

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 1999-10-26-014 / NOT PRECEDENTIAL
ID: CR980002
DATE: 10-26-99
DISPOSITION: SUSTAINED
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Claimant is a wholly owned subsidiary of CLAIMANT Supply Company ("CLAIMANT").
2. In the fall of 1996, the books and records of CLAIMANT for the period of July, 1993 through June, 1996 were audited by an auditor for the Tax Commission.
3. During the course of the CLAIMANT audit, an issue of whether an overpayment of sales tax could be credited against the results of the audit was discussed between the parties CLAIMANT'S REPRESENTATIVE, the auditor and the auditor's supervisor. The letter forwarded to the auditor indicates that the overpayment occurred during the period of January, 1996. CLAIMANT'S REPRESENTATIVE testified that the overpayment consisted of city sales tax for YOUR CITY, Oklahoma which had been erroneously paid on sales transactions between COMPANY ONE and CLAIMANT.
4. Pursuant to these discussions, CLAIMANT'S REPRESENTATIVE was advised that the overpayment could not be included in the audit, that the overpayment would have to be treated as a separate issue and that a claim for refund would have to be filed for the overpayment.
5. Neither the auditor nor the audit supervisor could remember having any discussions with CLAIMANT'S REPRESENTATIVE concerning COMPANY ONE'S request for refund during the CLAIMANT audit.
6. In June of 1997, the books and records of Claimant for the period of June, 1994 through May, 1997 were audited by the same auditor for the Tax Commission.
7. For purposes of the audit, Claimant executed on June 23, 1997, an Assessment and Refund Statute of Limitation Waiver Agreement whereby the statute of limitations on the assessment or refund of taxes for the period of June, 1994 through May, 1997 was extended to December 31, 1997.
8. The audit write-up indicates that the auditor "reviewed the 'Sales Tax Listing' (invoice register) for all months." The write-up also indicates that of the transactions determined to be taxable "[S]everal were delivered out of YOUR CITY limits."

9. The auditor initially scheduled certain of the sales transactions between COMPANY ONE and Claimant as subject to state and YOUR CITY sales tax because Claimant did not have a resale certificate for COMPANY ONE on file.

10. After being presented a copy of the letter from YOUR CITY stating that COMPANY ONE'S location was outside YOUR CITY limits of YOUR CITY, the auditor amended the audit to exclude YOUR CITY sales tax on these certain transactions.

11. The initial audit workpapers were also amended to exclude the sales transactions between Claimant and COMPANY TWO.

12. The aggregate amount of sales tax assessed for the audit period was \$6,356.22.

13. By letters dated October 30, 1996, February 24, 1997 and January 28, 1998, COMPANY ONE requested from Claimant a refund of YOUR CITY sales tax paid by COMPANY ONE to Claimant on materials shipped to COMPANY ONE'S location outside YOUR CITY limits of YOUR CITY during the period of October, 1993 through October, 1996.

14. CLAIMANT'S CONTROLLER, was the auditor's contact person during the COMPANY THREE audit. She admitted that she did not discuss COMPANY ONE'S refund request with the auditor and did not provide the auditor with either copies of COMPANY ONE'S letters or the invoices of COMPANY ONE'S transactions. She stated that the reason for her actions was the advice she received from CLAIMANT'S REPRESENTATIVE that COMPANY ONE'S refund request would have to be treated as a separate issue and could not be included in the audit results.

15. CLAIMANT'S REPRESENTATIVE advice to CLAIMANT'S CONTROLLER was based on his experience with the CLAIMANT audit. CLAIMANT'S REPRESENTATIVE also admitted that he did not provide the auditor with either copies of COMPANY ONE'S refund request letters or the invoices of COMPANY ONE'S transactions.

16. CLAIMANT'S CONTROLLER also testified that she did not file the claim for refund with the Tax Commission until February 17, 1998, not because of any information received from the auditor, but because she wanted to file one claim with the Tax Commission and she did not have all the information from COMPANY ONE.

17. The January 28, 1998 letter from COMPANY ONE to Claimant summed up the aggregate amount of the refund request and requested payment from Claimant. CLAIMANT'S REPRESENTATIVE testified that it was this letter that prompted Claimant to pay COMPANY ONE and to file the claim for refund.

18. The Division granted Claimant's refund request for the period of January, 1995 through June, 1996 and denied the request for the period of September, 1993 through December, 1994. The partial denial was based on the statute of limitations on refunds under Section 227(b) of the Uniform Tax Procedure Code, 68 O.S. 1991, § 201 et seq.

