UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2445

September Term, 2014

CONTINENTAL SURFACES, LLC

v.

COMPTROLLER OF THE TREASURY, COMPLIANCE DIVISION

Graeff,
Berger,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: May 5, 2016

Continental Surfaces, LLC ("Continental"), appellant, challenges a decision by the Maryland Tax Court upholding the Comptroller of the Treasury's (appellee) assessment that Continental was required to pay $408,959.39 to satisfy a tax deficiency resulting from unpaid sales and use tax on certain purchases and sales. On December 14, 2014, the Circuit Court for Prince George's County upheld the decision of the tax court. Continental appealed to this Court and now raises the following questions for our review:

I. "Whether the Maryland Tax Court erred when it determined that Continental Surfaces owed a tax . . . because Continental Surfaces did not intend to resell the silestone slabs it purchased from American Silestone and Granite, Inc. and Mercury Supply."

II. "Whether the Maryland Tax Court erred when it determined Continental Surfaces owed a tax . . . on the basis that the sales to Artelye were not resales excluded from sales tax requirements."

III. "Whether the Maryland Tax Court erred when it determined that Continental Surfaces owed a tax . . . on sales to Pittsburgh and Continental USA."

For the reasons set forth below, we affirm the judgment of the circuit court.

BACKGROUND

In 2008, the Comptroller initiated an audit of Continental Surfaces, LLC, a Maryland company owned by Peter Komorowski. Continental obtains granite and silestone and fabricates countertops from this stone.[1] Although it resells a portion of the slabs it purchases, Continental sells the majority of countertops it fabricates to companies that install the countertops in homes and apartment buildings.

[1] Silestone is an engineered stone used in countertops and is composed of stone pieces and an adhesive.

The results of the audit led to a finding of a deficiency in the payment of sales and use tax in several areas: (1) capital assets in the amount of $400.00; (2) material purchases of $117,013.58; (3) expenses of $8,380.85; (4) equipment leases of $7,056.27; (5) sales of $299,502.33 to Continental Surfaces of Pittsburgh, LLC ("Continental Pittsburgh"), Continental USA Kitchen and Bath, LLC ("Continental USA"), and Artelye Marble & Granite ("Artelye"); and (6) sales to United Marble of $2,677.07.[2] Only the material purchases and the sales to Artelye, Continental USA, and Continental Pittsburgh are at issue in this appeal.[3] The Comptroller found that Continental did not pay sales and use tax on certain purchases of slabs of silestone from two companies, American Silestone & Granite, Inc. ("American") and Mercury Supply. The Comptroller also assessed a tax deficiency due to a failure of Continental to collect sales tax on sales of countertops to Continental USA and Continental Pittsburgh, two companies also owned by Komorowski, and on sales of silestone slabs to Artelye, a fabricator and installer of countertops.

[2] To calculate the total unpaid tax, the Comptroller audited a sample period, October 1, 2007, through December 31, 2007, and used Continental's purchases and sales in this period to determine the level of underpayment of the sales and use tax. This sample was projected over the audit period, July 1, 2004, through June 30, 2008. Continental does not challenge the accuracy of the projection, and only disputes whether its purchases and sales are subject to the tax.

[3] Continental did business with United Marble & Granite, for only a portion of the four-year audit period, so the Comptroller considered these transactions independently and did not project them over the whole audit period.

The Comptroller issued his notice of final determination on September 12, 2011, which was upheld by a hearing officer, and Continental petitioned the tax court for review. A hearing was held in the tax court on June 19, 2013, in which two witnesses testified: Continental's comptroller and the Comptroller's auditor.

On October 31, 2013, in a memorandum opinion, the tax court upheld the Comptroller's assessment in substantial part.[4] Continental petitioned the circuit court to review the judgment of the tax court. The circuit court upheld the decision of the tax court on December 15, 2014, and Continental filed its appeal in this court on January 14, 2015. Additional details will be discussed below.

