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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001838-MR

CONSECO FINANCE CORPORATION
AND WELLS FARGO FINANCIAL
KENTUCKY, INC.

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 03-CI-01504 & 03-CI-01505

COMMONWEALTH OF KENTUCKY,
REVENUE CABINET

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE AND GUIDUGLI, JUDGES; PAISLEY, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Conseco Finance Corporation and Wells Fargo
Financial Kentucky, Inc. appeal from an opinion and order of the
Franklin Circuit Court. The Court concluded that the Kentucky
Board of Tax Appeals properly denied claims by Conseco and Wells
Fargo under KRS 139.350 for use tax deductions on worthless

¹ Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

credit accounts. For the reasons stated below, we affirm the opinion and order of the Franklin Circuit Court.

Conseco and Wells Fargo are unrelated corporate entities operating with offices in Kentucky. Their separate actions in Franklin Circuit Court were consolidated because they shared the same claim of error arising from the Kentucky Board of Tax Appeals.

During the periods at issue, Conseco and Wells Fargo would provide consumer credit to individuals purchasing tangible personal property from Kentucky retailers. Consumers would fill out credit applications at the retailers for the purpose of obtaining retail installment contracts. Conseco and Wells Fargo would receive the application by fax and check the applicant's credit rating. If Conseco and Wells Fargo chose to issue credit, they would pay the retailer the full price of the goods including sales and use tax and the consumer would receive the goods. In return, Conseco and Wells Fargo would receive installment payments from the consumers along with the retailers' contract rights and a purchase money security interest in the property sold.

If a consumer subsequently defaulted on an installment contract, Conseco and Wells Fargo would take steps to recover the property by repossession or other collection means. If a balance remained after the collection efforts were exhausted,

Conseco and Wells Fargo were left with bad debts which included the proportional share of the use tax paid to the Commonwealth. When Conseco and Wells Fargo claimed a KRS 139.350 use tax deduction for the tax amount on the worthless accounts, the Revenue Cabinet disputed the deductions and they were disallowed by the Board.

Conseco and Wells Fargo prosecuted a consolidated appeal from the Board's decisions to the Franklin Circuit Court. Upon hearing proof, the Court rendered an opinion and order on August 5, 2004, denying the appeal and affirming the Board's order. As a basis for its opinion and order, the circuit court concluded that the Board properly found that Conseco and Wells Fargo were not retailers for purposes of KRS 139.350 and as such were not entitled to bad debt reduction thereunder. This appeal followed.

Conseco and Wells Fargo now argue that the Franklin Circuit Court erred in affirming the Board's order. Specifically, they contend that they are retailers eligible to claim a refund or deduction under the bad debt statute. They also argue that they are independently entitled to relief under the common law of assignment, and note that decisions in other jurisdictions support their position in this case. They seek an order reversing the decision of the circuit court and granting their claim for relief.

Conseco and Wells Fargo's primary argument is that the Board and the circuit court erred in failing to find that they were retailers for purposes of the bad debt statute, KRS 139.350. As retailers, they would be entitled to a use tax deduction for the tax amount on the worthless accounts.

Their reasoning on this issue is as follows. They first note that they are assignees of the sellers' right to recover against defaulting buyers. Under KRS 139.080, an assignee falls within the definition of a "person"; a "person" falls within the KRS 139.140 definition of a "seller"; and, a "seller" falls within the definition of a "retailer" under KRS 139.110. They therefore contend that as assignees, the statutory definitions also make them retailers for purposes of relief under the bad debt statute.

We have closely examined this argument and are not persuaded that the circuit court erred in affirming the Board on this issue. KRS 139.350, as it existed when the original claim was made and as amended,² provides that a "retailer" could take as a deduction the amount of taxes collected and paid to the Commonwealth that were later charged off as part of a bad debt. The dispositive question, then, is whether Conseco and Wells Fargo are retailers.

² KRS 139.350 was amended effective July 1, 2004.

