IN THE GEORGIA TAX TRIBUNAL
STATE OF GEORGIA

EXECUTIVE LIMOUSINE TRANSPORTATION, INC.,	*	
Petitioner,	*	**ADMINISTRATIVE APPEAL**
v.	*	
DAVID CURRY, in his Official Capacity as Commissioner of the GEORGIA DEPARTMENT OF REVENUE,	*	**FILE NO. 1904992**
Respondent.	*	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S PARTIAL MOTION FOR SUMMARY JUDGMENT

This case is before the Tribunal on the parties' cross-motions for summary judgment. On May 15, 2019, Petitioner Executive Limousine Transportation, Inc. ("Executive") filed a Motion for Partial Summary Judgment ("Executive's Motion"). On June 14, 2019, Respondent David Curry, Commissioner of the Georgia Department of Revenue ("Department") filed a Motion for Summary Judgment ("Department's Motion") along with a response to Executive's Motion. On July 22, 2019, Executive filed a combined reply to the Department's response and response to the Department's Motion. On July 26, 2019, Executive filed a request for oral hearing on all pending motions for summary judgment. On August 20, 2019, the Department filed its reply to Executive's response. A hearing on these motions was held on August 27, 2019. Mr. Jonathan D. Gaul, Esq. and Mr. Les A. Schneider, Esq. appeared on behalf of Executive. Mr. J. Scott Forbes, Esq. appeared on behalf of the Department.

Having read and considered the relevant briefs, and listened to the arguments of both parties, the Department's Motion is hereby **GRANTED**, Executive's Motion is **DENIED**, and judgment is entered in favor of the Department.

FACTUAL BACKGROUND

1.

Executive is a licensed limousine carrier which operated in the State of Georgia during the refund period of July 1, 2015 through March 31, 2018 ("Refund Period").[1] Petition p. 1; Department's Statement of Material Facts ("Department's SMF") ¶ 1; Executive's Statement of Material Facts ("Executive's SMF") ¶ 1; Deposition of Dennis R. DeLoatch pp. 10, 12, 24, 35. Executive describes itself as providing a "paid-for" "chauffeured transportation service." Department's SMF ¶ 1; Dep. of DeLoatch p. 24.

2.

During the Refund Period, Executive contracted with both independent drivers and operators who hired their own drivers to provide this transportation service.[2] Department's SMF ¶ 2; Executive's SMF ¶¶ 8-10; Dep. of DeLoatch pp. 14-15. Drivers who drove for Executive were generally required to: (a) be 25 years of age or older; (b) have a clean driving record; (c) have two years of experience; (d) pass a medical examination; (e) pass a background check; and (f) acquire all necessary driving permits. Department's SMF ¶ 2; Dep. of DeLoatch pp. 16-18; see also Executive's SMF ¶¶ 2-3. Driver candidates went through a two-week introductory process and road test and received training on defensive driving and chauffeur etiquette by video. Department's SMF ¶ 2; Dep. of DeLoatch pp. 19-20; see also Executive's SMF ¶¶ 2. Executive did not have any formal education requirements for drivers. Department's SMF ¶ 2; Dep. of DeLoatch p. 17; see also Executive's SMF.

[1] Unless otherwise indicated, all facts referenced herein applied during the Refund Period.
[2] Neither party argues that Executive's contractual relationship with its drivers or operators has any bearing on the question of sales tax that is before the Tribunal.

3.

Executive used both company owned and independent operator owned vehicles for its fleet. Department's SMF ¶ 3; Executive's SMF ¶¶ 9-10; Dep. of DeLoatch p. 30. Vehicles were replaced every three years and only certain models were used, including Lincoln Town Cars and Cadillac XTSs in special livery editions with extra amenities, Chevrolet Suburbans, and larger vans and buses. Department's SMF ¶ 3; Executive's SMF ¶ 6; Dep. of DeLoatch pp. 31-33.

4.

Unless a customer requested a particular driver, drivers were arbitrarily assigned to trips by Executive's dispatchers in accordance with scheduling needs and the vehicle type requested. Department's SMF ¶ 4; Dep. of DeLoatch pp. 40-41. When assigning trips, Executive's dispatchers may have considered special requests by customers, such as requests for child-friendly drivers, drivers without long hair, or drivers who did not smoke. Department's SMF ¶ 4; Dep. of DeLoatch p. 42. Dispatchers also assigned trips based upon the number of passengers needed and would assign larger vehicles or additional vehicles if a customer's group was larger than expected. Department's SMF ¶ 4; Dep. of DeLoatch pp. 43, 45. Executive provided approximately 3,500 to 4,000 trips per week. Department's SMF ¶ 4; Dep. of DeLoatch p. 41. When asked how many of these trips involved customers requesting a particular driver, Executive's corporate representative was unable to provide a number. Department's SMF ¶ 4; Dep. of DeLoatch p. 41.

5.

Executive's fares were generally based on geographic zones and were calculated based on pick-up and drop-off locations as well as the type of vehicle used. Department's SMF ¶ 5, Exhibit A p. 2; Dep. of DeLoatch pp. 49-50. Sometimes Executive provided services on an

hourly basis depending upon the circumstances and arrangement with the customer. Department's SMF ¶ 5, Exhibit A p. 2; Dep. of DeLoatch pp. 49-50. Executive's billing did not change based on the identity of the driver. Department's SMF ¶ 5; Dep. of DeLoatch p. 52.

6.