DISCUSSION

Because the tax court is an adjudicative administrative agency, its decisions are subject to the same standards of judicial review as the adjudicatory decisions of other administrative agencies as provided by the Maryland Administrative Procedure Act. *See* Md. Code (1988, 2010 Repl. Vol., 2015 Supp.), Tax-General Art. ("Tax-Gen.") § 13-532(a) (incorporating §§ 10-222 and 10-223 of the State Government Article of the Maryland Code); *NIHC, Inc. v. Comptroller of Treasury,* 439 Md. 668, 682 (2014). When reviewing an administrative decision from the Maryland Tax Court, we generally

[4] The tax court found good cause to waive penalties and abate the 2% interest charged on Continental's assessment because of the two-year delay in the Comptroller's issuance of a final determination. *See Frey v. Comptroller of Treasury*, 422 Md. 111, 186-87 (2011), *cert. denied*, 132 S.Ct. 1796 (2012). The Comptroller did not appeal this adverse ruling. The Comptroller also conceded that Continental was entitled to an exemption with respect to its leases on machinery used in production, which reduced the tax assessment by $7,056.27.

review that decision directly, not the decision of the circuit court on judicial review. *Supervisor of Assessments v. Stellar GT*, 406 Md. 658, 669 (2008) (Citation omitted).

A reviewing court must affirm the tax court if its order "is not erroneous as a matter of law" and if the order "is supported by substantial evidence appearing in the record." *CBS Inc. v. Comptroller of the Treasury*, 319 Md. 687, 697-98 (1990) (quoting *Ramsay, Scarlett & Co. v. Comptroller,* 302 Md. 825, 834 (1985)). Under the substantial evidence standard, a "reviewing court may not substitute its judgment for the expertise of the agency; [the court] must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid; and . . . it is the agency's province to resolve conflicting evidence" and to draw inferences from that evidence. *Ramsay, Scarlett & Co.*, 302 Md. at 834-35. As with other agencies, a reviewing court will afford great weight to the Comptroller's "legal conclusions when they are premised upon an interpretation of the statutes that [it] administers and the regulations promulgated for that purpose." *Frey v. Comptroller of Treasury,* 422 Md. 111, 138 (2011), *cert. denied,* 132 S.Ct. 1796 (2012). The Comptroller (and upon review, the tax court) presumes that a sale is subject to tax, and the burden rests upon the vendor or purchaser (as the case may be) to prove that a sale is not subject to tax. *See* § 11-103 (instructing that a "rebuttable presumption exists that any sale in the State is subject to the sales and use tax" and that "[t]he person required to pay the sales and use tax has the burden of proving that a sale in the State is not subject to the sales and use tax").

This case involves the Comptroller's assessment of sales tax on purchases made by Continental and on products sold by Continental. Continental contests three conclusions reached by the tax court: 1) that taxes were owed on its purchases of silestone; 2) that taxes were owed on its sales to Artelye; and 3) that taxes were owed on its sales to Continental USA and Continental Pittsburgh. We address each in turn.

I. Continental's Purchases

Continental purchased slabs of silestone from two sources, American Silestone & Granite, a New Jersey company, and Mercury Supply, a Maryland company owned by Komorowski. The Comptroller determined that the purchases on which tax was not paid in the audit period gave rise to a tax deficiency of $117,013.58. Continental did not provide resale certificates to American or Mercury Supply, which would have waived the vendors' obligation to collect tax on the purchases.[5] Following repeated requests from the Comptroller, Continental could not provide documentation indicating which slabs were resold, and consequently would have been exempt from the tax. Similarly, during the tax court hearing, Continental's assistant comptroller was unable to say what amount or what percentage of these sales were resold as slabs.

The tax court found that "[a]lthough there was some evidence that some of the silestone slabs" were resold, Continental "provided no records to indicate how many silestone slabs were actually resold." The court held that "[t]he mere fact that the

[5] A resale certificate certifies that a business is acquiring tangible personal property for the purpose of resale. *See* Tax-Gen. § 11-408(b); *infra* p. 11.

Petitioner intended for the silestone purchases to be resold [did] not negate" Continental's obligation to pay sales tax on those purchases.

Continental now argues that the tax court erred in determining that it was responsible for payment of sales taxes on its purchases of silestone from American and from Mercury Supply. It contends that the Tax-General Article imposes "absolute liability" on the seller, and, accordingly, the Comptroller should have pursued American and Mercury Supply to obtain the unpaid taxes. The Comptroller asserts that the Tax-General Article imposes a concurrent duty on the purchaser and seller to pay the taxes.