19. Claimant timely protested the partial denial and demanded a hearing.

20. Claimant has amended its refund request to the period corresponding to the audit period, or June, 1994 through June, 1996.

21. The amount in controversy is \$3,880.50.

ISSUES AND CONTENTIONS

Claimant couches the issue as one of equitable estoppel; i.e., whether the Division should be estopped from asserting that the refund request for the period of June, 1994 through December, 1994 is barred by the statute of limitations on refunds. In Support of its position, Claimant cites Rule 710:65-3-1(e) of the *Oklahoma Administrative Code* and argues that but for the advice they received during the CLAIMANT audit, they would have requested that the overpayment be included in the COMPANY THREE audit and the statute of limitations would not have expired on their claim for refund.

The Division contends that the denial of the partial refund claim is correct and should be sustained. In support of this contention, the Division argues that Claimant failed to provide the auditor with proof of the overpayments prior to the close of the COMPANY THREE audit and in regard to that portion of the refund claim which was denied, failed to file its refund claim in a timely manner.

The undersigned finds that the doctrine of equitable recoupment is applicable in this cause. Therefore, the issue raised by Claimant, and the contentions and arguments of the parties are not addressed herein.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 1991, § 207.

2. "Equitable recoupment", as the phrase implies, is a rule of law which diminishes the right of a party to recover a debt, to the extent the party seeking to recover the debt holds money or property of the debtor without a moral right. *Black's Law Dictionary* 484 (5th Ed. 1979). Equitable recoupment is ordinarily a defensive remedy going only to mitigation of damages. *Id.*

3. In the tax context, the doctrine of equitable recoupment permits the set off of time barred refund claims against the assessment of additional taxes by the government. *United States v. Dalm*, 494 U.S. 596, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990). See, *Estate of Kasishke v. Oklahoma Tax Commission*, 541 P.2d 848, 852-853 (Okl. 1975). The principle has traditionally been limited to a single transaction, item, or taxable event receiving inconsistent tax treatment. *Id.* See, *Philadelphia & Reading Corp. v. United States*, 944 F.2d 1063, 1075-76 (3rd Cir. 1991) and *United States v. Forma*, 784 F.Supp 1132, 1138 (S.D.N.Y. 1992).

4. In *Estate of Kasishke*, supra, the Supreme Court of Oklahoma concluded that the entire estate tax return should be treated as a single transaction for purposes of recoupment", citing *American Motors Corp. v. Wisconsin Dept. of Revenue*, 64 Wis.2d 337, 219 N.W.2d 300, wherein the court found:

We see the difficulty and the debate on this point as arising out of the phrase, 'same transaction,' to which recoupment has traditionally been limited. It is true that recoupment has never been 'thought to allow one transaction to be offset against another,' but the question remains what is the 'same transaction' involved in claims for refunds or additional assessments in income tax cases for a single tax period. There is support for the narrower or stricter definition of 'same transaction' as involving only a particular item on a tax return or single event or transaction during the tax period. This limited or narrow definition of 'single transaction' in an income tax situation was rejected * * * in the *National Cash Register Company Case*. There the * * * court adopted a broader definition, holding that the entire year or tax period constituted the 'transaction' involved. The result of this broader test or definition is that either the state or the taxpayer can counter with a 'stale' claim, meaning one barred by the statute of limitations, so long as the same year or income tax period is involved. We see both equity and equality of treatment of the contending parties served by the *National Cash Register Company Case* approach.

5. Here, the audit period constitutes the 'same or single transaction'. Claimant remitted city sales taxes on certain sales to a company during the audit period. The Division has acknowledged that certain other sales with the same company were not subject to city sales tax during the audit period. Claimant's request for refund of the city sales taxes remitted during the audit period was filed subsequent to the expiration of the statute of limitations on refunds under 68 O.S. Supp. 1993, § 227(b). However, under the principles of equitable recoupment Claimant's time barred refund claim can be used to set off the assessment of additional taxes for the audit period. See, *Estate of Kasishke*, supra.

6. Claimant's protest to the denial of the claim for refund should be sustained under the doctrine of equitable recoupment. The assessment of additional sales taxes for the audit period should be set off by the amount of the claim for refund. If Claimant has paid the additional taxes assessed, a credit in the amount of \$3,880.50 should be allowed.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest to the denial of the claim for refund of Claimant be sustained.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was **NOT** deemed precedential by the Commission. This means that the legal conclusions are not generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.