Executive's drivers were paid a per-trip commission based on a base rate and fees associated with a trip, such as fees for meeting a customer at an airport terminal. Department's SMF ¶ 6; Dep. of DeLoatch pp. 60-62. Executive also included a suggested 20% gratuity in its bills, and any gratuity a customer chose to pay was passed on to the driver. Department's SMF ¶ 6; Dep. of DeLoatch pp. 51-52. Executive paid all independent operators, which contract with their own drivers, the same commission rate. Department's SMF ¶ 6; Dep. of DeLoatch p. 62. Executive paid a lower commission rate to drivers it contracted with directly, and all of these drivers were paid the same rate. Department's SMF ¶ 6; Dep. of DeLoatch pp. 61-63.

7.

Executive's customers had discretion to change the pick-up and drop-off locations for their trips, make stops while on a trip, and have their drivers take specific routes. Department's SMF ¶ 7; Dep. of DeLoatch pp. 47-48. Executive's policy was to provide "[w]hatever the client wants, demands we do, as long as it's not immoral [or] illegal" and to "make it easy . . . for that client to get from point A to point B." Department's SMF ¶ 7; Dep. of DeLoatch p. 47.

8.

When asked how Executive's service differed from taxi services, Executive's corporate representative identified the quality of its drivers, the vetting of its drivers, and the quality of its vehicles. Department's SMF ¶ 8; Dep. of DeLoatch pp. 36-37; see also Executive's SMF ¶ 7. When asked how Executive's service differed from ride-hailing services like Uber and Lyft,

Executive's corporate representative identified the type and consistency of the vehicles provided, the vetting that Executive requires of its drivers, including fingerprinting, and the level of service provided to Executive's customers. Department's SMF ¶ 8; Dep. of DeLoatch pp. 35-38; see also Executive's SMF ¶ 7.

9.

In July 2018, Executive filed a refund claim with the Department for state and local sales tax collected and remitted during the Refund Period. On July 31, 2018, the Department issued a letter denying this refund claim. On August 10, 2018, Executive filed a petition with the Tax Tribunal alleging that limousine carriers should not be subject to state sales tax because their services do not constitute "sales" that are subject to sales tax, and, even if they are sales, Executive provides "professional" or "personal" services that are exempt from sales tax. Petition pp. 1-5. Executive's petition also alleged that the Department had violated Executive's right to equal protection by not forcing ride-share companies like Uber and Lyft to collect sales tax. Petition p. 5. Finally, Executive alleged that it is not subject to local sales tax under O.C.G.A. §§ 40-1-116 and 40-1-168, which bar certain types of local taxation of motor and limousine carriers. Petition pp. 5-8.

10.

On May 15, 2019 and after completion of discovery, Executive filed a Motion for Partial Summary Judgment. Executive's Motion repeats the claims regarding state and local sales tax set out in the Petition but does not include Executive's equal protection claim. See Executive's Motion. In all, Executive seeks the refund of $518,524.62 in state sales tax and $366,767.88 in local sales tax and a ruling that it will owe no sales tax in the future. Executive's Motion p. 17

CONCLUSIONS OF LAW

I. Standard of Review

11.

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue as to any material fact as to each element of its claim and that the undisputed facts, when viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56(c); see also Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991); Scholastic Book Clubs, Inc. v. Comm'r, 2017-2 Ga. Tax Tribunal, Feb. 14, 2017.

The Rules of the Georgia Tax Tribunal likewise provide that "[a] party may move, based on supporting affidavits or other probative evidence, for summary judgment in its favor on any of the issues being adjudicated on the basis that there is no genuine issue of material fact for trial." Ga. Comp. R. & Regs. 616-1-3-.19(a).

II. Sales Of Transportation Are Subject To Sales And Use Tax.

12.

The Tribunal finds that Executive provides transportation that is subject to sales tax under the plain language of the Georgia Revenue Code and Department Rule 560-12-2-.84. It is undisputed that Executive "transport[s] passengers," Petition p. 1, and that it operates as a transportation service in the State of Georgia. Department's SMF ¶ 1; Executive's SMF ¶ 1. Under O.C.G.A. § 48-8-30(a), every "retail sale" in the State of Georgia is subject to state sales tax, and the term "retail sale" is specifically defined to include the sale of transportation:

> (31) "Retail sale" or a "sale at retail" means any sale, lease, or rental for any purpose other than for resale, sublease, or subrent. Sales for resale must be made in strict compliance with the commissioner's rules and regulations. Any dealer making a sale for resale which is not in strict compliance with the commissioner's

> rules and regulations shall be liable for and shall pay the tax. The terms "retail sale" or "sale at retail" include but are not limited to the following:
>
> (A) Except as otherwise provided in this chapter, the sale of natural or artificial gas, oil, electricity, solid fuel, transportation, local telephone services, alcoholic beverages, and tobacco products, when made to any purchaser for purposes other than resale.

O.C.G.A. § 48-8-2(31)(A). Executive contends that its sales of transportation to customers are not "retail sales" because such sales do not involve the transfer of title or possession of tangible personal property. See Petition pp. 1-3; Executive's Motion pp. 3-7. The Tribunal finds that this argument fails as a matter of law because: (1) Executive relies on tangible personal property to provide transportation, and its customers exercise both possession and control over this property; (2) these transactions fall within the broad definition of "sale" in O.C.G.A. § 48-8-2(33); and (3) Department Rule 560-12-2-.84 specifically declares that for-hire cars such as limousines are subject to sales tax.

A. Executive's Sales Involved Possession And Control Of Tangible Personal Property.

13.

