

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

CALE PARKING SYSTEMS USA, INC.

Petitioner,

v.

STATE OF FLORIDA DEPARTMENT
OF REVENUE,

Respondent.

CASE NO: 11 14532

DIVISION: DIVISION B

SUMMONS

Received by _____
Kole [unclear] [unclear] [unclear] [unclear]
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THE STATE OF FLORIDA

TO ALL AND SINGULAR THE SHERIFFS OF THE STATE:

YOU ARE COMMANDED to serve this Summons and a copy of the Complaint or Petition in this action on the following Defendant(s):

STATE OF FLORIDA, DEPARTMENT OF REVENUE
By and through its Executive Director, Lisa Vickers
5050 West Tennessee Street
Tallahassee, FL 32399-0100

Each Defendant is required to serve written defenses to the Complaint or Petition on DAVID W. ADAMS, ESQ., Sponsler, Bennett, Jacobs & Adams, P.A., P.O. Box 3300, Tampa, FL 33601, within twenty (20) days after service of this Summons on that Defendant, exclusive of the day of service, and to file the original of the defenses with the Clerk of this court either before service on Plaintiffs' attorneys or immediately thereafter. If a Defendant fails to do so, a default will be entered against that Defendant for the relief demanded in the Complaint.

NOV 14 2011

WITNESS my hand and the seal of this Court on _____, 2011.

CLERK OF THE COURT

Kim F. Dietz

(SEAL)

By: _____
Deputy Clerk

IMPORTANT

A lawsuit has been filed against you. You have 20 calendar days after this Summons is served on you to file a written response to the attached Complaint with the Clerk of this Court. A phone call will not protect you; your written response, including the above case number and named parties, must be filed if you want the Court to hear your case. If you do not file your response on time, you may lose the case, and your wages, money and property may thereafter be taken without further warning from the Court. There are no other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

If you choose to file a written response yourself, at the same time you file your written response to the Court you must also mail or take a carbon copy of photocopy of your written response to the "Plaintiff/Plaintiff's Attorney" named above.

IMPORTANTE

Usted ha sido demandado legalmente. Tiene 20 días, contados a partir del recibo de esta notificación, para contestar la demanda adjunta, por escrito, y presentarla ante este tribunal. Una llamada telefónica no lo protegerá. Si usted desea que el tribunal considere su defensa, debe presentar su respuesta por escrito, incluyendo el número del caso y los nombres de las partes interesadas. Si usted no contesta la demanda a tiempo, pudiese perder el caso y podría ser despojado de sus ingresos y propiedades, o privado de sus derechos, sin previo aviso del tribunal. Existen otros requisitos legales. Si lo desea, puede usted consultar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a una de las oficinas de asistencia legal que aparecen en la guía telefónica.

Ai desea responder a la emanda por su cuenta, al mismo tiempo en que presenta su respuesta ante el tribunal, debera usted enviar por correo o entregar una copia de su respuesta a la persona denominada abajo como "Plaintiff/Plaintiff's Attorney" (Demandate o Abogado del Demandante).

IMPORTANT

Des poursuites judiciaires ont été entreprises contre vous. Vous avez 20 jours consécutifs à partir de la date de l'assignation de cette citation pour déposer une réponse écrite à la plainte ci-jointe auprès de ce tribunal. Un simple coup de téléphone est insuffisant pour vous protéger. Vous êtes obligé de déposer votre réponse écrite, avec mention du numéro de dossier ci-dessus et du nom des parties nommées ici, si vous souhaitez que le tribunal entende votre cause. Si vous ne déposez pas votre réponse écrite dans le délai requis, vous risquez de perdre la cause ainsi que votre salaire, votre argent, et vos biens peuvent être saisis par la suite, sans aucun préavis ultérieur du tribunal. Il y a d'autres obligations juridiques et vous pourriez téléphoner à un service de référence d'avocats ou à un bureau d'assistance juridique (figurant à l'annuaire de téléphones).

Si vous choisissez de déposer vous-même une réponse écrite, il vous faudra également, en même temps que cette formalité, faire parvenir ou expédier une copie de votre réponse écrite au "Plaintiff/Plaintiff's Attorney" (Plaignant ou à son avocat) nommé ci-dessous.

