

IN THE SUPREME COURT OF OHIO

MARC GLASSMAN, INC.)	CASE NO. 07-0328
)	
Appellee,)	On Appeal from the
)	Cuyahoga County
vs.)	Court of Appeals,
)	Eighth Appellate District
WILLIAM W. WILKINS)	
[RICHARD A. LEVIN],)	
TAX COMMISSIONER OF OHIO,)	Court of Appeals Case
)	No. CA-06-087766
Appellant.)	

**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF APPELLEE MARC GLASSMAN, INC.**

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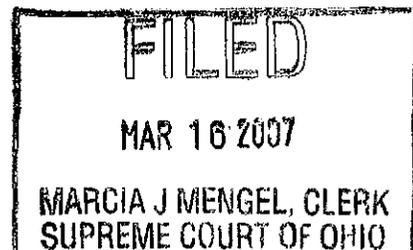


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I. Why this is not a case of public and great general interest.

The parameters of what constitutes an “electronic information service” subject to Ohio sales tax is largely a matter of settled law. Electronic access to databases such as Lexis or Nexis, where the business user has the ability to search and retrieve data with a computer, is universally accepted to be a taxable service. On the other hand, a simple confirmation that a credit transaction has been approved by a bank or health insurer has never been held to be a taxable event.¹

This dispute arose because the Tax Commissioner’s examining agent thought that NDC provided traditional data processing services for Marc Glassman, Inc. (“MGI”), because of vague language in the MGI/NDC contract. On this basis, a use tax assessment was levied. When the Tax Commissioner discovered that the facts would not support a data processing assessment, he refused to accept that an error had been made. Rather, he claimed that MGI used taxable electronic information services. While making this claim, he carefully argued that NDC’s services were distinguishable from those involving admittedly non-taxable Visa or Mastercard authorizations, and the Board of Tax Appeals accepted this argument.²

The Tax Commissioner now, however, asserts that not only should MGI be taxed, when it confirms that a customer’s purchase is covered by insurance, but also that a department store should be taxed when it receives confirmation that a Visa customer’s request for a credit purchase has been approved by his bank.

The Tax Commissioner does not dispute in this request for certification that MGI never has actual access to the insurer’s data, which remains confidential under HIPPA.

¹ *PNC Bank, Ohio N.A. v. Tracy* (July 7, 1995), BTA No. 1993-T-1316.

² See Opinion of Board at fn. 8, pg. 9, Appendix of Tax Commissioner, Exh. 2.

Rather, according to the Tax Commissioner, actual access is unnecessary. It is the mere use of an electronic intermediary that, according to the Tax Commissioner, makes the transaction taxable. Stated another way, in both the typical credit card transaction, and the pharmacy transactions, if the merchant uses an electronic messenger rather than the phone, the authorizations become a taxable service because of the "1993 legislative carve out" of the term "electronic information services."

But in fact the 1993 amendment made no significant changes to the pertinent definition of electronic information services. The statutory language that applied to MGI's transaction before 1993 read as follows:

R.C. 5739.01(Y)(1) defines automatic data processing and computer services in the following manner:

"(Y)(1) "Automatic data processing ... means *providing access to computer equipment for the purpose of* processing data or *examining or acquiring data stored in or accessible to such computer equipment* and ..."

After the renumbering in 1993, the pertinent statutory language, again in bold, reads almost identically.

(c) "Electronic information services" means *providing access to computer equipment* by means of telecommunications equipment *for the purpose of* either of the following:

(i) *Examining or acquiring data stored in or accessible to THE computer equipment;*

Yet, the Tax Commissioner continues to argue, without highlighting his contention, that switching a "the" for "such" "evidences" a desire by the General Assembly to change the pre-1993 case law. But, the Eighth District Court of Appeals had no trouble rejecting this flawed argument.

The Tax Commissioner also argues that somehow there is unfairness in the decision of the Eighth District Court of Appeals because the credit available for the equipment used by providers of electronic information services stays intact while the decision limits the tax base for tax collection by narrowing the definition of taxable electronic information services. However, this analysis is likewise flawed since both the tax base for collecting tax and the base for computing the credit look to the same definition of electronic information services. Further, Marc's has never even considered applying for this credit.