The Tribunal finds that the undisputed facts show that Executive's customers exercise significant possession and control of Executive's vehicles. All of Executive's customer transactions have two components – Executive provides a driver and Executive provides a vehicle. See Petition pp. 1-3; Executive's SMF ¶¶ 5-6. These vehicles include specialized livery sedans, SUVs, vans, and buses, and Executive points out that the quality and consistency of these vehicles distinguishes Executive from taxi companies and ride-share companies like Uber and Lyft. Department's SMF ¶ 3; Executive's SMF ¶¶ 6-7. Executive generally assigns trips based on the type of vehicle needed rather than the identity of the driver, and fares are calculated, based on, among other factors, the vehicle used. Department's SMF ¶¶ 4-5. The Tribunal finds that

the vehicles used by Executive are tangible personal property that can be "seen, weighed, measured, felt, or touched" as defined in O.C.G.A. § 48-8-2(37).

14.

Further, the Tribunal finds that Executive's customers exercise indirect control and possession over this tangible personal property. While Executive's drivers maintain direct control over the vehicle, customers are allowed to dictate when and where they are to be picked up and dropped off, and they do not share the vehicle with any other customers. See Department's SMF ¶ 7; Dep. of DeLoatch pp. 46-47. Executive's drivers are not expected to violate traffic laws, but they are otherwise expected to follow customers' directions, and customers can dictate routes or add stops as they see fit. Department's SMF ¶ 7; Dep. of DeLoatch pp. 47-48. As such, the Tribunal finds that Executive's sales did involve the transfer of possession of tangible personal property.

B. Transportation Transactions With Customers Are "Sales" Under O.C.G.A. § 48-8-2(33).

15.

The Tribunal also finds that Executive's transactions with its customers fall within the broad definition of "sale" set out in O.C.G.A. § 48-8-2(33). This paragraph defines a "sale" as "*any* transfer of title or possession, transfer of title and possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner by any means of any kind of tangible personal property for consideration." O.C.G.A. § 48-8-2(33) (emphasis added). Thus, a transfer of possession of personal property does not need to be a complete transfer of complete possession to be a sale, and the transfer can take any form. The Tribunal finds that this broad language is clearly intended to cover as wide a range of transactions as possible, including Executive's transactions with its customers.

16.

Executive also argues in the alternative that, even if its transactions are "sales," the limited term of possession enjoyed by its customers makes these sales rentals or leases, which are explicitly exempted from sales tax because they involve an operator. Executive's Response to the Department's Motion ("Executive's Response") pp. 4-5. However, even if Executive's sales did constitute leases or rentals, the Tribunal finds that these transactions would not be exempt from sales tax. A lease or rental is defined to include "any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration." O.C.G.A. § 48-8-2(17). A lease or rental is not subject to sales tax where the tangible personal property is provided with an operator, but the operator must be "necessary for the equipment to perform as designed" and must do "more than maintain, inspect, or install the tangible personal property." O.C.G.A. § 48-8-2(17)(C). Executive contends that it meets this requirement because it must provide a driver in order to provide limousine services. Executive's Response p. 5. However, beyond certain luxury features, the motor vehicles used by Executive are normal sedans, SUVs, and vans that can be operated by anyone who is properly licensed and familiar with operating a motor vehicle. See Department's SMF ¶ 3; Executive's SMF ¶ 6. The Tribunal finds that these are not specialty vehicles, and a particular operator is not "necessary" for these vehicles to "perform as designed." Hence, the Tribunal finds that, even if Executive's sales were leases or rentals, the exception in O.C.G.A. § 48-8-2(17)(C) does not apply.

C. Cars For Hire Are Subject To Sales And Use Tax Under Department Rule 560-12-2-.84.

17.

Department Rule 560-12-2-.84 states unequivocally that for-hire car services like Executive's are subject to sales tax. Department Rule 560-12-2-.84 addresses the application of

sales tax to taxicabs and states that taxicab owners and operators "shall collect the tax on fare for the transportation of persons . . . and shall remit same to the State Revenue Commissioner." GA. COMP. R. & REGS. r. 560-12-2-.84(1). This Rule also states that "[f]or the purpose of this regulation, cars for hire are taxable in the same manner as taxicabs." GA. COMP. R. & REGS. r. 560-12-2-.84(1). There is no dispute that Executive provides cars for hire, and the Tribunal finds that its services are subject to sales tax under this Rule. See O.C.G.A. § 40-5-1(9) (defining for hire as "to operate a motor vehicle in this state for the purpose of transporting passengers for compensation or donation as a limousine carrier").

18.

Executive also argues that Department Rule 560-12-2-.84 cannot be applied because it exceeds the Department's authority and is contradicted by statute. Petition p. 3 n. 4; Executive's Motion p. 7 n. 4. Nonetheless, the Tribunal notes that "[a]ll duly enacted regulations carry a presumption of validity," and a rule is valid where it is authorized by statute and is reasonable. Albany Surgical, P.C. v. Department of Community Health, 257 Ga. App. 636, 637-38 (2002) (citations omitted). The Department is authorized to promulgate rules like Rule 560-12-2-.84 because the legislature has granted it broad power to publish "reasonable rules and regulations not inconsistent with [Title 48] or other laws or with the Constitution of this state or of the United States for the enforcement of [Title 48] and the collection of revenues under [Title 48]." O.C.G.A. § 48-2-12(a). Department Rule 560-12-2-.84 is also reasonable because it merely interprets the pronouncement in O.C.G.A. § 48-8-2(31)(A) that "retail sales" include the sale of transportation and applies this pronouncement to taxicabs and for-hire cars.

19.