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~~VENUE AND CASE~~

NOV 14 2011

CLERK OF CIRCUIT COURT
HILLSBOROUGH COUNTY, FL

PETITION TO CONTEST ASSESSMENT

Petitioner, CALE PARKING SYSTEMS USA, INC. ("CALE"), by and through its undersigned counsel, files this Petition pursuant to Section 72.011, Florida Statutes, and Rule Chapter 12-6 of the Florida Administrative Code, to contest the legality of the STATE OF FLORIDA, DEPARTMENT OF REVENUE ("Department") assessment of sales and use tax, and in support thereof states as follows:

1. This is an action brought pursuant to Chapter 72, Florida Statutes, to contest the assessment of sales and use tax against Petitioner, CALE.
2. This Court has jurisdiction over this action pursuant to Fla. Stat. § 72.011.
3. Venue is appropriate under Fla. Stat. § 72.011(4)(a) because Petitioner resides and has its principal place of business in this county.

THE PARTIES

4. CALE is a Florida corporation authorized to do business and doing business throughout the state of Florida.
5. Defendant is the agency of the State of Florida charged with the collection and enforcement of the sales and use tax laws.

6. The material facts are as follows and, to the best of Petitioner's knowledge, are generally not in dispute.

CALE'S PARKING METERS

7. CALE is a provider of sophisticated electronic parking meters for cities and towns throughout the United States. The meters are set up throughout popular parking areas to simplify parking transactions for CALE's clients. The meters accept cash, coin, credit card, and parking cards/coins where available, and process these payments pursuant to the established parking rates.

8. The paying customer is provided with a receipt to document the transaction while the meter processes the payment transaction for the city or town which owns the meter.

9. CALE's parking meters electronically store each transaction in the installed computer memory hard drive and transmit the information via wireless modem to CALE's Internet portal, allowing both CALE and their clients the ability to monitor and track transactions.

10. Additionally, CALE's meters' contain self-diagnostic software, allowing all meter issues to be reported directly to CALE's maintenance staff via SMS text messaging, email, or by logging on to CALE's Internet portal.

11. From 2007 through 2009, CALE provided parking meters to political subdivisions throughout the state of Florida. In each instance, the meters provided to these cities, towns, and parking agencies were powered by solar technology. Specifically, the parking meters contain a solar cell panel which draws electrical power from the Sun and allows the meters to operate without being hard-wired to any other electrical source.

12. Thus, each meter is a free-standing piece of equipment placed by CALE's client to collect and process payments for parking services at nearby parking spaces.

THE DEPARTMENT'S ASSESSMENT

13. On or around September 24, 2010, the Department completed an audit of CALE's sales from January 1, 2007, through December 31, 2009, and documented its "Notice of Intent to Make Audit Changes." A true and correct copy of the Notice of Intent to Make Audit Changes is attached hereto and incorporated herein as **Exhibit "A."**

14. Pursuant to the Notice of Intent to Make Audit Changes, the Department assessed \$36,153.53 in taxes "due from the improvements to real property for which no tax was paid or accrued, and as the contractor, the taxpayer is the ultimate consumer of the tangible personal property that becomes real property."

15. The Department also assessed \$9,038.36 in penalties and \$4,971.00 in interest as of September 24, 2010. Thus, the total assessment against CALE was \$50,162.89.

16. On November 5, 2010, CALE filed its initial petition against the Department's assessment. A true and correct copy of the initial petition is attached hereto and incorporated herein as **"Exhibit "B."** While CALE admitted certain aspects of its transactions were taxable events, CALE pointed out to the Department that CALE's sales of tangible personal property to political subdivisions of the State of Florida were exempt pursuant to Florida law. *See Exhibit "B."*

17. On December 28, 2010, the Department issued a revised "Notice of Proposed Assessment." A true and correct copy of the Notice of Proposed Assessment is attached hereto and incorporated herein as **Exhibit "C."** The revised Notice of Proposed Assessment assessed \$33,183.85 in taxes and \$4,987.12 in interest through December 12, 2010.