With some exceptions, the Tax-General Article imposes a tax on retail sales in Maryland, i.e. sales of tangible personal property.[6] §§ 11-101(h), -102(a). Although the vendor, under normal circumstances, is required to collect the sales tax from the purchaser, *see* Tax-Gen. § 11-403, if the purchaser does not pay the sales tax at the time of purchase, the purchaser is liable to pay the tax. The relevant statutory provisions cannot be more clear. Pursuant to Tax-Gen. § 11-501(a), a buyer who fails to pay the sales and use tax on a purchase shall file a sales tax return with the Comptroller.[7] With that return, a buyer must remit the amount of tax due to the Comptroller. Tax-Gen. § 11-

[6] In this context, the Tax-General Article defines a "sale" as a transaction for a consideration in which "title or possession of property is transferred or is to be transferred absolutely or conditionally by any means, including by lease, rental, royalty agreement, or grant of a license for use[.]" Tax-Gen. § 11-101(i)(1).

[7] "The return shall state for the period that the return covers: (1) the total value of the tangible personal property or taxable service that is subject to the sales and use tax; and (2) the sales and use tax due." Tax-Gen. § 11-501(b).

601(a). Moreover, the buyer is personally liable for the sales tax and for the interest and penalties of the tax, if the buyer has not paid the tax to the vendor. Tax-Gen. § 11-601(c).

Continental maintains that the Court of Appeals, in *Comptroller of Treasury, Retail Sales Tax Division v. Atlas General Industries*, 234 Md. 77 (1964), and in *Rockower Brothers v. Comptroller of Treasury*, 240 Md. 379 (1965), recognized the "absolute liability" of the vendor to pay sales tax. However, even a cursory reading of both cases reveals that the Court acknowledged that a *purchaser* can be liable for payment of sales taxes as well. *Rockower Brothers*, 240 Md. at 391 ("[T]he sales tax act imposes primary liability on the purchaser to pay the tax" (Citation omitted)); *Atlas General*, 234 Md. at 83 (recognizing that the burden of proof that a sale is not subject to tax can rest on the purchaser). A statement that a vendor is an alternate taxpayer, and as such, the vendor is "absolutely bound" to see that the sales tax reaches the Comptroller, does not diminish the duty of a purchaser to pay the tax. *See Rockower Bros.*, 240 Md. at 392.

Continental next argues that because it purchased the silestone with the intention of reselling, the purchase is exempt from sales tax. Tax-Gen. § 11-101(h)(3)(ii) provides that a sale of tangible personal property is exempt from sales tax if, among other things, the purchaser intends to: "1. resell the tangible personal property in the form that the buyer receives or is to receive the property; [or] 2. use or incorporate the tangible personal property in a production activity as a material or part of other tangible personal property to be produced for sale[.]"

However, under the Comptroller's regulations, if any person purchases tangible personal property for resale without paying the tax—e.g. under the exemption just outlined—and subsequently converts the property to personal use, that person "shall include the cost of that portion converted to the buyer's personal use as a purchase subject to the sales and use tax on the return to be filed for the period in which the property was converted."[8] COMAR 03.06.01.07B, C. Thus, even if Continental had the intention of reselling the silestone it purchased, when it did not provide proof of which silestone it resold, it was deemed to have converted the stone to personal use and was required to pay sales tax to the Comptroller.

Continental contends that "[t]here was no evidence whatsoever, let alone substantial evidence, that the purchases were made for any other purpose than resale." However, as noted above, the intent of the purchaser matters only in determining whether the vendor had an obligation to collect the tax, not whether the purchaser must ultimately pay it. The Tax-General Article imposes a rebuttable presumption "that any sale in the State is subject to the sales and use tax[.]" § 11-103(a). Further, the person required to pay the sales tax—in this case, Continental—"has the burden of proving that a sale in the State is not subject to the sales and use tax." § 11-103(b). Continental was required to demonstrate to the Comptroller and the tax court that the purchases of silestone were not converted to personal use and, instead, were resold. The tax court concluded that "Although there was some evidence that some of the silestone slabs were fabricated by

[8] As used here, "personal use" means a non-resale use.

the Petitioner and was sold to third parties, [Continental] has provided no records to indicate how many silestone slabs were actually resold." From our review of the record, the tax court did not err in concluding that Continental did not meet its burden to show which purchases were not subject to the tax, and did not err in upholding the assessment of the Comptroller.[9]

II. Sales to Artelye

During the audit period, Continental sold silestone slabs to Artelye, and did not collect sales tax on the transaction. After the audit period, Continental received a resale certificate from Artelye, indicating that Artelye intended to resell the slabs. At the tax court hearing, Continental's assistant comptroller testified that it was Continental's understanding that Artelye intended to resell the silestone slabs, and that Continental did not know or have any reason to know that Artelye would not resell the slabs.