Department Rule 560-12-2-.84 rule has also been recognized and applied by Georgia

courts. In Collins v. Adam Cab, 261 Ga. 305 (1991), the Georgia Supreme Court considered the application of this Rule to the taxicab industry. The Court understood that the Rule "recognized the need to collect the tax on fares for transportation of persons," and found that the Rule properly required taxicab companies to collect sales tax. Id. at 306-07. Notably, the taxicab companies in Adam Cab did not even dispute that the service provided by taxicabs were taxable sales of transportation. See id. Further, the Tribunal notes that Department Rule 560-12-2-.84 has existed in its current form since 1991, and, despite numerous revisions to the sales tax statutes since that time, the legislature has not acted to override the rule or declare that transportation services provided by for-hire car companies are not subject to sales tax. See O.C.G.A. §§ 48-8-2, 48-8-3.

20.

Even though Executive makes a compelling argument in accordance with its interpretation of New Cingular Wireless PCS, LLC v. Georgia Department of Revenue, 303 Ga. 468 (2018), the Tribunal finds that Executive has not overcome the presumption that Department Rule 560-12-2-.84 is valid and that Executive is subject to sales tax under the Rule's plain language. Accordingly, the Tribunal finds that Executive makes retail sales of transportation to its customers, and these retail sales are subject to sales tax.

III. Executive Does Not Provide The Type Of "Professional" or "Personal" Services That Are Exempt From Sales And Use Tax.

21.

Executive further argues in the alternative that even if its sales of transportation are "retail sales" that would be subject to sales tax, it is exempt from sales tax because it provides "professional" or "personal" services. Petition p. 4; Executive's Motion pp. 7-9. Code Section 48-8-3 establishes sales tax exemptions, and paragraph (22) of this statute states that sales tax

shall not apply to "[p]rofessional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made." Executive contends that its drivers are "professionals" because they are "accepted throughout the country as professionals," are subject to state licensing and regulation, and provide a high quality service. Petition p. 4; Executive's Motion pp. 7-8. Executive also argues that the service its drivers provide is "personal" because it is like the services provided by typesetters, barbers, and automobile painters which are not subject to sales tax under Department Rules. Petitioner p. 4; Executive's Motion pp. 8-9; see also GA. COMP. R. & REGS. rr. 560-12-2-.08, 560-12-2-.12, 560-12-2-.75.

22.

Strictly construing O.C.G.A. § 48-8-3(22), the Tax Tribunal finds that Executive's arguments for tax exemption are without merit because: (1) for-hire drivers are not treated like professionals under Georgia law; (2) for-hire drivers are not licensed or regulated like professionals and are subject to less stringent requirements than those necessary for professional licensure; (3) the word "professional" in O.C.G.A. § 48-8-3(22) is used to describe the type of service and not the quality of the service provided; (4) the service Executive's drivers provide is unlike the "personal" services that are recognized in the Department's Rules; and (5) sales are not inconsequential elements of the service Executive provides. Furthermore, even if there was any doubt as to whether Executive provides "professional" or "personal" services, Department Rule 560-12-2-.84 controls and explicitly states that Executive's for-hire transportation sales are subject to sales tax.

A. Limousine Drivers Are Not Treated Like Professionals Under Georgia Law.

23.

Neither party has identified any Georgia statute, administrative rule, or court decision that recognizes for-hire or limousine drivers as "professionals." This absence of recognition stands in contrast to other services that are recognized as "professional" under Georgia law. For example, Title 43 is titled "PROFESSIONS AND BUSINESSES" and establishes "professional licensing boards" that are charged with licensing and regulating certain skilled professions such as accountancy, cosmetology, landscape architecture, and nursing. See O.C.G.A. §§ 43-1-1(3), 43-3-1 to 43-3-37, 43-10-1 to 43-10-20, 43-23-1 to 43-23-20, 43-26-1 to 43-26-13. Georgia law allows individuals to form a "professional corporation" only if they practice one of a number of enumerated professions, such as "certified public accountancy, architecture, chiropractic, dentistry, professional engineering, land surveying, law, pharmacy, [and] psychology . . . ." O.C.G.A. §§ 14-7-2(2), 14-7-3. Similarly, a "professional association" may only be formed by attorneys or individuals who hold a professional license under Title 43. O.C.G.A. §§ 14-10-2, 14-10-3. Special rules apply to state contracts for "professional services," which are defined to be architecture, registered interior design, professional engineering, land surveying, and landscape architecture. See O.C.G.A. §§ 50-22-2(4), 50-22-4. None of these statutes mention for-hire drivers or limousine drivers; likewise, the statutes and rules regulating for-hire drivers and limousine carriers do not describe these drivers as professionals. See O.C.G.A. §§ 40-5-1, 40-5-39, 40-1-151 to 40-1-170; GA. COMP. R. & REGS. rr. 375-5-5-.01 to 375-5-5-.06, 515-16-8-.01 to 515-16-8-.13. The Tribunal finds that for-hire drivers are not recognized as "professionals" under Georgia law, and the sales tax exemption in O.C.G.A. § 48-8-3(22) does not apply in this case.

B. Executive's Drivers Are Not Licensed Or Regulated Like Professionals.

24.