18. On January 17, 2011, CALE timely filed its protest to the revised Notice of Proposed Assessment. A true and correct copy of the protest is attached hereto and incorporated herein as **Exhibit "D."** Again, CALE notified the Department that the sale of tangible personal property to the political subdivisions was not taxable under Florida law.

19. CALE and the Department corresponded for the next several months, debating their respective positions on this issue. On May 20, 2011, CALE filed a Petition for Reconsideration with the Department, explaining why CALE's sales of these tangible parking meters are exempt transactions under Florida law. A true and correct copy of CALE's Petition for Reconsideration is attached hereto and incorporated herein as **Exhibit "E."**

20. On September 16, 2011, the Department issued its final decision on the issue. A true and correct copy of the Department's final Notice of Reconsideration is attached hereto and incorporated herein as **Exhibit "F."**

21. The Department's final decision assesses taxes and interest against CALE in the total amount of \$39,838.34. Pursuant to the Department's final decision and Florida law, following CALE's exhaustion of all administrative remedies, CALE files this timely petition to contest the Department's assessments.

22. Florida Statute § 212.08(6) provides an exemption from sales tax for "sales made to the United States Government, a state, or any county, municipality, or political subdivision of a state when payment is made directly to the dealer by the governmental entity."

23. The Department contends this exemption does not apply to CALE's transactions because the parking meters sold to the political subdivisions, according to the Department, are "fixtures...permanently attached to the realty." See Exhibit F (citing Rule 12A-1.051(2), F.A.C.)

24. The Department bases its assessment on its interpretation of Florida Statute § 212.08(6) which provides: "This exemption does not include sales of tangible personal property made to contractors employed either directly or as agents of any such government or political subdivision thereof when such tangible personal property goes into or becomes a part of public works owned by such government or political subdivision."

25. The Department's determination is wrong for several reasons.

**CALE'S PARKING METERS ARE NOT FIXTURES SINCE
THEY ARE NOT PERMANENTLY ATTACHED TO REALTY**

26. First, in order for the Department's assessment to be correct, the CALE meters must fall under the definition of "fixtures." Rule 12A-1.051(2)(c)(1), Florida Administrative Code, defines a "fixture" as "an item that is an accessory to a building, or other structure, or to land, that retains its separate identity upon installation, *but is permanently attached to the realty*" (emphasis added), Rule 12A-1.051(2)(c)(1), F.A.C. (2009).

27. In the instant case, the parking meters are easily transferred from location to location, depending upon demand for parking spaces and other factors. Indeed, several political subdivisions include removal of the parking meters as part of their preparation for hurricanes to avoid any damage to the meters.

28. Since "permanent attach[ment]" to the realty is an element of the definition of "fixture" and the meters are not permanently attached to the land, the meters are not fixtures and CALE's sale to political subdivisions remains exempt.

**CALE'S PARKING METERS ARE NOT FIXTURES
BECAUSE THEY ARE "MACHINERY OR EQUIPEMNT"**

29. Additionally, pursuant to Rule 12A-1.051(2)(c)(4), F.A.C., "the term 'fixture' does not include the following items, whether or not such items are attached to real property in a permanent manner:...(b) Machinery or equipment."

30. Rule 12A-1.051(2)(e), F.A.C., defines "machinery or equipment." The definition of machinery or equipment "includes property that...is intended to be used in manufacturing, producing, compounding, **processing**...in the performance of commercial services, or for other purposes not related to a building or other fixed real property improvement" (emphasis added). Rule 12A-1.051(2)(e), F.A.C.

31. In this case, the parking meters "process" payments from parking customers. This is clearly a "commercial service." As such, the parking meters qualify as "machinery or equipment," which are not "fixtures" under Florida law. Therefore, CALE's sale of this equipment to political subdivisions is tax exempt.

