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Miscellaneous Tax Determinations
Alcoholic Beverage Tax
A-Z

BUREAU OF LAW

MEMORANDUM

Schaefer, F. & M.,
Brewing Company

TO: Commissioners Murphy, Palestin & Macduff

FROM: Martin Schapiro, Hearing Officer

SUBJECT: F & M SCHAEFER BREWING COMPANY

Period from January 1962 through September 1963
Article 18

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N.Y., on December 24, 1964 and continued on February 25, 1965. The appearances and the evidence produced were as shown in the stenographic minutes and the exhibits submitted herewith.

On July 25, 1964 a determination of tax was issued in the amount of $5,060.58 for the period from January 1962 through September of 1963. Since the sum of $790.72 had been paid pursuant to reports filed by the taxpayer, the amount of $4,269.86 was outstanding. None of the items are contested by the taxpayer other than that of a disallowance of losses unaccountable during that period in the amount of 2144,097.87 gallons at $ 1/3¢ per gallon amounting to $4,803.28.

At hearings held, the taxpayer argued that these represent thefts by F & M Schaefer Brewing Company personnel. Indictments were returned against a few of the personnel and affidavits submitted tending to establish a theft of a very minimum amount of beer. The remaining amount remains unaccounted for, but there is a strong probability and likelihood that such amounts were stolen by the taxpayer's employees.

The taxpayer during the audit period involved filed a claim with their insurer in the amount of $236,000. On August 5, 1965, the taxpayer settled the insurance claim with the insurer for $100,000 and signed a general release assigning all right and interest to any claim to the insurance company.

Four issues are involved herein. The first one is whether or not the taxpayer has overcome the presumption set forth in section 428 of Article 18 of the Tax Law that, "All alcoholic beverages which have come into the possession of a distributor shall be deemed to have been sold or used by such distributor unless it shall be proved to the satisfaction of the tax commission that such alcoholic beverages have not been sold or used." I believe that the evidence received herein warrants the presumption of theft as alleged by the taxpayer. This is born out by the fact

that under a Blank Claim Policy issued by the insurer covering thefts by employees, the insured has received $100,000 in settlement. However, although the facts indicate that a loss by theft occurred, the second issue, which is the primary one, is whether or not a "theft" is a "sale" under section 478 subdivision 18 of the Tax Law. Such subdivision prior to its amendment by Chapter 550 of the Laws of 1938 defined the word "sale" to mean "any transfer, exchange or barter in any manner or by any means whatsoever for a consideration." The law was amended in 1938 to eliminate the words "for a consideration" in order that gifts made by a distributor would also be taxable (letter of February 11, 1938 by former Counsel to Maurice Whitney, Chairman, Committee on Taxation, Assembly Chamber).

Since the original law as enacted defined a sale as a transaction for consideration, it can be inferred that what was intended was a voluntary transfer. When the words "for consideration" were eliminated in order that gifts could be taxed, this did not change the concept of voluntariness of the transfer. I am, therefore, of the opinion that the theft did not result in a sale under Article 18 of the Tax Law.

It is to be noted that the Cigarette Tax Law, Article 20, was enacted defining the word "sale" in conformity with the definition used in Article 18 of the Tax Law. Article 18 and Article 20 of the Tax Law are unique in that other jurisdictions do not define the word "sale" as broadly as defined in our Tax Law, and is generally made dependent upon a transfer of title. For example, in an opinion of the California Attorney General to the State Board of Equalization (Opinion No. 46/34, October 28, 1946), the Attorney General was of the opinion that a liability for excise tax in the case of theft of distilled spirits was upon the taxpayer, if the theft occurred after title had passed to the purchaser, but that exemption could be claimed for the stolen spirits. The excise tax on distilled liquor does not specifically contain a provision for exemption in the case of a theft.

A question of theft of cigarettes was raised in the matter of R.H. Macy & Co., Inc. There, in two opinions dated November 24 and December 18, 1952, copies of which are in the file, former Counsel held that a tax was properly imposed upon a retail dealer on cigarettes which had been stolen from the dealer. The result reached was based upon the nature of imposition of the cigarette tax. Section 471 provides that "There is hereby imposed and shall be paid a tax (a) on all cigarettes possessed . . . for sale" (Emphasis Supplied). Furthermore, section 477, last paragraph, provides that, "The possession . . . of cigarettes in unstamped packages by any person other than an agent, shall be presumptive evidence that such cigarettes are possessed for purposes of sale or for purpose of use." (Emphasis Supplied) Moreover, section 473

provides for the affixing of a stamp upon cigarettes within 24 hours.

Subdivision 1 of section 424 of Article 18 of the Tax Law provides for the imposition of an excise tax at 3 1/3¢ per gallon upon beers and at different amounts per gallon upon other alcoholic beverages. Paragraph f of such subdivision provides for an excise tax upon all other liquors when sold or used within this state. The words "when sold or used within this state" are intended by Article 18 to apply to all beverages including beer. Thus, section 428 of the Tax Law provides for the filing of a return stating separately the number of gallons of beers, wines and liquors sold or used by such distributor in this state. Furthermore, section 429 makes the possession of alcoholic beverages a presumption that they have been sold or used. Article 18 in effect imposes an excise tax upon the sale or use of alcoholic beverages by distributors within the state. The cigarette tax, however, is imposed upon possession for sale or use.

The third issue is whether or not a use of the alcoholic beverage took place resulting in the proper imposition of tax. In accordance with section 428, subdivision 12 of the Tax Law which defines the word "use" as meaning, "any compounding or mixing of alcoholic beverages with other ingredients or other treatment of the same in such manner as to render them unfit or unsuitable for consumption as a beverage and also the actual consumption of alcoholic beverages as a beverage or otherwise" (Emphasis Supplied), the word "use" was inserted into the Tax Law by Chapter 94 of the Laws of 1934 at a time when the word "sale" meant a sale for a consideration. It can, therefore, be inferred that the word "use" implied a voluntary use and not an involuntary one.