Executive also argues that its drivers are "professionals" because they must be specially licensed, are subject to criminal background checks and fingerprinting, and are regulated by state agencies. Petition p. 4; Executive's Motion pp. 7-8. The Tribunal finds this argument unpersuasive because the licensure requirements and regulatory controls that for-hire drivers are subject to are less stringent than the requirements and controls imposed for professional license holders. Under O.C.G.A. § 40-5-39(a), for-hire drivers must have either a for-hire license endorsement issued by the Department of Driver Services or a private background check and certification. To qualify for a for-hire license endorsement, a driver must be over 18 years of age, possess a valid driver's license, pass a criminal background check, submit to fingerprinting, and be lawfully present in the United States. O.C.G.A. § 40-5-39(b). A driver may also qualify as a for-hire driver via a private background conducted directly by the taxi service, limousine carrier, or ride-share company employing the driver rather than the Department of Driver Services. O.C.G.A. § 40-5-39(e). Neither method of approval includes any education or training requirements or establishes any professional conduct standards. See O.C.G.A. § 40-5-39. The Department of Driver Services can exercise only limited oversight authority over for-hire endorsement holders through its ability to suspend, revoke, or cancel endorsements, and it may only take this action when a driver is subject to criminal charges or has provided false information. See GA. COMP. R. & REGS. r. 375-5-5-.05. This oversight is further limited by the fact that neither O.C.G.A. § 40-5-39 nor the Department of Driver Service's rules appear to establish any control over for-hire drivers certified by private background check. See GA. COMP. R. & REGS. rr. 375-5-5-.01 to 375-5-5-.06.

25.

The minimal requirements and limited oversight for for-hire drivers are unlike the requirements and control exercised over professional license holders. Individuals who hold a professional license issued by a professional licensing board are typically required to complete significant education or training and pass an examination before a license can be issued. See O.C.G.A. §§ 43-3-9(b) (certified public accountants must have an accounting degree or equivalent, at least one year of relevant experience, and pass an examination), 43-10-9(a) (cosmetologists must complete a 1,500 credit hour course or an apprenticeship and pass an examination), 43-23-7 (landscape architects must have a degree in landscape architecture or an equivalent and pass an examination), 43-26-7 (registered professional nurses must have graduated from an approved nursing program or equivalent and pass an examination). These professionals must also meet certain practice and professionalism standards, and professional licensing boards have significant oversight and disciplinary power over the professionals they license. See O.C.G.A. § 43-1-19 (granting professional licensing boards the authority to investigate and discipline licensees for a wide range of conduct including unprofessional behavior and criminal convictions), O.C.G.A. § 43-10-6 (establishing sanitation requirements for barbers and cosmetologists); GA. COMP. R. & REGS. rr. 20-12-.01 to 20-12-.19 (establishing a code of professional conduct for accountants), 310-7-.01 (establishing stamping requirements for landscape architects), 410-10-.01 (establishing practice standards for registered professional nurses). The licensure requirements and level of oversight that apply to these and other professions that are regulated under Title 43 are substantially greater than those that apply to licensure of for-hire drivers. The Tribunal finds that Executive's drivers are not "professional" as contemplated by O.C.G.A. § 48-8-3(22) solely by virtue of compliance with the Department

of Driver Services' for-hire endorsement requirements.

C. "Professional" Services Are Defined By The Type Of Service Provided And Not The Quality Of That Service.

26.

Executive next argues that its drivers qualify as "professional" because of the quality of service they provide. Executive's Motion p. 8. Executive points to the fact that it has high standards in vetting chauffeurs, uses high quality vehicles, and provides service above and beyond that of taxicabs and ride-share companies. Id. However, the Tribunal finds the word "professional" as used in O.C.G.A. § 48-8-3(22) describes a type job or service, not the quality of that service. The question raised by Executive's argument is which use of "professional" was intended by the legislature when it included the word in O.C.G.A. § 48-8-3(22). The Tax Tribunal finds that the legislature only intended to exempt services that are "professional" by type and not quality. The Sales and Use Tax Act was first enacted in 1951, and the original version included the same language that now appears in O.C.G.A. § 48-8-3(22):

> The terms "retail sale" and "sale at retail" shall also not include the following:
>
> (a) Professional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made nor services rendered by repair men for which a separate charge is made.

1951 Ga. Laws 360, 365; Departments' SMF Exhibit B. Accordingly, the word "professional" in current O.C.G.A. § 48-8-3(22) must be understood as the word "professional" was defined in 1951. Webster's Fifth Edition Collegiate Dictionary, published in 1946, defines "professional" in relevant part as:

> 1. Of or pertaining to a profession; as *professional* ethics.
>
> 2. Characteristic of or conforming to the standards of a profession; as distinctly *professional* work.

Department's SMF Exhibit C. The word "profession" is then defined in relevant part as "[t]he occupation, if not commercial, mechanical, agricultural, or the like, to which one devotes oneself; a calling; as, the *profession* of arms, of teaching; the ***three professions*** or ***learned professions*** of theology, law, and medicine." Webster's Collegiate Dictionary Fifth Edition; Department's SMF Exhibit C.

27.

This interpretation is reinforced by the other words used with "professional" in O.C.G.A. § 48-8-3(22) – "personal" and "insurance." While the word "personal" can be used as an adjective to describe both a type of service and the quality of a service, e.g., a business's customer service may be "personal" in nature because it uses human customer service representatives rather than automated systems, the word "insurance" describes only a type of service. Thus, the only way to read all three terms consistently is to construe the terms "professional" and "personal" to also refer to specific types of services rather than the quality of services. The Tribunal finds that Executive's drivers provide its customers with a high quality service, but this does not mean the service is "professional" as that word is used in O.C.G.A. § 48-8-3(22).

D. Executive's Drivers Do Not Perform "Personal" Services As That Term Is Used In Georgia Law.

28.

