Adm.Code § 5000.340(a).[1] At some point in April 2010, the Department began a sales/use tax audit of Petitioner, Nokia Siemens Networks US LLC ("Nokia"). The audit of Nokia's books and records covered the period from July 1, 2007 to June 30, 2009 ("Relevant Period"). The audit ultimately culminated in the Department's issuance of two notices of tax liability ("NTL's") to Nokia dated October 1, 2013. Stip. ¶¶'s 6-7. Collectively, the NTL's proposed an assessment of $ 886,232 in tax and $157,795.77 in interest computed through the date of the NTL's. *Id.*

Nokia originally protested the NTL's with the Department's Office of Administrative Hearings but subsequently invoked the transfer provision of the Illinois Independent Tax Tribunal Act of 2012 and filed a petition challenging the NTL's here. Nokia's Petition contained

[1]References to the Stipulation shall be indicated by the abbreviation, "Stip." followed by the applicable paragraph number and/or Exhibit letter.

two counts. The first count raised a legal challenge to the Department's proposed assessment of use tax, stating that Nokia purchased the items at issue for resale and not for use. In the second count, Nokia contended that the Department's statistical sampling methodology was flawed. While this matter was pending in the Tribunal, the Department reviewed additional Nokia records and revised its proposed assessment of sales/use tax downward from $ 886,232 to $864,517.

During the Relevant Period, Nokia operated three distinct business segments: (i) Devices and Services, responsible for mobile devices and related services; (ii) NAVTEQ, a leading provider of digital map information; and (iii) Nokia Siemens Networks, formed by a 2007 merger between Nokia Siemens AG. Stip. ¶ 2. Segment three, Nokia Siemens Networks is the Nokia business at issue in this matter. *Id.* During the Relevant Period, Nokia's Siemens Networks, among other things, designed, installed and maintained telecommunications networks for telecommunications providers like T-Mobile. Stip. ¶¶'s 3-5. The customer base for this part of Nokia's business consisted of a limited number of telecommunications providers/customers. Stip. ¶ 4. Nokia typically entered into large, multi-year contracts with such customers, such as the "Supply Contract" with T-Mobile at issue in this matter. Stip. ¶¶'s 4-5.

The Department's NTL's initially proposed use tax in the amount of $ 886,232. Stip. ¶ 6. That amount was subsequently reduced to $864,517 after the Department's auditor reviewed additional documents. Stip. ¶ 6. Of the $864,517 of use tax still at issue, $736,005 consists of use tax the Department proposed assessing on certain power modules, relatively small pieces of equipment Nokia sold or transferred to T-Mobile per the Supply Contract. Stip. ¶¶'s 8, 15. Although Nokia has filed a cross partial motion for summary judgment ("Nokia's Motion"), addressing use tax on only the power modules, the Department's Motion for Summary Judgment addresses the entire amount of proposed use tax still at issue, $ 864,517, because, as explained below, the Department believes that under the regulation at issue, the function of the property

transferred to the telecommunications customer is irrelevant. Rather, the activities of the taxpayer/construction contractor installing and maintaining a telecommunications system control the taxability of the items or property it sells as part of its contract.

Standard for Summary Judgment

Summary judgment is appropriate when, and only when, the court finds that, based on the pleadings, depositions, and affidavits, no genuine issue of material fact exists between the parties. 735 ILCS 5/2-1005(c); *Neofotistos v. Metrick Electric Co.,* 217 Ill.App.3d 506, 513, 577 N.E.2d 511 (2nd Dist. 1991). In deciding the whether the movant is entitled to summary judgment, the court will construe all the evidence against the summary judgment movant and in favor of the nonmovant. *Purtill v. Hess,* 111 Ill.2d 229, 240, 489 N.E.2d 867 (1986). Summary judgment is proper where the parties have stipulated to facts and the moving party is entitled to judgment as a matter of law. *LoBianco. v. Clark,* 231 Ill.App.3d 35, 38, 596 N.E.2d 56 (1st Dist. 1992). By filing cross motions for summary judgment, the parties essentially invite the court to decide the matter as a question of law, although the court is not bound to the parties' joint representation that no material issue of fact exists. *Fidelity Nation Title Insurance Co. of New York v. Westhaven Properties Partnership,* 386 Ill.App.3d 201, 212, (1st Dist. 2007).

Issue

Nokia has agreed that the taxability of the modules depends on the applicability of Department Regulation, 86 Ill.Adm.Code § 130.1940(c)(3). Stip. ¶8. Specifically, the Stipulation reads:

> The parties further agree that whether the modules are subject to tax is controlled by whether 86 Ill.Adm.Code § 130.1940(c)(3) applies to Nokia's activities with respect to the supply contract.