The Comptroller, however, did not consider the resale certificate valid, because he concluded that Continental knew or should have known that Artelye was not, in fact, in the business of reselling silestone slabs. The Comptroller's auditor testified that based on his experience auditing countertop businesses, his conversations with Joseph Pleta,

[9] Continental also argues that the tax court committed legal error because it considered Continental's failure to provide a resale certificate as evidence of Continental's failure to resell the slabs. Continental argues that the resale certificate provision affects the "the duty of a vendor to collect the sales and use tax," and therefore cannot be used against the purchaser. The argument, however, becomes circular because Continental had to present a resale certificate in order for the vendor to waive the sale tax on the purchase. Ultimately, Continental did not present a resale certificate, and still did not pay tax on its purchases. The tax court did not err in making reference to the resale certificate in its discussion of Continental's liability for the sales tax on its purchases.

Continental's comptroller, and Robert Dykes, Continental's assistant comptroller, and his review of Artelye's website, he determined that Continental knew or should have known that Artelye's business consisted of installing the slabs it purchased from Continental, not of reselling those slabs to other installers.

Addressing Artelye's business model of installation (as opposed to resale), the Comptroller's auditor testified that Continental was required to collect the sales tax, despite the existence of the resale certificate, because, upon installation in real property, the countertops lost their character as tangible personal property. In the opinion of the Comptroller, because the retail sales were not of tangible personal property, the resale certificates could not relieve Continental of its duty to collect taxes on the sales.[10] Continental did not provide affirmative evidence that Artelye resold the silestone.

The tax court concluded that, even though Continental received a resale certificate,

> the evidence suggests that Artelye was in the business of fabricating and installing countertops but was not in the business of selling slabs. There is no evidence that Artelye resold the slabs. [Continental] knew or should have known that the slabs were not resold and thus were subject to sales tax at the time of the sale.

On appeal, Continental argues that its sales of silestone to Artelye were not subject to the sales tax because it obtained a resale certificate from Artelye and because there was no substantial evidence that Artelye did not resell the silestone.

[10] The tax court did not rely on this second basis to uphold the Comptroller's assessment of liability on Continental for its sales to Artelye. We similarly do not address it.

Section 11-401(a) of the Tax-General Article requires vendors, as trustees for the State, to collect sales tax from the buyers of their good and services.[11] As noted above, vendors and purchasers have concurrent obligations to pay sales tax. Consistent with this duty, the Tax-General Article "imposes personal liability on the vendor for failure to collect sales tax from purchasers of tangible personal property and pay it over to the Comptroller."[12] § 11-601(c)(2); *Chesapeake Indus. Leasing Co. v. Comptroller of Treasury*, 331 Md. 428, 434-35 (1993).

However, in certain circumstances, a vendor is excused from its obligation to collect sales tax. Because "[i]t is the intent and purpose of the sales and use tax acts 'to impose the tax on the final purchaser or ultimate consumer and to avoid a pyramiding of the tax,'" *Comptroller of the Treasury v. Fairchild Engine & Airplane Corp.*, 227 Md. 252, 257 (1961) (Citation omitted), the purchaser who intends to resell the property he or she buys "is not required to pay the tax" because the purchaser "is not the ultimate consumer, but, rather, the tax must be paid by the final purchaser of the . . . article[,]"

[11] Section 11-401 states:

> (a) A vendor is a trustee for the State and is liable for the collection of the sales and use tax for and on account of the State.
>
> (b) A vendor has the same rights to collect the sales and use tax from a buyer and the same rights regarding the nonpayment of the sales and use tax by a buyer that the vendor would have if the sales and use tax were a part of the purchase price of the tangible personal property or taxable service at the time of the sale.

[12] In this context, a vendor is defined as a business that "sell[s] or deliver[s] tangible personal property" in the State. § 11-701(c).