Executive also contends that it provides "personal" services that are like the "personal" services that are defined in the Department's Rules. Petition p. 4; Executive's Motion pp. 8-9. Specifically, Executive argues that its drivers provide services that are analogous to other services that have been declared to be "personal." See Petition; Executive's Motion. The Tribunal finds that "personal" services are limited statutorily to those services that are explicitly

enumerated. Under Department Rules, barber and beauty shop operators, automobile refinishers and painters, and typesetters are all deemed to provide "personal" services that are not subject to sales tax. GA. COMP. R. & REGS. rr. 560-12-2-.08, 560-12-2-.12, 560-12-2-.75. Georgia courts have also concluded that the preparation of false teeth, crowns, and other custom dental products by a dental laboratory is a "personal" service along with shoe repair, the practice of law, preparation of artificial limbs and braces, and architecture and engineering services. Hawes v. Dimension, Inc., 122 Ga. App. 190, 192 (1970). These services all require an element of transformation by the individual providing the service. A barber or cosmetologist takes scissors and beauty products and transforms the customer's hair or skin in a way that is unique to that customer. An automobile refinisher or painter transforms the exterior of an automobile. A typesetter prepares standard printing equipment to print a customer's custom text or design. A dental lab transforms raw materials into custom tooth replacements. An attorney analyzes a client's unique legal problem and provides advice or prepares documents for that client. An architect or engineer applies his or her skill to prepare plans that meet the client's needs and comply with building and safety standards.

29.

The Tribunal finds that transportation services provided by Executive's drivers do not involve a transformation for the Executive customer akin to that provided by the enumerated examples. Executive's drivers pick passengers up, drive them to their destination, and drop them off. Drivers are not transforming materials into some end product, and the passenger is exactly as he or she was at the time of pickup and drop off. While Executive's drivers and passengers have in-person interactions, the Tribunal finds that the service provided is not "personal" as that term is recognized in Georgia law.

E. Sales Are Not An Inconsequential Element Of The Transportation Executive Provides.

30.

As discussed above, tangible personal property in the form of vehicles is a key element in the transportation Executive provides. Code Section 48-8-2(22) authorizes an exemption for "professional" or "personal" services only where sales are "an inconsequential element" of the transaction "for which no separate charges are made." Sales are a critical element in Executive's transactions with its customers for two reasons. First, sales of transportation are explicitly defined as "retail sales," so "sales" cannot be an inconsequential element where transportation is concerned. See O.C.G.A. § 48-8-2(31)(A). Second, while Executive's customers do not exercise exclusive direct control or possession of Executive's vehicles, they do purchase exclusive use and are generally able to direct Executive's drivers as they see fit. See Department's SMF ¶ 7; Dep. of DeLoatch pp. 46-48. Executive responds to this argument by claiming that it is much cheaper for customers to rent their own vehicles rather than use Executive's services, to support its contention that Executive's vehicles are inconsequential elements of its transactions. This argument is not supported by the undisputed facts here, which show that Executive sales depended on the type and quality of the vehicles provided, which included specialized livery edition luxury cars, SUVs, vans, and buses that were never more than three years old, were a standardized black on black color, were overly insured, and were non-smoking. Department's SMF ¶ 3; Executive's SMF ¶ 6. Additionally, under O.C.G.A. § 48-8-2(22), sales must not be merely a small part of the transaction for a service to be exempted as "professional" or "personal," but must be so minor as to be "inconsequential." The Tribunal finds that the use of vehicles by a limousine transportation service is not "inconsequential," no matter the relative costs of limousine transportation versus other transportation options.

Accordingly, the Tribunal finds that Executive's use of vehicles was not inconsequential, and these transactions are not exempt from sales tax under O.C.G.A. § 48-8-2(22).

IV. Executive Is Required To Collect And Remit Local Sales Tax.

31.

Executive further claims that even if it is subject to sales tax, it should be exempted from the local component of sales tax because local governments are barred from levying excise taxes on limousine and motor carriers. Executive relies on O.C.G.A. § 40-1-116, which applies to motor carriers, states that:

> No subdivision of this state, including cities, townships, or counties, shall levy any excise, license, or occupation tax of any nature, on the right of a motor carrier to operate equipment, or on the equipment, or on any incidents of the business of a motor carrier;

and O.C.G.A. § 40-1-168, which applies specifically to limousine carriers, states:

> No subdivision of this state, including cities, townships, or counties, shall levy any excise, license, or occupation tax of any nature, on the right of a limousine carrier to operate equipment, or on the equipment, or on any incidents of the business of a limousine carrier.

Petition pp. 5-8; Executive's Motion pp. 9-18. Executive argues that local sales tax falls into the category of "excise . . . tax of any nature" and cannot be applied to motor carriers and limousine carriers under these statutes. Id. The Tribunal finds that, within the meaning of O.C.G.A. §§ 40-1-116 and 40-1-168: (1) local sales tax is not an "excise, license, or occupation tax"; (2) even if it were, local sales tax is not a tax specifically on the right of a limousine or motor carrier to operate, its equipment, or its business; and (3) local sales tax is imposed on the customer and not Executive unless Executive violates its obligation to collect and remit sales tax on behalf of its customers.

A. Local Sales Tax Is Not An Excise, License, Or Occupation Tax.

32.

The Tribunal finds that local sales tax is not an "excise, license, or occupation tax" as those terms are used in O.C.G.A. §§ 40-1-116 and 40-1-168. Local sales tax is administered just like state sales tax and applies to every "retail purchase, retail sale, rental, storage, use, or consumption of tangible personal property" or performance of a service subject to sales tax without any special rules for motor or limousine carriers. See, e.g., O.C.G.A. §§ 48-8-30(a), 48-8-113, 48-8-204.

33.