Stip. ¶ 8. The regulation provides:

> Construction contractors who contract for the improvement of real estate consisting of engineering, installation, and maintenance of voice, data, video, security, and all telecommunications systems incur Use Tax, rather than

> Retailers' Occupation Tax, liability on those items if they are sold at one specified contract price. This provision applies to all of the items in this subsection (c)(3) even if they are not incorporated into real estate.

86 Ill.Adm.Code § 130.1940(c)(3)(emphasis added). The regulation applies to "construction contractors" who install, engineer and maintain, among other things, a telecommunications system. *Id.* The regulation looks to the contractor's activities rather than the types of property sold. If a contractor is subject to this regulation, it incurs use tax on the items it is selling and/or transferring to its customer. It should not be collecting tax (or accepting resale certificates) from its customers as a retailer, because it is not considered to be functioning as a retailer. Rather, according to the regulation, it is acting or functioning as a construction contractor, albeit a highly specialized one.

Argument

Although Nokia in its motion cited several other Department regulations, it is clear that if its activities with respect to the Supply Contract bring it within the scope of this regulation, it is taxable on all the items sold to T-Mobile in the Supply Contract. Those other regulations Nokia cited do not change the result.

Applying the regulation, the first inquiry is whether Nokia is a "construction contractor." While Nokia itself conceded this point in that it only addressed the regulation's "one contract price" provision, it is clear from various provisions of the Supply Contract that Nokia was acting as a construction contractor: (i) See Stip. Exhibit C, Article 4.4, page 13, where the requirement of zoning and construction permits is discussed; See Stip. Exhibit C, Article 4.6, page 14 discussing the transfer or "hand over" of a "site"; (iii) See Stip. Exhibit C, Article 4.5, page 14 providing for Nokia's access to "all Sites and utilities; and (iv) See Stip. Exhibit D, pages 6-7, definition and discussion of "civil work:

> 'Civil Work' means the labor and materials necessary for the performance of demolition, construction and renovation work (e.g., roads, grading, fencing, structural improvements, lighting, cabling, etc.) at a Site to ensure that such

> Site is ready for installation of Equipment and Software. Civil Work may be purchased from Supplier as a Service to be performed hereunder.
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> * * *
>
> Paragraph 4.5 is hereby amended by adding the following to the end of the first sentence herefo:
>
> > "provided, however, that Supplier shall be responsible for meeting such Site requirements with respect to any Sites for which Purchaser has purchased Civil Work from Supplier.

Nokia is the "Supplier" in the Supply Contract. Therefore, it is clear that Nokia was a "construction contractor" within the meaning of regulation.

Once an entity is considered a construction contractor, it still must perform at least one of the three enumerated services in the regulation in order to fall within its scope, i.e., engineering, installing, and maintaining. 86 Ill.Adm.Code § 1940(cc)(3). Based on the Supply Contract, Nokia did all three. See definition of "Services":

> "Services" shall mean the system design, installation, commissioning, integration supervision, training, consultancy, and technical assistance services that the Supplier is required to provide to the Purchaser under this Supply Contract and which are described in Appendix. 7. . .

Exhibit C, Supply Contract, Article 1.17, page 6. With respect to maintenance, see Exhibit C, Supply Contract, Article 9.11:

> The Supplier covenants that it is willing to provide maintenance and support services to the Purchaser for the Equipment and Software incorporated in the System for a period of then (10) years from the date hereof. Such services shall be subject to concluding a separate contract between the Parties in the form of Appendix 14. . .

Although Nokia in its motion did not raise either of these arguments, i.e., that it is not a construction contractor or that it did not perform any of the three listed or applicable services, it is clear from the Supply Contract that it: (i) functioned as a construction contractor in its T-Mobile contract; and (ii) performed all three of the enumerated services, engineering, installation and maintenance.

As indicated above, Nokia's sole argument against application of the regulation is that the regulation does not apply because the Supply Contract was not for "one specified contract price." 86 Ill.Adm.Code § 1940(c)(3). Nokia's argument assumes that the regulation's reference to "one specified contract price" applies to the contract itself, not to the items sold. In analyzing the regulation, it is necessary to read the particular provision carefully:

> Construction contractors who contract for the improvement of real estate consisting of engineering, installation, and maintenance of voice, data, video, security, and all telecommunications systems incur Use Tax, rather than Retailers' Occupation Tax, liability on those items if they are sold at one specified contract price. This provision applies to all of the items in this subsection (c)(3) even if they are not incorporated into real estate.