Comptroller of Treasury v. Am. Cyanamid Co., 240 Md. 491, 494-95 (1965) (citing *Fairchild Engine & Airplane*, 227 Md. at 257).

Section 11-408(b) helps avoid pyramiding by absolving the vendor of the responsibility to collect sales tax from a buyer if the buyer provides the vendor with a signed resale certificate, which certifies that the buyer is not the end-user and will be reselling the product to another buyer—one who will eventually pay the sales tax.[13]

However, a "vendor may not accept a resale certificate if the vendor knows or should know that the sale is not for the purpose of resale." Tax-Gen. § 11-408(b)(3)(i); *see also* COMAR 03.06.01.14G ("A vendor may not accept a resale certificate at any time, including the 60-day grace period, if at the time of acceptance the vendor knows or should know that the sale is not for resale"). Although a resale certificate waives a vendor's obligation to collect the sales tax at the time of the sale, if the certificate is subsequently determined to be invalid, the vendor is responsible for overcoming the presumption that the sale is subject to the tax. *See* § 11-103.

[13] The resale certificate must meet the following requirements:

> (i) [be] in the form that the Comptroller requires by regulation;
> (ii) state[] the name and address of the buyer;
> (iii) 1. provide[] the Maryland sales and use tax registration number of the buyer
>
> * * *
>
> (iv) contain[] a statement to the effect that the tangible personal property or taxable service is bought for the purpose of resale.

Tax-Gen. § 11-408(b)(1).

Continental first insists that the Comptroller cannot tax it both as a buyer for failing to pay taxes on its purchases and as a vendor for failing to collect sales tax from its purchasers. However, the General Assembly, by enacting the sales tax provisions of Tax-General Article, has placed payment obligations on both vendors and purchasers. Accordingly, when one entity acts in both roles during the course of its business, and has not provided records showing which of its purchases were resold and which were converted to personal use, the Comptroller may assess taxes on both purchases and sale.

Before the tax court, the Comptroller's witness testified that his understanding of Artelye's business was that Artelye was a fabricator and installer of countertops and that it did not resell the countertops that it purchased from Continental. The witness also testified that, based on his conversation with Continental's comptroller and assistant comptroller, Continental knew or should have known that Artelye was not reselling the silestone it bought from Continental. It is the duty of the trial court to weigh evidence and assess witness credibility. Even though Continental's assistant comptroller testified that Continental did not know or have any reason to know that Artelye would not resell the slabs, the tax court apparently found the Comptroller's witness convincing and credited his testimony over that of Continental's assistant comptroller. We discern no error in this regard.

Because Continental was operating under a legally and evidentiary insufficient resale certificate, it had the burden of proving that Artelye did, in fact, resell the silestone

in the same form to an end user or another retailer.[14] However, Continental did not present any evidence of Artelye's use and sales. In view of the presumption "that any sale in the State is subject to the sales and use tax," § 11-103(a), the tax court did not err in upholding the Comptroller's assessment on Continental's sales to Artelye.[15]

III. Sales to Continental USA and Continental Pittsburgh

As mentioned above, in addition to owning Continental Surfaces, LLC, the appellant in this case, Komorowski owned several other companies to whom Continental sold silestone and granite countertops, including Continental Pittsburgh and Continental USA. These companies installed countertops primarily in residential homes and apartments. The Comptroller accurately described the business model of Continental Pittsburgh and Continental USA as follows:

[14] Continental contends that the Comptroller did not provide sufficient evidence that Artelye did not resell the silestone. This contention, however, demonstrates a reversal of the burden of proof—it is Continental, the person required to pay the sales tax— that "has the burden of proving that a sale in the State is not subject to the sales and use tax." § 11-103(b); *Maryland-Nat'l Capital Park & Planning Comm'n v. State Dept. of Assessments & Taxation*, 110 Md. App. 677, 690 (1996) *aff'd,* 348 Md. 2 (1997) (Citation omitted).

[15] Continental requests, in a footnote in its brief, that we offset the assessment of tax on the purchases of slabs from Mercury and American by the amount assessed on its sales to Artelye because the transactions involve the same slabs. However, the testimony at the hearing established that Continental failed to provide the Comptroller with documentation of which of its purchases were resold to Artelye. If there were instances where this was the case for Continental's purchases and sales to Artelye, it was incumbent upon Continental to show which transactions were allegedly taxed twice. It is not self-evident from the record which of Continental's untaxed purchases were sold to Artelye.