Conseco and Wells Fargo would have us conclude that they are retailers for purposes of KRS 139.350 because of the statutory definitions of "person", "seller", and "retailer" addressed above. The flaw in this reasoning is that the definitions of seller and retailer set forth in KRS 139.140 and KRS 139.110 include provisions that the seller is "engaged in the business of selling tangible personal property"³ and is one who "makes any 'retail sale' or 'sales at retail' ".⁴ While Conseco and Wells Fargo provided credit for retail sales, they were not engaged in the business of selling tangible personal property or making retail sales.

As the circuit court correctly found, where statutory language is free from ambiguity, its exact language must be followed.⁵ The language of KRS 139.350 is such a statute. Neither Conseco nor Wells Fargo made retail sales and as such are not retailers for purposes of KRS 139.350. The Board and the circuit court properly so concluded. We find no error on this issue.

Conseco and Wells Fargo go on to argue that they are independently entitled to relief under the common law of assignment. They contend that irrespective of the bad debt

³ KRS 139.140.

⁴ KRS 139.110.

⁵ Griffin v. City of Bowling Green, 458 S.W.2d 456 (Ky. 1970).

statute they are entitled as assignees to step into the contractual shoes of the retailers. In so doing, they maintain that they are entitled to the same bad debt relief enjoyed by the retailers.

We are not persuaded by this argument. The common law, which Kentucky adopted from English law, is superseded by conflicting statutory law and judicial decisions.⁶ Thus, even if we were to conclude that the retailers had assigned to Conseco and Wells Fargo a common law right to recover taxes paid on the bad debts (which we do not believe is the case), any such assignment of rights would be superseded by the bad debt statute. Having concluded that the bad debt statute is clear and unambiguous, and that it does not allow for mere third party lenders to become retailers for purposes of tax recovery, it follows that Conseco and Wells Fargo are not entitled to a common law recovery of the tax. The extra-jurisdictional cases cited by Conseco and Wells Fargo are not persuasive on this issue.

It is also worth noting that neither Conseco nor Wells Fargo actually paid the taxes to the Commonwealth. Rather, they transferred to the retailers funds from which the retailers paid the taxes. Setting aside the statutory and common law arguments, it would make little sense for Conseco and Wells

⁶ Commonwealth v. Donoghue, 63 S.W.2d 3 (Ky. 1933). See also, Kentucky Constitution § 233.

Fargo to recover taxes which they had not paid. They are lenders who provided funds to consumers for the purpose of purchasing goods. The assignment of rights from the retailers to Conseco and Wells Fargo allowed them to pursue remedies against the defaulting consumers, but not remedies against the Commonwealth which are governed by the statutory law.

Accordingly, we find no error in the circuit court's denial of relief on this issue.

We are also not persuaded by Wells Fargo's argument that because it is a registered Kentucky retailer it is entitled to assume that role in the transactions at issue. Wells Fargo was not acting as a retailer in the matter now before us, and KRS Chapter 139 requires an entity to be engaged in retailing in the transaction for which it claims a tax refund. Wells Fargo was acting as a lender and not a retailer in the matter at bar and is not entitled to relief merely because it had previously registered as a retailer.

Lastly, Conseco and Wells Fargo argue that the denial of their claim for relief is inequitable and inconsistent with the legislative intent of the bad debt statute. They maintain that the tax was paid to the Commonwealth, and that the Board's failure to provide a proportional refund on the bad debt constitutes a windfall to the Commonwealth.

Again, the record indicates that Conseco and Wells Fargo did not pay the taxes at issue. Rather, they transferred funds to the retailers from which the retailers paid the wholesale cost of the goods, retained profits and paid taxes. As for the legislative intent of the bad debt statute, it is clearly evidenced in the language limiting recovery to retailers. The circuit court did not err in so finding.

For the foregoing reasons, we affirm the opinion and order of the Franklin Circuit Court.

ALL CONCUR.

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