Finally, the Tax Commissioner spends considerable time suggesting that the decision of the Eighth District is inappropriate in view of *MIB v. Tracy*³ and *Quotron Systems v. Limbach*.⁴ But *MIB* and *Quotron* are "search and retrieve" cases, like a taxable Lexis transaction. Indeed, in *MIB*, this Court stated "access" means "the ability to communicate and enter and make use of MIB's computer equipment to retrieve the data stored therein." This is consistent with the definition of electronic information services which requires the ability to enter the computer equipment for the purpose of examining or acquiring data. And, equally to the point, to contend that an electronic messenger, without access to an insurer's or bank's computer, provides a taxable service is inconsistent with the General Assembly's 1993 definition of electronic information services.

To sum up, the statutory language typically imposes a tax on "search and retrieve" services. But here we simply have an electronic messenger who cannot search the insurer's database. The decision of the Eighth District Court of Appeals

³ *MIB, Inc. v. Tracy* (1998), 83 Ohio St.3d 154.

⁴ *Quotron Systems v. Limbach* (1992), 62 Ohio St.3d 447.

properly applied the statute with pre-existing precedent that proved “workable”. Its decision was well reasoned; was fact based; and applied the doctrine of *stare decisis*. There is no need for this Court to accept certification and to review the decision of the Eighth District Court of Appeals.

II. Statement of the Case and Facts

The Tax Commissioner issued a use tax assessment against MGI. MGI filed a petition for reassessment. The Commissioner rejected the petition and made his Final Determination.

MGI filed a Notice of Appeal with the Ohio Board of Tax Appeals appealing the Tax Commissioner's Final Determination, and the Board of Tax Appeals scheduled a hearing. At the evidentiary hearing, and without objection, MGI submitted documents from NDC Health ("NDC") explaining its role in the disputed service transactions. It also called Brian Kendro, Vice President of MGI. He explained how MGI, on behalf of a customer and through "switching" intermediaries, seeks authorization to fill a prescription on a third-party pay basis. The Tax Commissioner did not call any witnesses or offer any exhibits.

During the audit period, MGI purchased services from NDC and Envoy Corporation⁵ ("Envoy").⁶ The services provided by these two companies are substantially similar, so that their taxability is the same. Envoy's technology was older and a bit slower, but the service was identical. There was no written agreement with Envoy. The written agreement with NDC was admitted (Exhibit 3). The remainder of this brief will refer to these service providers collectively as "NDC."

The NDC services included a per transaction charge for NDC's switching service, whereby NDC routed prescription coverage inquiries sent by MGI on behalf of its customers and responding confirmations sent by various insurance companies.⁷

⁵ (TR 8).

⁶ (TR 6).

⁷ (TR 27).

In a typical transaction, a customer needing a prescription filled goes to an MGI in-store pharmacy.⁸ The customer provides the pharmacist with a prescription and his or her insurance information.⁹ The insurance information is usually on an insurance card containing, among other information, the insurance company name, the plan name, the member name and the member number.¹⁰ The pharmacist, for the customer, enters the relevant information into a computer terminal either owned or leased by MGI.¹¹

This information is transmitted to a frame relay network via a private dedicated communication line.¹² The information is then routed directly to NDC who is also connected to the frame relay network via a dedicated private communication line.¹³ A dedicated line is a private point-to-point line. This is used for confidentiality and security concerns associated with a public channel such as the internet.¹⁴ Maintaining the security and privacy of health information has become even more important since the passage of the Health Insurance Portability and Accountability Act of 1996 (HIPPA).¹⁵

Upon receipt of the information, NDC, who is connected to multiple insurance companies through various individual private communication lines, routes the information directly to the appropriate insurance company.¹⁶ NDC then simply waits for an authorization response from the insurance company.¹⁷

⁸ (TR 18).

⁹ Id.

¹⁰ (TR 19).

¹¹ (TR 18-19).

¹² (TR 19, 51).

¹³ Id.

¹⁴ (TR 21).

¹⁵ (TR 20).

¹⁶ (TR 19).

¹⁷ (TR 44).

The insurance company then sends its response back to the customer through NDC.¹⁸ If the prescription is approved for the customer, an authorization number is sent to NDC along with other information such as co-pay amount and eligibility.¹⁹ NDC then routes this information back to the frame-relay network via the dedicated private communication line.²⁰ The entire transaction, commencing with MGI entering the insurance information with its computer terminal, takes an average of four seconds.²¹

¹⁸ (TR 20).

¹⁹ *Id.*

²⁰ *Id.*

²¹ (TR 22). The transaction took slightly longer when performed by Envoy.