> Approximately 80% of the countertops Continental fabricates are sold to Pittsburgh. Pittsburgh installs the countertops it purchases from Continental into homes pursuant to "furnish and install" contracts with retailers Home Depot and Lowe's. As an example, the contract with Home Depot provides that "Service Provider [Pittsburgh] represents and warrants that it understands the tax consequences of providing services . . . on a 'furnish and install' basis, according to which Service Provider is responsible for sourcing and delivering the merchandise to be installed by Service Provider hereunder." That contract further states that "furnish and install" and "installation only" services are generally not resold and thus generally do not require issuance of a resale certificate. Under a furnish-and-install contract, Lowe's or Home Depot is effectively a general contractor and Pittsburgh is a subcontractor. The countertops sold to Pittsburgh never became part of the inventory of Lowe's or Home Depot. . .
>
> Continental USA had contracts with the owners of seven high-rise apartment buildings to rehab apartments. Continental USA purchased the countertops from Continental for the apartment units it was rehabbing and installed those countertops into the residential apartment units.

Continental did not charge sales tax on the countertops it sold to Continental Pittsburgh or to Continental USA for installation into the residences. As with the sales to Artelye, even though both Continental Pittsburgh and Continental USA submitted resale certificates after the audit, the Comptroller determined that because the sales were made pursuant to residential installation contracts, the resale certificates did not relieve Continental of its obligation to collect tax on the sales. At the tax court hearing, Continental argued that its sales to Continental USA should be considered tangible personal property because the apartment buildings where the countertops were installed were properly considered commercial spaces under COMAR 03.06.01.19C(5). *See* discussion *infra*, page 18. With regard to its sales to Continental Pittsburgh, Continental argued "the interposition of Home Depot and Lowe's into this transaction makes a ton of

difference, because ultimately Home Depot and Lowe's are responsible for getting the slab of granite into the homeowner's home and installed."

The tax court found that "the evidence indicates that both companies contracted with third parties to provide countertops and install them into the residence of the third party customers." Consequently, it determined that the sale of the countertops to Continental Pittsburgh and Continental USA were "sale[s] of real property and not resales of tangible personal property." The tax court disagreed with Continental's "contention that the residential apartments where Continental USA installed countertops were in fact 'commercial spaces' and therefore the countertops should be treated as tangible personal property." It concluded that the "[a]partments in which Continental USA installed the countertops were residences and not commercial spaces and the tax was properly applied."

Continental reiterates its arguments, contending that the tax court erred because Continental was not required to collect sales tax on its sales to Continental Pittsburgh and Continental USA because those sales were resales and were not installed in residential real property. The Comptroller responds that there was substantial evidence to support the tax court's conclusion that the sales were actually sales of real property and not resales of tangible personal property.

A "retail sale" includes "a sale of tangible personal property for use or resale in the form of real estate by a builder, contractor, or landowner[.]" Tax-Gen. § 11-101(h)(2)(i). Retail sales are subject to sales and use tax. Tax-Gen. § 11-102(a)(2);

COMAR 03.06.01.19A (providing that the "sale of tangible personal property to a person who will use or resell it in the form of real property is taxable"). Notably, the Comptroller's regulations specify that tangible personal property that is incorporated into real property loses its identity as personal property and becomes real property. COMAR 03.06.01.19A (advising that "a person who constructs, improves, alters, or repairs real property shall pay the tax on all materials purchased, which will be incorporated into real property in such a manner that the materials will lose their identity as tangible personal property"). The resale certificates discussed in the previous section relieve a vendor of its obligation to collect sales tax on tangible personal property, but do not relieve a vendor of its obligation to collect tax on sales of real estate. *See* Tax-Gen. § 11-408(b).

"The determination of whether material installed or annexed to real property will become a part of the real property depends principally upon the intention of the person making the annexation." COMAR 03.06.01.19C(1). The intention of the party installing the material can be gleaned from "(a) Nature of the article annexed; (b) Mode of annexation; (c) Purpose for which it was annexed; and (d) Practicality and feasibility of removal of the annexed article." COMAR 03.06.01.19C(4). If the installed material "permanently and substantially improve[s] land, a building, or other real property, the material will be considered to have become real property. An installed or annexed item which is an integral, necessary, and expected part of real property constitutes a permanent and substantial improvement to the real property." COMAR 03.06.01.19C(2).