None of Georgia's state and local sales tax statutes define or describe sales tax as an "excise" tax. See O.C.G.A. §§ 48-8-1 to 48-8-278.[3] Instead, O.C.G.A. § 48-8-30, which imposes sales tax, specifically differentiates these types of taxes and states in paragraph (i) that "[t]he tax levied by this Code section is in addition to all other taxes, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to all other fees and taxes levied." Further, the references to "excise" tax that do exist the Georgia Revenue Code demonstrate that the legislature uses the term "excise" tax to describe subject specific taxes like those on alcohol, motor fuel, or fireworks rather than general taxes like sales tax. See O.C.G.A. §§ 3-4-60 (excise tax on sales of distilled spirits), 3-5-80 (excise tax on sales of beer), 48-9-3 (excise tax on motor fuel), 48-11-2 (excise tax on sales of tobacco products), 48-13-51 (excise tax on sales of rooms, lodgings, and accommodations), 48-13-93 (excise tax on the rental of motor vehicles), 48-13-112 (excise tax on the sale or use of energy), 48-13-131 (excise tax on sales of fireworks), 48-15-3 (excise tax on marijuana).

[3] In fact, there is no definition of "excise" tax in Georgia law.

34.

The authority cited by Executive in support of its contention that state or local sales and use tax imposed under the Georgia Revenue Code is an excise tax is distinguishable from the facts of the present case. The decision in Williams v. General Fin. Corp., 98 Ga. App. 31,34 (1958), describes Georgia sales tax as "in the nature of license and occupation or excise taxes," but does so only to compare sales tax to property tax and answer a question about liens. The court in City of Columbus v. Atlanta Cigar Company, Inc., 111 Ga. App. 774 (1965), addressed only whether a local sales tax on cigarettes was pre-empted by state sales tax. Department Rule 560-7-7-.03(4)(c)(2), which Executive cites for the phrase "[f]ederal and state excise taxes, including sales taxes, shall be included as part of such receipts," is not relevant because it addresses an unrelated subject, apportionment of corporate income tax. Executive also cites two United States Supreme Court decisions that the Tax Tribunal finds are not relevant to the present matter because they address sales tax and excise tax only in the context of interpreting federal statutes such as the Railroad Revitalization and Regulatory Reform Act and Soldiers' and Sailors' Civil Relief Act. See CSX Transp., Inc. v. Ala. Dep't of Revenue, 562 U.S. 277 (2011); Sullivan v. United States, 395 U.S. 169 (1969). This authority does not demonstrate that local sales tax is an "excise" tax as that term is used in Georgia law and O.C.G.A. §§ 40-1-116 and 40-1-168, and the Tribunal finds that these Code Sections do not exempt Executive from local sales tax. In sum, notwithstanding the fact that "excise tax" is not defined anywhere in Georgia statute, no authority is cited by either party that demonstrates that local sales tax is an excise tax as that term is used in Georgia law.

B. Local Sales Tax Is Not The Type Of Limousine Carrier Specific Tax That Is Barred By O.C.G.A. §§ 40-1-116 and 40-1-168.

35.

The Tribunal additionally finds that local sales tax is not specific to limousine carriers and is not the type of tax that is intended to be prohibited by O.C.G.A. §§ 40-1-116 and 40-1-168. Like state sales tax, local sales tax is collected and administered by the Department, and is applied to the limousine and motor carrier industries like other industries. See, e.g., O.C.G.A. §§ 48-8-113, 48-8-204. In contrast, O.C.G.A. §§ 40-1-116 and 40-1-168 protect against taxes that specifically target motor and limousines carriers. Code Section 40-1-116 only applies where the tax in question is levied "on the right of a motor carrier to operate equipment, or on the equipment, or on any incidents of the business of a motor carrier." Code Section 40-1-168 similarly applies only to tax "on the right of a limousine carrier to operate equipment, or on the equipment, or on any incidents of the business of a limousine carrier." The legislature could have simply stated that limousine or motor carriers are not subject to taxation by local governments but chose instead to include these particular conditions. Given these conditions and the requirement that tax exemptions be read narrowly, the Tribunal finds that the plain language of O.C.G.A. §§ 40-1-116 and 40-1-168 does not bar the application of local sales tax that does not specifically target the rights, equipment or business of motor or limousine carriers.

36.

This conclusion is supported by the purpose and content of the Georgia Motor Carrier Act of 2012 and Georgia Limousine Carrier Act of 2012, which created the current versions of O.C.G.A. §§ 40-1-116 and 40-1-168. See 2012 Ga. Laws 632. The synopsis of this law states that it is intended to transfer regulation of motor carriers and limousine carriers from the Georgia Public Service Commission to the Georgia Department of Public Safety and to alter rules about

drivers' licenses and chauffeur endorsements. See 2012 Ga. Laws 632. Code Section 40-1-51 also contains a legislative finding of the need for regulation and control of for-hire transportation to protect public welfare and consumers and provide for a competitive business environment. See O.C.G.A. § 40-1-51. None of these statements of purpose discuss exemptions from any tax, let alone local sales tax. This is consistent with the content of both the Motor Carrier and Limousine Carrier Act, which focus on certification of motor and limousine carriers and regulation of their operations including insurance, rates, recordkeeping, advertising, and hiring of drivers. See, e.g., O.C.G.A. §§ 40-1-102, 40-1-104, 40-1-112, 40-1-118, 40-1-121, 40-1-130, 40-1-152, 40-1-158, 40-1-165, 40-1-166. These are primarily regulatory statutes rather than tax exemption statutes, and the exemptions in O.C.G.A. §§ 40-1-116 and 40-1-168 must be read in this context.[4]

37.

