

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2001-11-13-009 / NOT PRECEDENTIAL
ID: P9600131
DATE: 11-13-01
DISPOSITION: SUSTAINED IN PART / DENIED IN PART
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In the early 1980's, Protestant started the business of performing letter press work for other printers, including perforations for tear outs, scoring for folding, blind embossing and consecutive numbering.

2. By the mid-1980's, Protestant also began performing some work for the general public, including business cards and letter heads.

3. At this time, Protestant being aware he should charge and collect sales taxes on his sales to the general public telephoned the Tax Commission to inquire as to a sales tax permit.

4. At all times relevant, the vast majority of Protestant's work was performed for other printers. Only 5% to 25% of his work per month was performed for the general public.

5. According to Protestant, after explaining the nature of his work and the small amount he did for the general public, he was told that the Tax Commission would rather not trouble with such a small amount and that he should pay tax on everything he purchases.

6. Protestant testified that his purchase invoices were the subject of the initial audit. He stated that he was assessed additional taxes on his purchases which he paid. He further testified that subsequent to the initial audit, the auditor came back to review his sales invoices.

7. The Division admits that Protestant paid sales tax on his purchases.

8. The aggregate amount in controversy is \$5,783.84, consisting of sales tax in the amount of \$4,336.71, interest accrued through March 1, 1996, in the amount of \$1,013.30, and penalty in the amount of \$433.83.

9. The audit encompassed the period of February 1, 1993 through December 31, 1995.

10. The auditor testified that the assessment results from Protestant's failure to charge sales tax on taxable sales.

11. Protestant testified that the only purchases he makes are for his sales to the general public. He stated that the other printers provide all of the ingredients for his sales to them.

ISSUE AND CONTENTIONS

The issue presented for decision is whether the Division should be estopped from asserting that the taxes are due on Protestant's sales to the general public.

Protestant contends that but for the instructions he received from the Division and the refusal to issue him a sales tax permit, he would have collected sales tax on his sales to the general public.

The Division contends that the assessment should be upheld. In support of this contention, the Division cites 68 O.S. 1991, § 1354(E) and argues that sales by printers are subject to sales tax. In addition, the Division cites 68 O.S. 1991, § 1365(C) and argues that the vendor has the burden of proving a sale is not subject to sales tax.

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. Each sale of an item of tangible personal property, unless otherwise exempted by the provisions of the Oklahoma Sales Tax Code¹, is subject to sales tax, 68 O.S. 1991, § 1354(1)(A)²; including the sale of "[p]rinting or printed matter of all types, kinds, or character". 68 O.S. 1991, § 1364(E).

3. The incidence of the levy of sales tax is on the consumer who is required to pay the tax to the vendor. 68 O.S. 1991, § 1361(A). The vendor is required to collect the full amount of the sales tax from the consumer, 68 O.S. 1991, § 1361(A); and report, 68 O.S. 1991, § 1365(A); and remit the same to the Tax Commission, 68 O.S. 1991, § 1362(A). The vendor is personally liable for the full amount of the sales tax whether or not the tax is collected from the consumer. 68 O.S. 1991, § 1361(A).

¹ 68 O.S. 1991, § 1350 et seq.

² This section provides:

1. There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, Section 1350 et seq. of this title, an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds of each sale of the following:

(A) Tangible personal property, except newspapers and periodicals;

4. The essential elements of an equitable estoppel are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the knowledge, actual or constructive, of the real facts; (3) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question by the party to whom the conduct is made; (5) reliance, in good faith, upon the conduct; and (6) action or inaction based thereon of such a character as to change the position or status of the party to his injury, detriment, or prejudice. See, **Board of County Commissioners of Marshall County v. Snellgrove**, 428 P.2d 272 (Okl. 1967). See, generally, 28 Am Jur 2d **Estoppel and Waiver** § 35.

5. As a general rule, estoppel does not apply against the state acting in its sovereign capacity, and the Tax Commission as an agency of the state is not bound by the unauthorized acts of its officers; **State ex rel. Cartwright v. Dunbar**, 618 P.2d 900, 911 (Okl. 1980), or because of the mistakes or errors of its employees, **State ex rel. Oklahoma Tax Commission v. Emery**, 645 P.2d 1048, 1051 (Okl. 1982). An exception is applicable, however, where the facts and circumstances show the interposition of estoppel will further some prevailing principle of public policy or interest; **Burdick v. Independent School District**, 702 P.2d 48 (Okl. 1985), or where the officers and employees act within their authority, **State ex rel. Commissioners of Land Office v. Lamascus**, 263 P.2d 426 (Okl. 1953).

6. Here, Protestant did not establish the essential elements of an equitable estoppel. Accordingly, the Division is not estopped from asserting the taxes are due on Protestant's sales to the general public.

7. "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.*

8. 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).

9. 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.

10. Here, the audit period constitutes the "same or single transaction." Under the doctrine of equitable recoupment, the sales taxes paid by Protestant on his purchases which were utilized in making sales to the general public should be set off against the assessment of sales tax on his sales to the general public.

11. Protestant's protest to the proposed sales tax assessment should be sustained to the extent of a set off of the sales taxes paid against the sales taxes assessed. Otherwise, Protestant's protest should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest of Protestant be sustained in part and denied in part. It is further DETERMINED that the amount in controversy be revised in accordance herewith and that the resultant amount of sales taxes, if any, be fixed as the deficiency due and owing. It is further DETERMINED that all penalty and interest, accrued and accruing, be waived.

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.