In this case, the Comptroller determined that, because the sales of countertops were made in accordance with furnish and install contracts, whereby Continental USA and Continental Pittsburgh would install the countertops in residential properties, the sales were taxable as sales of real property. Countertops are permanent fixtures that improve a building and are an expected part of a residential space. Because Continental's purchasers intended to "resell" the countertops in the form of real property, we discern no error in the conclusion that the sales were taxable. *See* COMAR 03.06.01.19C. Further, Continental cannot rely on resale certificates provided by Continental Pittsburgh and Continental USA because resale certificates apply only to sales of tangible personal property. Tax-Gen. § 11-408(b). Thus, the "furnish and install" contracts obviated the applicability of the resale certificates.

The regulations contain an exception for improvements on commercial property, which provides that "[a]s a general rule, counters, countertops, and cabinetry installed in commercial spaces will be treated as tangible personal property." COMAR 03.06.01.19C(5). However, "[d]oors, windows, molding, built-ins, and kitchen cabinetry installed in residential or commercial spaces will be treated as realty." *Id.*

Continental argues that, with respect to sales to Continental USA, the countertops were not installed in residential spaces, but instead were installed in commercial apartment buildings at the direction of the buildings' owners. Continental's argument fails to provide a distinction between its installation in commercial and residential spaces. Although an apartment building's common spaces—such as the foyer and stairwells—

may be considered commercial spaces, Continental's witness described its business as completing rehabs of the inside space of residential apartments, not the common space in the building.[16] The sales to Continental USA, thus, do not fall within the commercial spaces exemption for real property.[17]

Similarly, Continental cannot avoid its duty to pay tax on its sales to Continental Pittsburgh by arguing that the sales were made pursuant to a contract with a third party. Continental Pittsburgh purchased the countertops pursuant to furnish and install contracts, in this instance, with Lowes and Home Depot, whereby Pittsburgh was a subcontractor that purchased and installed countertops in residential homes. It matters not that Continental Pittsburgh purchased the countertops pursuant to a contract with a third party. The Comptroller's regulations provide "[t]axability is not affected by language in a real property construction contract or subcontract . . ." COMAR 03.06.01.19B. Accordingly, Continental's sales to Pittsburgh, which installed the

[16] Continental relies on *Admiral Insurance Co. v. American National Savings Bank, F.S.B.*, 918 F. Supp. 150, 152 (D. Md. 1996), a case which discussed the definition of a commercial building under an insurance contract. However, because the insurance contract articulated its own definition of commercial building, the case is inapplicable to the current proceeding, which concerns a definition of a commercial space under the Maryland tax statute.

[17] In a different context, the Comptroller has stated that "[a] commercial or industrial building is any building or part of a building used for any purpose other than as a permanent private residence. Included are apartment buildings (other than the interior of individual-occupied apartments) . . ." Comptroller of Maryland, *Spotlight on Maryland Taxes - Janitorial and Cleaning Services*, available at http://taxes.marylandtaxes.com/Business_Taxes/Business_Tax_Types/Sales_and_Use_Tax/Tax_Information/Special_Situations/Janitorial_Services.shtml (last accessed April 26, 2016).

countertops in residences, constituted retail sales, and Continental was required to collect taxes on the sales.[18]

In summary, the record contained substantial evidence for the tax court to conclude that 1) Continental failed to pay taxes on purchases that it could not prove it resold; 2) Continental failed to collect taxes from Artelye when it knew or should have known that Artelye would not resell the silestone; and 3) Continental failed to collect taxes on retail sales of materials that were to be installed in residential properties. We affirm the judgement of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[18] Continental argues, for the first time on appeal, that its sales to Continental Pittsburgh were not taxable because the countertops were shipped to and installed in Pennsylvania. *See* COMAR 03.06.01.25. Continental did not make this argument in either the tax court or the circuit court. "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). Here, Continental did not ask the tax court to consider whether COMAR 03.06.01.25 applied to its sales to Continental Pittsburgh, and the tax court did not address this issue in its memorandum opinion. We will not now decide an issue that was not raised and decided below.