The legislature could have explicitly stated that motor and limousine carriers were exempt from sales tax when it enacted the Georgia Motor Carrier Act of 2012 and Georgia Limousine Carrier Act of 2012. These acts went into effect on May 1, 2012, and the various local sales taxes existed at that time in largely the same form that they exist now. See, e.g., O.C.G.A. §§ 48-8-2 (2012), 48-8-110.1 (2012). Instead of declaring that motor and limousine carriers were exempt from these local sales taxes, the legislature opted only to exclude these

[4] Executive's argument that O.C.G.A. §§ 40-1-116 and 40-1-168 must be understood as they existed in the 1960s and earlier is misplaced because, while these statutes may share language with earlier statutes, they were enacted by the legislature in 2012 and must be understood in relation to the law as it existed in 2012. Additionally, Executive's reliance on the intent of the legislature rather than the text of O.C.G.A. §§ 40-1-116 and 40-1-168 is misplaced because "the legislature's intent is discerned from the text of a duly enacted statute and the statute's context within the larger legal framework." Gibson v. Gibson, 301 Ga. 622, 631-632 (2017) (quoting State v. Riggs, 301 Ga. 63, 67 (2017)) (internal quotation marks omitted). And "[w]hen judges start discussing not the meaning of the statutes the legislature actually enacted, as determined from the text of those laws, but rather the unexpressed "spirit" or "reason" of the legislation, and the need to make sure the law does not cause unreasonable consequences, we venture into dangerously undemocratic, unfair, and impractical territory." Gibson, 301 Ga. at 632 (quoting Merritt v. State, 286 Ga. 650, 656 (2010) (Nahmias, J., concurring specially)) (internal quotation marks omitted).

carriers from "excise, license, or occupation tax." See O.C.G.A. §§ 40-1-116, 40-1-168; 2012 Ga. Laws 632. Likewise, the legislature could have amended local sales tax statutes to reflect an exemption for motor and limousine carriers. Instead, the legislature chose only to update O.C.G.A. §§ 48-13-16 and 48-13-18, which exclude businesses regulated under the Georgia Department of Public Safety like motor and limousine carriers from local licensing and occupation or business taxes. See 2012 Ga. Laws 632 §§ 24-25. Code Section 48-13-16(a) makes it clear that these exemptions are limited in scope, stating that these businesses "shall be subject to taxation and regulation as otherwise provided by general law and municipal charters . . . ." Accordingly, the Tribunal finds that O.C.G.A. §§ 40-1-116 and 40-1-168 do not exempt Executive from local sales tax.

C. Executive Must Collect And Remit Local Sales Tax Even If O.C.G.A. §§ 40-1-116 And 40-1-168 Apply Here.

38.

Even if Executive was not liable for local sales tax under O.C.G.A. §§ 40-1-116 and 40-1-168, under current law it would still be required to collect local sales tax from its customers and remit this tax to the Department. "Every person purchasing or receiving any service within this state, the purchase of which is a retail sale, shall be liable for tax on the purchase . . . ." O.C.G.A. § 48-8-30(f)(1). Every person furnishing such a service is a dealer and is responsible for collecting and remitting this tax. O.C.G.A. §§ 48-8-30(f)(1), 48-8-32. A dealer effectively acts as an agent of the state and is required to do this "[n]otwithstanding any exemption from taxes which a dealer enjoys under the Constitution or laws of this state, any other state, or the United States." O.C.G.A. § 48-8-33. The tax exemptions in O.C.G.A. §§ 40-1-116 and 40-1-168 apply to taxes on "the right of a [motor or limousine] carrier to operate equipment, or on the equipment, or on any incidents of the business of a [motor or limousine] carrier," but make no

mention of taxes on the sales of a motor or limousine carrier. Thus, unlike a sales tax exemption which exempts a *transaction* from sales tax, the exemptions in O.C.G.A. §§ 40-1-116 and 40-1-168 exempt *motor or limousine carriers* from certain taxes. As these statutes do not exempt the sales of motor or limousine carriers from tax and the incidence of sales tax in a sales transaction falls on the customer, the exemptions in O.C.G.A. §§ 40-1-116 and 40-1-168 simply do not apply. Further, even if O.C.G.A. §§ 40-1-116 and 40-1-168 applied here, Executive's customers would still owe local sales tax, and Executive must carry out its responsibility as a dealer to collect and remit this tax. Therefore, no local sales tax refund is due, and the Tribunal finds that Executive's refund claim for local sales tax fails as a matter of law.

V. Executive's Equal Protection Challenge Fails Because The Tax Tribunal Lacks Authority To Rule On This Claim.

39.

Executive contends that its rights under the Equal Protection Clause of the 14th Amendment of the United States Constitution have been violated because the Department has failed to require other for-hire car companies like Uber and Lyft to pay sales tax. The Tribunal finds that it does not have authority to rule on this claim under Tax Tribunal Rule 616-1-3-.21, which states that the Tribunal is not authorized to resolve constitutional challenges. Although the Tribunal is authorized under Tax Tribunal Rule 616-1-3-.21 to make findings of fact regarding constitutional challenges, it declines to do so in the present case.

CONCLUSION

For all the forgoing reasons, the Department's Motion is hereby **GRANTED**, Executive's Motion is **DENIED**, and judgment is entered in favor of the Department. The denial of Executive's refund claims for state and local sales taxes is hereby **AFFIRMED**.

SO ORDERED this 21st day of October, 2019.

HONORABLE LAWRENCE E. O'NEAL, JR.
CHIEF JUDGE
GEORGIA TAX TRIBUNAL