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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

Day, Co. Chanc.

TIME WARNER ENTERTAINMENT)
COMPANY, L.P.,)
)
Plaintiff,)
)
v.)
)
LOREN L. CHUMLEY,)
Commissioner of Revenue,)
State of Tennessee,)
)
Defendant.)

F09 A
No. 04-3262-I



2007 APR 16 AM 10:53
DAVIDSON CO. CHANCERY CT.
D.C.&M.

FILED

AMENDED ORDER

Upon review of the pleadings filed in this matter and the Plaintiff's and Defendant's cross-motions for summary judgment, and following a hearing on said motions held on March 23, 2007, the Court ORDERS as follows:

1. Plaintiff's Motion for Summary Judgment is GRANTED and Defendant's Motion for Summary Judgment is DENIED.
2. During the period December 1994 through December 1999 ("Period at Issue"), Plaintiff, through its Memphis-based division, Time Warner Cable of the Mid-South ("TWC-MS"), sold cable television services to subscribers in Tennessee. TWC-MS imposed monthly fees for the television services it offered.
3. In instances where a subscriber failed to pay an invoice in a timely manner, TWC-MS imposed an additional, separately stated fee, termed a "Late Payment Handling Charge" ("Late Fee"), on the delinquent subscriber's invoice. TWC-MS' subscriber contracts explained the company's right to impose the charge, in a paragraph distinct from paragraphs

addressing monthly, recurring charges. Any subscriber could avoid the Late Fee by paying its monthly invoice in a timely manner.

4. TWC-MS neither collected from its subscribers nor remitted to the Department of Revenue (“Department”) sales tax on the Late Fee.

5. On November 30, 2003, the Department issued Plaintiff a sales/use tax assessment (“Assessment”), claiming sales tax due on the Late Fees collected by TWC-MS during the Period at Issue. Specifically, the Assessment claimed \$809,025.14 in sales tax due on the Late Fees, plus interest thereon in the amount of \$443,742.43, for a total of \$1,252,767.57. In accordance with Tenn. Code Ann. § 67-1-1801(c)(1), on August 3, 2005, Plaintiff filed with this Court a bond in the amount of \$1,879,151.36, representing 150% of the aforementioned sum.

6. From the inception of the Period at Issue through June 1999, Tennessee imposed its sales tax on “[f]ees for subscription to, access to or use of cable television services in excess of those charges made for the basic rate charged by the supplier of such services.” Tenn. Code Ann. § 67-6-212(a)(5) (1998). From July 1, 1999 through the end of the Period at Issue, the language of the tax imposition statutes changed slightly; however, the parties agree that the change did not alter the scope of the tax. Therefore, the question presented by the parties’ respective summary judgment motions is whether the Late Fees constitute “[f]ees for subscription to, access to or use of cable television services.”

7. The Court finds that the Late Fees do not constitute “[f]ees for subscription to, access to or use of cable television services.” Most notably, the undisputed evidence shows that “TWC-MS provided subscribers with no additional programming services in return for payment of any Late Fee.” Plaintiff’s Statement of Undisputed Material Facts in Support of Its Motion

for Summary Judgment, ¶ 18. To the contrary, the Late Fees offset unique, additional expenses TWC-MS incurred in pursuing payment from delinquent subscribers. Such expenses included training of additional employees to pursue delinquent accounts, additional telephone/ mailing costs, and expenses associated with sending a technician to disconnect service. *Id.*, ¶ 15. The Late Fees were a separate charge to the customer, distinct from charges for taxable cable television services. *Penske Truck Leasing Co. v. Huddleston*, 795 S.W.2d 669, 671 (Tenn. 1990) (finding that truck lease charges and optional fuel purchases were “separate parts of a divisible contract,” and therefore, must be addressed separately for sales tax purposes).

8. Upon this Order becoming final, or if an appeal is taken upon issuance of a mandate concluding proceedings in favor of Plaintiff, the Department of Revenue shall cancel all outstanding portions of the assessment of sales and use taxes at issue in this matter and, within ten (10) days of the entry of this Order or issuance of a mandate if an appeal is taken, the aforementioned bond filed with the Court as surety pursuant to Tenn. Code Ann. § 67-1-1801(c) shall be returned to the Plaintiff.

9. The Court further finds that the Plaintiff is the prevailing party in this case within the meaning of Tenn. Code Ann. § 67-1-1803(d) and is entitled to an award of reasonable attorneys’ fees and expenses of litigation as provided by that statute. The Court finds, however, that determination of the amount of such fees and expenses to which the Plaintiff is entitled should await the outcome of any appeals in this case.

10. Having determined all of the claims of the parties in this matter, the Court finds that there is no just reason for delay in entering a final, appealable judgment as to all matters other than the amount to be awarded to the Plaintiff for attorneys’ fees and expenses. Pursuant to Tenn. R. Civ. P. 54.02, therefore, the Court expressly directs that a final, appealable judgment is

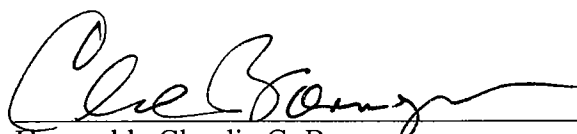
hereby entered, granting the Plaintiff's motion for summary judgment, and denying the Commissioner's motion for summary judgment dismissing the Counterclaim with prejudice.

11. The Court reserves determination of the amount of reasonable attorneys' fees and expenses of litigation to be awarded pursuant to Tenn. Code Ann. § 67-1-1803(d) in this case until all appeals are concluded. The time within which any notice of appeal may be filed in this case shall run from the date of entry of this Final Judgment in accordance with Tenn. R. Civ. P. 54.02. Within sixty (60) days after that date, the Plaintiff may file an application for an award of fees and expenses, unless a timely notice of appeal is filed. If the decision of this Court is appealed, the prevailing party may file an application for an award of fees and expenses within sixty (60) days after issuance of the mandate concluding proceedings in the appellate courts.

12. All costs of this case are taxed against the Commissioner.

13. This Order modifies and supersedes the Court's Order dated April 3, 2007.

It is so ORDERED.



Honorable Claudia C. Bonnyman,
Chancellor, Part I

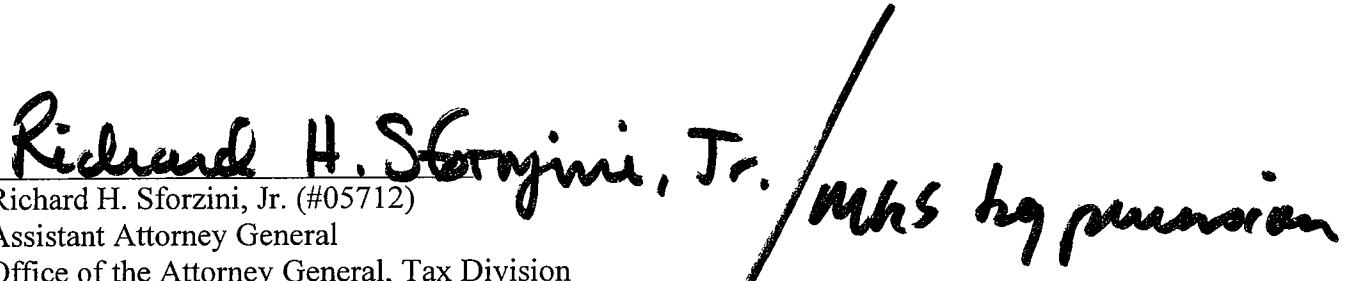
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