Payment for Use of Coin-Operated Air Vending Machine Not Subject to Sales Tax

by Sharon R. Paxton

May 24, 2011

In *Air-Serv Group, LLC v. Commonwealth*, No. 459 F.R. 2008 (April 14, 2011), a three-judge panel of the Commonwealth Court ruled, with one dissent, that charges for the use of coin-operated air vending machines are not subject to sales tax. The court concluded that the air dispensed from such a machine does not constitute "tangible personal property" and that the process of using a vending machine to pump air is not a taxable service.

Air-Serv owns, installs, maintains, and services coin-operated air vending machines, which are located at gas stations and convenience stores. It charges a fee for the right to use its machines, which pump air from the atmosphere through a compressor, for a specific number of minutes. The charge for use of the machines does not vary with the amount of air placed into a tire or other inflatable device, or with the amount of time for which the machine is operated. Air-Serv asserted that atmospheric air is not taxable as "tangible personal property" for several reasons. The court agreed, noting that the air dispensed from Air-Serv's vending machines is not chemically different from atmospheric air and that atmospheric air is not "personal property" because it is not subject to ownership by any private individual, group or entity.

In addition to arguing that atmospheric air is "tangible personal property," the Commonwealth had contended that the process of using a vending machine to pump air is a taxable service because a customer inflating a tire is engaged in altering, mending or repairing tangible personal property, which is a taxable service. The parties had stipulated that Air-Serv is selling an entirely different kind of service – "the opportunity to use the vending machine's compressor to pump air for a fixed period of time." The court therefore determined that Air-Serv's air vending service is not subject to sales tax because it is not a specifically enumerated taxable service, and it is not analogous to any of the taxable services enumerated in the statute and the Department of Revenue's regulations.

Judge Leadbetter dissented on the basis that Air-Serv is not selling air, but rather the right to use its equipment for a fee, which is taxable as a rental or license to use tangible personal property. In a lengthy footnote, the majority rejected the dissent's position for several reasons. First, the majority determined that it would be inappropriate for the court to raise this issue on its own since the parties had not raised or briefed this issue and had not developed a factual record concerning this question. Regarding the

merits of the dissent's position, the majority further noted the possibility that the machines might be fixtures, a form of real property, and not personal property. Since the parties did not stipulate to any facts pertaining to whether the air vending machines were fixtures or personal property, the majority determined that the state of the record precluded the court from reaching the issue of whether the use of an air vending machine is a taxable rental or license.