

STATE OF VERMONT

SUPERIOR COURT  
Washington Unit

CIVIL DIVISION  
Docket No. 78-2-19 Wncv

Sears, Roebuck and Co.,  
Plaintiff

v.

State of Vermont,  
Defendant

FINDINGS AND ORDER

In this action, Sears, Roebuck and Co. challenges the determination of the Commissioner of the Department of Taxes that concluded that Sears owed the State additional sales and use tax payments for the period June 2004 to May 2007. Sears makes multiple arguments in support of its view that the Commissioner erred. First, Sears argues that the record does not provide proof that the parties had validly agreed to extend the statute of limitations to April 30, 2008 and that, without such an extension, the State failed to meet the limitations deadline.

Second, in another attack on the statute of limitations, Sears contests whether the assessment made by the Commissioner was sufficient to meet the applicable deadline. It argues that, to toll the limitations period, a tax assessment must be final before the end of the statute of limitations period. It asserts that an assessment does not become fixed and “final” until the period for taking an appeal has lapsed. In this instance, Sears maintains, the Commissioner’s assessment did not become final until after the April 30, 2008 statute of limitations deadline. In

Sears' view, the Commissioner's April 28, 2008 assessment would not become final until it had exhausted its rights of appeal, and it had 60 days within which to begin that process.

Third, as to the merits, Sears claims that the Commissioner erred in holding it responsible for sales and use taxes concerning a promotional flyer for which it had contracted with a third party to create and distribute but over which it had little, if any, actual control.

The Court believes the first contention needs to be addressed before the others. The parties litigated this case pursuant to a factual stipulation. The stipulation itself did not state that the statute of limitation was extended to April 30, 2008. It did, however, attach written extension agreements between Sears and the State and between a different entity, Sears Procurement, with the State. Sears now argues that those attached agreements are fatally flawed. It asserts that there is a gap in the periods of the extension agreements with Sears and that the only attached agreement extending the limitations period to April 30 is one between Sears Procurement and the State.

The State counters that Sears is taking advantage of a technical error. It attaches to its memo an additional extension agreement between the State and Sears that extends the period to April 30. It asks the Court to expand the record to include that document. It further argues that any "gaps" in the extension agreements do not preclude enforcement of the agreement it hopes to add to the record.

The State also argues that Sears never raised this issue below and has litigated this case with the implicit (and, on occasion, explicit) acknowledgement by Sears that the agreements attached to the stipulation of facts had extended the limitations period to April 30. The failure of Sears to make the instant argument below, the State contends, precluded the State from introducing additional evidence below and the Commissioner from making a ruling on the issue.

Sears maintains that it litigated this case pursuant to a stipulation of fact that attached certain agreements, that it raised the statute of limitations as a defense, and that the record attachments show no basis to conclude that this matter was timely brought.

Court does not believe it has the power to expand the record on appeal, as requested by the State. Nor has the State cited any such authority to the Court. The record on appeal rightly reflects what occurred below. While there may be power to expand an appellate record to include materials introduced below but mistakenly omitted, it cannot be expanded to include materials that, in fact, were not so admitted.

The Commissioner is on stronger footing arguing that Sears failed to preserve this argument. *See, e.g., Pratt v. Pallito*, 2017 VT 22, ¶ 15, 204 Vt. 313, 319 (discussing need to exhaust and preserve claims before administrative agency). A review of the filings below and for much of this appeal shows that Sears did not make this precise argument. Further, because of that, the State did not address the issue factually and procedurally before the Commissioner. Sears is also correct,

however, that this matter was adjudicated on a narrow agreed record, and it did explicitly raise the broad issue of compliance with the statute of limitations before the Commissioner and before this Court.

The Court believes it is important to allow the parties an opportunity to address this specific issue in a fair manner. In the Court's view, the only way that can be accomplished is through a limited remand. The Court retains authority to remand to an administrative body for additional proceedings and findings. *See, e.g., Town of Victory v. State*, 2004 VT 110, ¶ 24, 177 Vt. 383, 393 (remanding matter back to PVR to determine the valuation anew); *Conservation Law Foundation v. Burke*, 162 Vt. 115, 128 (1993) (noting that insufficient record for agency action typically warrants remand).

Such a remand would allow the Commissioner to consider whether to allow the additional evidence sought to be admitted by the State and to make an initial determination as to whether the alleged "gap" in the extension agreements precludes any extension to April 30, 2008. It will follow that course in this case.

WHEREFORE, the matter is remanded to the Commissioner on the limited issue noted above. The Court will retain jurisdiction over the remaining portions of the case, and the matter will be stayed pending resolution of the remanded issue. If either side appeals the Commissioner's determination on that issue, it will be combined with this matter after briefing. It is the Court's hope that the Commissioner can expedite the consideration of this narrow question.

*So ordered.*

Dated this \_\_ day of December 2019 at Montpelier, Vermont.

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Timothy B. Tomasi,  
Superior Court Judge