The fourth issue herein is whether or not a sale took place on August 5, 1965 when the taxpayer subrogated its rights to the insurance company. The subrogation is in the form of a Release and Assignment Agreement which provides that, "The Insured has assigned and does hereby assign, sell, transfer and set over to the Surety all its rights, title and interest in relation to any and all items claimed in and by the said proof of loss, and all money that may be recovered by reason thereof, up to $100,000.00."

In the recent case of Consolidated Edison Company v. State Tax Commission, 23 A D 2d 477, the court held that insurance proceeds were not gross receipts pursuant to section 182 of the Tax Law. Under such reasoning, the indemnification of $100,000.00 is not gross receipts resulting from a sale. The taxpayer, however, has by the agreement sold all its rights, title and interest in relation to any and all items claimed in and by the proof of loss. The proof of loss filed with the insurer on December 18, 1964 lists under items various packages of beer in accordance with an attached

schedule. The question is, therefore, whether or not the subrogation herein results in a taxable sale. Although the Release and Assignment Agreement took place two years subsequent to the periods covered in the assessment, the attorneys have consented to the inclusion of the periods up to and immediately subsequent to the date of the assignment, if such assignment and subrogation becomes pertinent at arriving at a determination.

I am of the opinion that the assignment did not result in a sale as such word is defined in section 420, subdivision 18 of the Tax Law. Subrogation is an equitable right and the doctrine is clearly applicable where the policy contains the ordinary subrogation clause (see 45 C.J.S. section 1269). The issue here is whether or not the assignment and subrogation which took place on August 5, 1965 in addition to subrogating the claims of the insured to the insurer also transferred title to the beverages which were stolen. Where the insurance paid exceeds the loss and the insured has been paid in full for such loss, the insured cannot maintain an action against the wrong doer as he is no longer the real party in interest (see 31 N.Y. Jur section 1635). In such case it could be argued that title to the property had passed to the insurer. However, where as here, the loss exceeds the amount paid by the insurer, it has been held that the insured is still the legal owner of the entire cause of action (Par-X Uniform Service Corp. v. Emigrant Industrial Sav. Bank, 265 A D 888, 53 NYS 2d 16; Henderson v. Park Cent. Motors Service, 225 A D 788 232 NYS 511; Henderson v. Park Cent. Motors Service, 138 Misc. 183 244 NYS 489). It is appreciated that the legal ownership of the cause of action is not necessarily synonymous with legal ownership of the personal property underlying the claim. Similarly, words of transfer in the assignment of all rights, title and interest in relation to any or all items claimed are ordinary words of subrogation and do not necessarily transfer title to the items themselves.

I am, therefore, of the opinion that there has been no sale or transfer of the stolen items by virtue of the assignment and subrogation and that, accordingly, no tax can be imposed because of such subrogation. I have, therefore, prepared a proposed determination limiting myself to the period under review cancelling the assessments on the ground that the theft was not a sale or use upon which a tax could be imposed. Kindly return the file after disposition.

/s/ MARTIN SCHAPIRO
Hearing Officer

/s/ S. HECKELMAN
Approved

MS:ca
Enc.

June 28, 1966

STATE OF NEW YORK

STATE TAX COMMISSION

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IN THE MATTER OF THE APPLICATION :

OF :

F & M SCHAEFER BREWING CO. :

FOR A HEARING TO REVIEW THE DETERMINATION OF THE STATE TAX COMMISSION UNDER ARTICLE 18 OF THE TAX LAW FOR THE PERIOD COMMENCED JANUARY 1, 1962 AND ENDED SEPTEMBER 30, 1963 :

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F & M Schaefer Brewing Company, the taxpayer herein, having filed an application for a hearing to review the determination of the State Tax Commission with respect to alcoholic beverage taxes assessed under Article 18 of the Tax Law for the period commenced January 1, 1962 and ended September 30, 1963, and a hearing having been held on December 14, 1964 and continued on February 25, 1965 at the office of the State Tax Commission, 80 Centre Street, New York, N. Y. before Martin Schapiro, Hearing Officer of the Department of Taxation and Finance, the taxpayer having appeared by its officer and having been represented by Counsel, and the entire record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That a determination was issued on August 12, 1964 determining alcoholic beverage taxes under Article 18 of the Tax Law due and owing for the period January 1, 1962 through September 30, 1963 in the amount of $4,269.88; that this amount was arrived at, as set forth in the statement of audit changes dated July 21, 1964, by imposing a tax of $4,883.28 for the sale or use of 144,097.87 gallons of beer as losses unaccountable during the audit period, and by further crediting and debiting

certain overstatements and understatements of inventory which are not contested by the taxpayer.

(2) That said losses were disclosed as a result of an inventory of merchandise which showed a shortage of 144,887.87 gallons of beer.

(3) That the shortage was occasioned during the taxable period by theft by the taxpayer's employees without the knowledge of the taxpayer.

Upon the foregoing facts, the State Tax Commission hereby DECIDES:

(A) That a theft is not a sale or use upon which a tax may be imposed pursuant to Article 18 of the Tax Law.

(B) That, accordingly, that portion of the assessment imposing a tax of $4,803.28 upon the sale or use of the 144,887.87 gallons of beer is hereby cancelled, and the amount of $533.48 is hereby directed to be refunded to the taxpayer.

DATED: Albany, New York on the 8th day of July , 1966.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
President

/s/ IRA J. PALESTIN
Commissioner

/s/ JAMES R. MACDUFF
Commissioner