86 Ill.Adm.Code § 130.1940(c)(3)(emphasis added). As it states, construction contractors who perform the applicable services are subject to use tax on "those items," if "they are sold at one specified contract price." *Id.* From a grammatical point of view, the term "they" appears to refer to the items sold, not the contract. Ignoring the fact that "they" is plural rather than singular, Nokia insists that "they" refers to the contact itself. In other words, the phrase "one specified contract price" applies to the contract itself and not the items sold. Also, the regulation refers to something being sold and the only items sold are the items at issue. The contract itself is not and could not be "sold," casting further doubt on Nokia's interpretation.

So it must be resolved whether the phrase "one specific contract price" applies to the various items sold by the construction contractor or simply whether the contract itself must have one specified price. Nokia's argument/interpretation is that the regulation does not apply because the Supply Contract with T-Mobile was not really for one specified price because it did not have a "fixed price." The Department believes that the phrase applies to the items sold and that those items all contained specific prices. See Annex 10A: BSS Pricing.

The issue presents the question of how to interpret the regulation. In Illinois, an agency's regulation interpreting a statute it is charged with enforcing is entitled to "substantial deference."

Lauer v. American Family Life Insuance Co., 199 Ill.2d 384, 388, 769 N.E.2d 924 (2002). Agency regulations "have the force and effect of law, and must be construed under the same standards which govern the construction of statutes." *Union Electric Co.v. Department of Revenue,* 136 Ill.2d 385, 391, 556 N.E.2d 236 (1990). Since the regulation is interpreted in the same manner as a statute, courts will apply general principles of statutory construction. *Id.* Among those principles or rules is the "last antecedent rule." *Swank v. Department of Revenue,* 336 Ill.App.3d 851, 857, 785 N.E.2d 204 (2nd Dist. 2003). Under this rule, the phrase "they are sold" and more specifically, the word "they" refers to the word, phrase or clause immediately preceding the word in question. *Id; McMahan v. Industrial Comm'n*, 183 Ill.2d 499, 512-13, 702 N.E.2d 545 (1998). Applying the last antecedent rule to the regulation, the word "they" from the phrase "they are sold at one specified contract price" must apply to a word or phrase immediately preceding it, i.e., "those items." Consequently, the reference to "one specified contract price" must apply to the items sold, i.e., the modules and all other tangible personal property sold to T-Mobile in the Supply Contract.

Even without application of the "last antecedent rule," Nokia's interpretation makes no sense. In order for the regulation to apply, something has to be sold at "one specified contract price." Nokia insists that the phrase refers to the contract itself. But the contract was not sold, only items of property and equipment like modules were sold. So even apart from application of the "last antecedent rule," Nokia's interpretation cannot be squared with a plain reading of the regulation. The phrase "one specified contract price" could logically only apply to the property and equipment sold, not the contract itself.

Therefore, Nokia's entire discussion and argument claiming that the Supply Contract did not have a "fixed price" is irrelevant. The only fixed price or prices at issue were those for the equipment including, but clearly not limited to, the modules. And those items all had fixed prices. See Annex 10A: BSS Pricing.

Because: (i) Nokia was a construction contractor within the meaning of the regulation; (ii) performed all three of the required services of engineering, installation and maintenance of telecommunications systems for T-Mobile in the Supply Contract; and (iii) sold items including but not limited to, the modules at issue for one specified contract price, it was and is subject to use tax on all such items sold. 86 Ill.Adm.Code § 1940(c)(3). Moreover, Nokia's argument at the end of its motion, i.e., that it was acting as a retailer in selling items to T-Mobile, is contrary to the regulation. As the regulation itself provides, if a construction contractor falls within its scope, it must pay use tax on the items it sells/installs pursuant to any contract. There is no option or choice to do anything else. In short, the construction contractor is not functioning as a retailer and therefore should not be collecting tax from its customers or accepting resale certificates. *Id.*

For all the foregoing reasons, Nokia was subject to the regulation and therefore owes use tax on all the items of equipment it sold to T-Mobile. The Department's NTL(s) should therefore be affirmed as adjusted, Nokia's Motion for Partial Summary Judgment should be denied and the Department's Motion for Summary Judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael Coveny, an attorney for the Illinois Department of Revenue, state that I served a copy of the attached Department's Motion for Summary Judgment upon:

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By email attachment to the email addresse listed above on November 20, 2015.

Michael Coveny