

I AM RENTAL-PURCHASE

I AM RETAIL

You tell your customers, the Congress and the press that you are in the rental business—not retail. But what are you telling the tax man?

Rental dealers are in business to make money and they have selected the rental-purchase industry as the best means toward that end. They have chosen to offer a unique transaction to a niche market instead of, say, opening a furniture or electronics retail store aimed at the general population. It may not be the case any more that the rental-purchase business is less competitive than retail, but it is still true that the large service component associated with rental-purchase makes the transaction less price sensitive than the retail buying and selling of what have nearly become commodities, e.g. certain categories of electronics, where the market is driven entirely by price.

By Ed Winn III

A FOOLISH INCONSISTENCY

IF YOU ASK RENTAL DEALERS WHAT BUSINESS THEY ARE IN, most will tell you that they are in the “rental” business, the “rent-to-own” business or the “rental-purchase” business. If you ask them whether they are in the retail sales business, most will say “no”—unless, of course, they are also in that business as an adjunct to the rental business.

If you ask them whether they want to be in the retail sales business, most will answer “no” and really mean it. They do not want to compete with Wal-Mart and have to sell DVD players for \$88. Retail selling of electronics and, to a lesser extent, furniture has become a high volume, low-margin business and is the business model that

this tax, but merchandise held for rental is not. Thus, Hertz, Avis and Blockbuster must pay the tax on their cars and tapes and DVDs; car dealers and Sears and Wal-Mart do not have to pay the tax on the items they carry.

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and got reprimanded by the judge. The tax court judge was fairly scathing in his criticism of the rental dealer for talking out of both sides of his mouth about what business he was running [see *W.H. Paige & Co. vs. State Board of Tax Commissioners*, 711 N.E.2d 552 (1999)]. In order to appeal the assessment rendered on his merchandise out on rent in the field, the rental dealer had to argue that “notwithstanding the language in the rent-to-own lease stating that Paige is the holder of legal title of the musical instruments...Paige is not the owner of the musical instruments for the purposes of the personal property tax.”

Elsewhere in the opinion, the court notes that, “Paige maintains that the lessee’s ability to terminate the lease prior to the completion of the lease

be exempted from the Kansas personal property tax. In brief after brief, in appeal after appeal, all the way to the state Supreme Court, attorneys for the rental companies crafted complex legal arguments for the propositions that the rental-purchase transactions under scrutiny were not what they purported to be by their own terms and were, instead, really conditional sales agreements. It is a wonder that legal aid lawyers did not take these briefs, reverse the names and use them in their several recharacterization lawsuits that were being litigated around the country during the early- to mid-1990s.

The Kansas case did catch the attention of the late Henry Gonzalez when he chaired the House Banking Committee and in 1993 held hearings on the rent-to-own industry:

“A ‘rent-to-own’ company is now arguing in a Kansas appellate court that it is in the ‘sales’ business in order to avoid paying state taxes on rental property. Drawing a distinction between the ‘rent-to-rent’ business and ‘rent-to-own,’ this dealer claims that ‘when a customer contracts with a rent-to-own company, both parties anticipate that the customer may-and probably will-end up owning the merchandise.’”

It was Ralph Waldo Emerson in his essay *Self Reliance* who wrote that, “A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.”

It may fairly be said that there are a few immutable truths in the universe—not many, perhaps, depending upon one’s point of view, but a few. One of those truths for rental dealers is that they are really and truly in the rental business. One may wonder whether expecting consistency on an issue fundamental to the continuing viability of one’s life work is foolish. Some things arguably demand consistency. For rental dealers, understanding the true nature of the business that they are in is one of those things, even if it costs them a few dollars to maintain that consistency. ■

Ed Winn III is APRO’s general counsel. His e-mail address is edwinn@e-bylaw.com.

From time to time, rental dealers—ever alert for the chance to increase profits—seek to slip the bonds of rental-purchase consistency and argue with the tax man that they are not really in the rental business after all and, instead, are selling their merchandise and should not have to pay this personal property tax. Consistency be damned.

most rental dealers have considered and rejected in favor of the rental business.

Most rental dealers are pretty consistent in their preference for the rental business over retail sales and, even if they did not live through the more harrowing days when the line between rental and retail was more blurred legally than it is today, most know the history of the industry’s struggle for recognition and clear separation of the rental business from retail sales.

There is, not surprisingly, a price to be paid for this choice as there is a price for most choices in life. One price for being in the rental business is the assessment of personal property tax on rental merchandise in a number of states. In these states, inventory held for resale is most often exempted from

rental-purchase consistency and argue with the tax man that they are not really in the rental business after all and, instead, are selling their merchandise and should not have to pay this personal property tax. This is not a position these dealers would want to take with customers, legal aid lawyers, legislators, the press—or anyone, really—but the tax man. And they would not want to make the argument with all tax men, really—just the county or other local personal property tax assessor. If they made this argument with the Internal Revenue Service, they would pay more tax, not less.

However, from time to time some rental dealers do make this argument, consistency be damned. It was made most recently by a musical instrument rental dealer in Indiana. The argument was ultimately unsuccessful, but not before the rental dealer went to court

term is irrelevant...[to the treatment of the transaction for tax purposes].” The court noted the vast body of case law holding that rental-purchase transactions are true leases as opposed to conditional sales with a retained security interest by the lessor and even acknowledged the few minority decisions where courts ruled in favor of consumers, usually on unusual facts. But the court went on the say, “However, the tug on the heartstrings (and the attractiveness of those [minority view] cases) is considerably less powerful in situations where a lessor is attempting to disclaim the language of a contract it drafted.”

This Indiana case is not the first such instance of rental dealer double talk. The same issue arose in Kansas a few years ago when several rental companies argued that their transactions were really conditional sales in order to



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