

IN THE SUPREME COURT OF OHIO

THE HOME DEPOT USA, INC.,

Appellant,

v.

WILLIAM W. WILKINS [RICHARD A.  
LEVIN], TAX COMMISSIONER OF OHIO

Appellee.

CASE NO. 08-1182

ON APPEAL FROM OHIO BOARD OF  
TAX APPEALS

CASE NOS. 2006-M-206  
2006-M-207

**MOTION OF APPELLANT HOME DEPOT U.S.A., INC. FOR ORAL ARGUMENT  
BEFORE THE COURT**

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Pursuant to Rule IX, Sections 1(B) and 7(A) of the Rules of Practice of the Supreme Court of Ohio, Appellant Home Depot hereby respectfully requests permission to present oral argument to the full Supreme Court of Ohio.

In determining whether to grant oral argument, the Court considers whether the case at hand involves a matter of great public importance, complex issues of law or fact, a substantial constitutional issue, or a conflict between courts of appeals. . *See State ex rel. McGinty v. Cleveland City School Dist. Bd. of Edn.*, 81 Ohio St. 3d 283, 286 (1998).<sup>1</sup> This appeal readily satisfies this standard. First, it concerns a matter of first impression that is of great public importance: whether the State is entitled to retain sales tax payments that major national retailers with multiple stores in Ohio (here, Home Depot) make on behalf of customers who subsequently default on their credit accounts and never pay for their transactions. In addition, this appeal presents substantial questions under the United States and Ohio Constitutions, because Ohio law

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<sup>1</sup> These factors were cited in reference to S.Ct.Prac.R. IX(2)(A), but due to the absence of authority directly interpreting S.Ct.Prac.R. IX(7)(A), presumably would inform the Court's analysis under that provision as well.

imposes more burdensome tax obligations upon vendors such as Home Depot who use third-party financial institutions to administer credit sales in their stores, thereby discriminating against such vendors.

Many large national retailers, including Home Depot, offer their creditworthy customers the option of purchasing goods and services using private-label credit cards (“PLCCs”), which typically may be used only at an individual retailer’s stores. Because of burdens imposed by federal lending restrictions and the difficulty of complying with the lending laws of fifty different state regimes, most national retailers use third-party financial institutions (“credit card servicers”) authorized by federal law to issue credit cards on a nationwide basis to finance and manage their PLCC programs. Despite the widespread use of this business practice, the State claims that its sales tax laws, R.C. 5379.01 et. seq. (“the Act”), do not allow for reimbursement of sales taxes remitted by vendors to the State on PLCC credit transactions where the customer ultimately defaults. Instead, the State claims that it is entitled to retain millions of dollars as “sales tax” on these sales that never occurred.<sup>2</sup>

The State’s approach defeats the central purpose of R.C. 5739.121, which is to provide sales tax refunds to vendors who bear the bad debt losses on uncollected accounts. Home Depot fully bore such losses under its PLCC program. Yet under the State’s construction of the Act,

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<sup>2</sup> In support of this far-fetched claim, the State cites this Court’s decision in *Chrysler Fin. Co. v. Wilkins*, 102 Ohio St. 3d 443 (2004), which — according to the State — precludes Home Depot from claiming bad debt losses resulting from its PLCC program. *Chrysler Financial* is inapposite, however, because the vendor there — unlike Home Depot — did not suffer any loss due to customer delinquencies; instead, the vendor was made whole by the purchaser of the relevant retail installment contracts. As the Court explained: “After the retail installment contract was assigned to Chrysler, and the [vendor] had been *paid in full*, the [vendor] could not claim a bad debt deduction.” *Chrysler Financial*, 102 Ohio St. 3d at 448 (emphasis added). In contrast, Home Depot was never “paid in full” under the PLCC program. Through payment of the service fees and the other compensation it provided to the servicers, Home Depot fully bore the burden of bad debt losses and other administrative costs incident to the program. Therefore, the fact that the vendor in *Chrysler Financial* did not bear the risk of loss on bad debt losses and was properly deemed unqualified to recover under the Act has no bearing whatsoever on Home Depot’s refund claim for losses that it incurred on uncollected PLCC accounts.

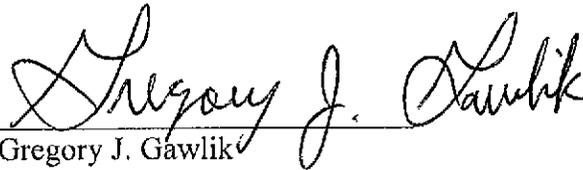
vendors such as Home Depot are properly denied sales tax refunds merely because they incur and record bad debt losses on their books on a program-wide basis, rather than on an account-by-account basis. The State also argues that the absence of a detailed and itemized accounting of the service fees and other income that Home Depot provides to the credit card servicers somehow nullifies the bad debt loss that Home Depot incurred under the PLCC program, even though R.C. 5739.121 requires no such accounting, and even though the parties to the servicing agreements concur that Home Depot fully compensated the servicers for all defaulted accounts and fully bore the risk of loss on the PLCC portfolio. Although the Board of Tax Appeals (the "Board") conceded that the bad debt provision "has limited application under current business practices" (Op. 10; App. 18), it adopted the State's view.

In addition to conflicting with the Act, the State's arbitrary distinction between a vendor who uses servicers to administer its credit accounts, and a vendor who issues in-store revolving credit, also violates basic notions of equal protection and due process. *See Boothe Fin. Corp. v. Lindley*, 6 Ohio St. 3d 247, 249 (1983) (stating that equal protection "protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class") (citation and internal quotation marks omitted). Both vendors suffer a loss when accounts go uncollected, and both deserve a refund for sales taxes remitted to the State that are never paid by customers. *See MCI Telecomm Corp. v. Limbach*, 68 Ohio St. 3d 195, 200 (1994) (holding that equal protection is violated when "taxpayers within the same class owning or leasing the same type of equipment are treated differently" under the State's tax code). There is simply no rational basis to deny relief to one group of vendors merely because they record losses on their books in a different manner than another group when both suffer the same economic loss from a defaulted sales transaction. The Act, as interpreted by the Board, also violates due process by unjustly enriching the State and impermissibly converting the State's sales tax regime into a tax on consumer defaults.

In sum, this case concerns statutory and constitutional issues of the utmost public importance. If the Board's decision were allowed to stand, it would impose unreasonable and

unjust burdens on large national retailers for whom it is impracticable to extend and administer credit themselves. The Board's decision also would unjustly enrich the State by allowing it to retain sales tax revenues advanced by vendors on behalf of purchasers who failed to pay for their goods and thus did not bear their statutory burden of paying sales tax. See R.C. 5739.03(A). Oral argument will assist the Court in resolving the important interests at stake in this appeal. For these reasons, Home Depot respectfully requests that the Court grant Home Depot's motion to present oral argument to the full Supreme Court of Ohio.

Respectfully submitted,



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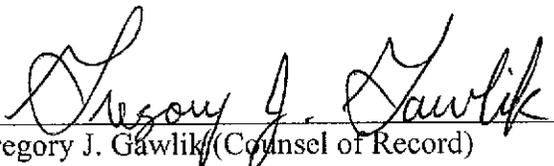
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DATE: November 5, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Motion of Appellant Home Depot U.S.A., Inc. For Oral Argument Before This Court has been served by certified U.S. mail, postage prepaid, to Counsel for Appellee, Damion M. Clifford, Assistant Attorney General, 30 East Broad Street, 25th Floor, Columbus, Ohio, 43215, on this 5th day of November, 2008.

  
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