32. Additionally, Rule 12A-1.051(2)(e)(3), F.A.C., further clarifies that "'Machinery or equipment' serves a particular commercial activity that is carried on **at a location rather than serving general uses of land or a structure**" (emphasis added). CALE's parking meters clearly serve a particular commercial activity, collecting and processing payments for parking, rather than serving general use to the land. The meters are periodically relocated from time to time, which demonstrates the commercial activities are provided "at a location," rather than serving the land. As such, CALE's parking meters are not fixtures and are thus tax exempt when sold to a political subdivision under Florida law.

CALE'S CONTRACTS ARE NOT PUBLIC WORKS CONTRACTS

33. The Department's conclusion is also erroneous because the contracts at issue are not properly classified as "Public works" contracts and CALE is not properly classified as a "Public Works Contractor."

34. First, the definition of "Public works" is a "project[] for public use or enjoyment, financed and owned by the government, in which private persons undertake the obligation to do a specific piece of work that involves installing tangible personal property in such a manner that it becomes part of a public facility." Rule 12A-1.094(1)(c), F.A.C.

35. In this case, as stated above, the parking meters are not installed in such a manner that they "become part of a public facility." These parking meters are capable of easy mobility based on demand, lack of sunlight, or severe weather. Indeed, theft of these meters by individuals in pick-up trucks has become an issue. As such, the contracts to install CALE parking meters are not "public works" contracts under Florida law.

CALE IS NOT A PUBLIC WORKS CONTRACTOR

36. Additionally, even if these were "public works" contracts, CALE is not properly classified as a "public works contractor" for all of these contracts. Specifically, "Contractor" does not include a person that provides tangible personal property that will be incorporated into or become part of a public facility if such property will be installed by another party." Rule 12A-1.094(1)(a)(2), F.A.C.

37. In the contracts at issue, it is true that CALE installs some of the parking meters for its governmental clients. However, CALE typically installs the first few meters for its clients to show the city, town, or other agency's workers how to properly install the meters. Thereafter,

subsequent purchases of parking meters are simply delivered to the client's warehouse and the governmental entity's employees install the meters wherever they deem fit. Therefore, for most of the meters which are subject to the Department's audit, CALE cannot be classified as a "public works contractor" since it does not install the parking meters.

**CALE'S CONTRACTS ARE MIXED CONTRACTS PREDOMINANTLY
FOR THE SALE OF TANGIBLE PERSONAL PROPERTY**

38. Finally, even if the meters are fixtures, and CALE is a public works contractor, the Department' assessment must be reversed because the contracts at issue are "mixed contracts."

39. Rule 12A-1.051(8), F.A.C., provides, in pertinent part that:

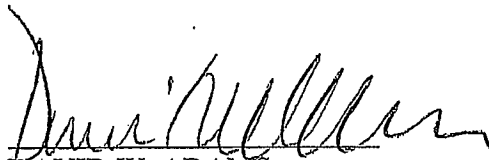
A mixed contract is one that involves a real property improvement...and also involves providing tangible personal property that remains tangible personal property and does not become part of the real property. In terms of a mixed contract, taxability depends on the predominant nature of the work performed under the contract and upon the contract terms...If the predominant nature of a mixed contract is a contract for tangible personal property, taxability of the contract will be determined as if the contract were entirely for tangible personal property.

40. The predominant nature of CALE's contracts with governmental entities is for the parking meters themselves and the advanced technology contained therein. The predominant nature of the contract is not to bolt the parking meters into concrete. Therefore, the entire contract should be tax exempt as a sale of tangible personal property to a governmental entity.

41. The Department has erroneously assessed taxes against CALE. This assessment will affect the substantial interests of CALE and the political subdivisions of this state by improperly taxing these transactions, thereby depriving CALE and the governmental entities their lawful tax exemption rights.

42. This assessment will have a chilling effect on the ability of CALE to do business with the political subdivisions of this state, as it will illegally increase the cost of doing business with the government.

WHEREFORE, Petitioner, CALE PARKING SYSTEMS USA, INC., requests a declaration that Respondent, STATE OF FLORIDA, DEPARTMENT OF REVENUE's, assessment of sales and use taxes as set forth herein is null and void, award Petitioner its fees and costs of bringing this action pursuant to Fla. Stat. 120.80(14), and for such other and further relief as may be appropriate.



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