III. Argument in Opposition to Jurisdiction

1. Appellee's Counter Proposition of Law.

When NDC Simply Confirmed By Electronic Means That the Insurer Had Approved A Pharmacy Transaction, MGI Did Not Receive The Benefit Of A Taxable Service

In the Court of Appeals, the parties present starkly different views of Amended Substitute House Bill 152. MGI argued that Amended Substitute House Bill 152 simply removed language from the definition of automatic data processing services, separated it into a new paragraph, added a second part to the definition -- not germane in this appeal -- and provided a title of "electronic information services." At the same time, a credit was made available for providers of "electronic information services," hence the need for such services to be separately defined. The Tax Commissioner argued that Amended Substitute House Bill 152 made substantive changes to the definition of electronic information services and consequently *PNC Bank v. Tracy*²² was legislatively overruled.

The Eighth District agreed with MGI because the General Assembly had actually simply re-enacted its previous definition i.e. "examining or acquiring data stored in or accessible to the computer equipment", which had been buried in the definition of "automatic data processing services".

The Tax Commissioner cannot, and still does not, identify any **relevant** substantive change in the definition of a taxable service under R.C. 5739.01(Y)(1)(c)(i) (formerly deemed automatic data processing and re-titled as "electronic information services") because there were none. Certainly, a separate caption for the definition has no affect on determining taxability. To restate, all of the real-time authorizations that

²² (July 7, 1995) BTA Case No. 93-T-1316

were exempt before the "re-titling" continued to be exempt under R.C. 5739.01(Y)(1)(c)(i).

Likewise, the testimony of Mr. Kendro established that MGI did not have the competitive advantage that would have existed if it would have had access to data for an electronic search and retrieval from the insurance company's computer:

Q: If you had access to the computer of the payor, and it was like an Internet service provider where you could download and obtain information, would there be a commercial benefit to you to have an actual access to the information from the payor's computer?

A: Sure. We could possibly see what their plan was with that individual, if there was a certain maximum amount to bill for a certain drug or if a certain drug has better coverage with them.

Q: So if you had access to the computer of the payor, you could actually obtain information on how to bill to maximize the potential amount received by the pharmacy?

A: Sure.

Q: Do you have access to that information?

A: No.²³

To sum up the case law before 1993 appropriately distinguished between access to verifiable facts from a LEXIS type database, and simply receiving an answer to a credit inquiry through an electronic intermediary. The statute did **not** prove unworkable, and when the statute was re-enacted the General Assembly did not seek to broaden the tax base and over-rule *PCN Bank v. Tracy supra*. The decision of the Eighth District was correct and there is no issue of great general interest.

²³ (TR 24).

IV. Conclusion

The Eighth District Court of Appeals properly found that the Am. Sub. H.B. 152 definition of electronic information services is nearly identical to the definition previously provided and that the Tax Commissioner's attempt to argue that the tax base had been expanded, because of a simple re-working of a definition was fallacious. As the Eighth District held:

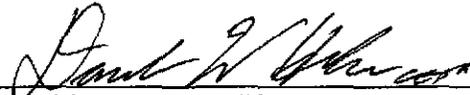
We find the holding in *PNC Bank, Inc.*, supra, applicable to the instant matter. As in *PNC Bank, Inc.*, supra, MGI's customers do not receive access to the insurance company's computer through NDC. Therefore, MGI cannot examine or acquire any insurance information stored in or available to the insurance company's computers. Additionally, NDC lacks access to the insurance company's computers. NDC merely transmits a specific inquiry and receives a specific answer. NDC does not determine the eligibility of coverage, nor can it access the insurance company's computers to inquire into the details of the coverage. Moreover, since the insurance company's response to a request is not generated until the request is received, NDC has no access to any information stored in insurance company's computer which can be used by NDC to authorize insurance coverage. This services does not provide "access to computer equipment by means of telecommunications equipment for the purpose of examining or acquiring data stored in or accessible to such computer equipment" Therefore, the services provided by NDC do not constitute "electronic information systems," and thus, are not services subject to use tax. Consequently, the Tax Commissioner's determination with respect to these transactions is unreasonable and unlawful and must be reversed.

Id at pp 8-9.

The mere electronic delivery of an answer to a credit or insurance coverage request has never been and is not intended to be taxable. The decision of the Court of

Appeals confirms this and in no way erodes the tax base. The decision of the Eighth District was correct, and this Court should not accept jurisdiction.

Respectfully submitted,



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Certificate of Service

I hereby certify that a copy of the foregoing MEMORANDUM IN OPPOSITION TO JURISDICTION was mailed by regular U.S. Mail, postage prepaid, this 16th day of March, 2007, to:

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