

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Merrimack Superior Court
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NOTICE OF DECISION

**Rebecca L. Woodard, ESQ
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Concord NH 03301**

Case Name: **Capital One Auto Finance, Inc. v. Kevin Clougherty , et al**
Case Number: **217-2010-CV-00708**

Enclosed please find a copy of the court's order of October 02, 2012 relative to:

ORDER

October 03, 2012

William S. McGraw
Clerk of Court

(485)

C: Andrew W. Serell, ESQ

The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

Capitol One Auto Finance, Inc.

v.

**Kevin Clougherty, Commissioner of the New Hampshire Department of
Revenue Administration, et al**

NO. 2010-CV-0708

ORDER

Petitioner Capital One Auto Financing, Inc. ("Capital One") appeals the decision of the Commissioner ("Commissioner") of the Department of Revenue Administration ("DRA") upholding the assessment of additional tax, interest and penalties under the business profits tax against it for the tax years 2003, 2004, 2005 and 2006. Capital One has moved for summary judgment. The Respondents object. For the reasons stated in this Order, the motion for summary judgment is DENIED WITHOUT PREJUDICE, and this case is REMANDED to the DRA for further proceedings.

I

The issue in this case is whether the DRA properly assessed a business tax against Capitol One by including two banks related to Capital One in the tax calculation between tax years 2000 to 2006. Resolution of this issue turns upon a determination of whether these two banks- Capital One Bank and Capital One F.S.B.-Conducted "business activities" within the State of New Hampshire.

The relevant statute, RSA 77-A: 1 XII, was amended in 2007 to define business

activity in such a way as to incorporate the so-called "economic nexus" test. Before the DRA, the Respondents argued that the economic nexus test had been applied by the DRA prior to the 2007 amendment of the statute, and the DRA hearing officer agreed.

Based on its interpretation of RSA 77-A: 1 XII, the hearing officer found in favor of the Respondents. The hearing officer did not reach the issue of whether or not the two banks had a "physical presence" in the State, which Petitioner argued was necessary in order for a tax to be assessed against it. Petitioner appealed.

After this Court entered certain discovery orders, the Respondents abandoned their position that the "economic nexus" test was applicable under the version of the statute in effect prior to the 2007 amendment. On June 21, 2012, the State filed a pleading in which it stated that:

"... it no longer intends to claim that the Petitioner owes the taxes in question based upon an economic nexus or substantial economic presence test. Respondent does intend to continue to pursue the argument that that taxes are owed based on upon an argument that the petitioner had a physical presence in New Hampshire sufficient to trigger the taxes in question."

Respondent's Notice of Amended Legal Position, paragraph 4.

Capital One has moved for summary judgment, on the grounds that the Respondents have withdrawn from this case the sole basis on which they were defending its claims. The Respondents object, reasoning that the dispositive issue in this case is a question of fact- whether the DRA properly assessed the taxes due under RSA chapter 77-A. The Respondents argue in their papers that since the physical presence test is applicable, genuine issues of material fact exist as to whether or not activities such as hiring attorneys licensed in New Hampshire, collections activities by third parties, filing of lawsuits and the use of judicial and public resources, are sufficient to establish a

physical presence.

II

The fundamental issue raised by the Petitioner in its motion for summary judgment is that the Respondents are precluded from raising in this Court legal issues that were not properly raised in the administrative proceeding conducted by the Commissioner. RSA 21-J: 28-b IV provides in relevant part that "legal issues shall be limited to those raised before the Commissioner, with the exception that the taxpayer may raise additional issues addressing constitutional issues, and either party may raise additional claims upon a showing of good cause." Petitioner alleges that by raising the economic nexus test, the Respondents waived the right to rely on the physical presence test. Petitioner provides no authority for its position. Moreover, the statute provides that either party may raise additional legal claims upon a showing of good cause. RSA 21-J: 28-b IV.

The Court is not persuaded that an alternative legal theory as to why the same statute applies to the taxpayer is necessarily a new "legal claim" within the meaning of RSA 21-J: 28-b IV. Moreover, to the extent that the "physical presence" test is included within the economic nexus test, it does not appear that it would be unreasonable for the theory to be considered.

It is true that the DRA did not consider this theory, because of its view that the pre-2007 statute encompassed the economic nexus test. While appeal to this Court from the DRA is de novo, the Court believes it would be in the interest of judicial economy to remand this matter to the DRA for consideration of whether or not the DRA properly assessed, since depending upon the outcome of the DRA proceedings, proceedings in

this Court may not be necessary. Accordingly, this case is remanded to the DRA for further proceedings to determine whether or not the business profits tax assessed against Petitioner for the tax years 2003, 2004, 2005 and 2006 may be upheld under RSA 77-A:1 XII, utilizing the physical presence test.

SO ORDERED.

10/2/12
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice

RBM/