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Sales Tax Determination in A-2

BUREAU OF LAW

MEMORANDUM

Bethlehem Auto Laundry, Inc.

TO: Commissioners Murphy, Macduff and Conlon

FROM: Vincent P. Molineaux, Hearing Officer

SUBJECT: Bethlehem Auto Laundry, Inc.
Application to review determination of sales tax

A hearing on the above matter was held before me at Albany, New York on December 14, 1966.

The issue raised is whether the receipts from a customer-operated car wash are subject to the sales tax. In addition to a car wash operated by attendants, which taxpayer concedes to be taxable, and upon which the tax has been paid, taxpayer has two auto-self operated car wash stalls activated by a coin-operated device for which a quarter delivers the water, detergent, etc. through a cycle which is suppose to effect a wash with the assistance of the customer. In addition, there are machines which may be activated by a quarter or a dime which provide wax for waxing the car, which is delivered through the same wand as the wash service for 25¢, heat for drying the car for 10¢, a vacuum hose which operates for a prescribed period for 10¢, a dispenser for disposable towels sold for 10¢ or 25¢ a package, and white wall cleaner pads sold for 10¢.

The commodities, if taxable, are taxed under section 1105(a) of the Tax Law. The services, if taxable, are taxed under section 1105(c)(3).

Taxpayer claims that since the last sentence of section 1132(b) of the Tax Law provides that "no tax shall be collected from the customer upon receipts from retail sales of tangible personal property which would result in a tax of five mills or less", they are unable to collect the tax and consequently are not required to pay to the State a tax which they are not permitted to collect.

However, section 1137 of the Tax Law provides in part that "Every person required to file a return * * * shall, at the time of filing such return, pay to the tax commission the taxes imposed by" (Article 28) "as well as all other monies collected by such person acting or purporting to act under the provisions of" (Article 28).

Section 1141 of the Tax Law provides for proceedings to recover the tax "Whenever any person required to collect the tax shall fail to collect or pay over any tax, penalty or interest imposed . . ."

Similar matters have been considered by the courts in both Missouri and Utah.

Automagic Vendors, Inc. et al. v. Morris (Missouri Supreme Court, Division No. 1, July 13, 1964) involved the sale of merchandise through coin-operated machines. Under the Missouri statute the tax is imposed upon every retail sale (section 144.020), and the duty is on the purchaser to pay the amount of the tax to the vendor (section 144.060). "Every person receiving any payment or consideration upon the sale of property * * * shall remit the taxes so collected or required to be collected to the director of revenue" (section 144.080), and "2. The returns shall show the amount of gross receipts from sales, services and taxable transactions by the person and the amount due thereon during and for the period covered by the return and with the return the person shall remit to the director of revenue the amount of the tax due, including any and all monies collected from the purchaser as sales tax."

The tax had been collected by tokens for small purchases, but in 1961 a new section was added to the statute which provides that

> "notwithstanding the rate of taxes imposed by this chapter, and in order to avoid fractions of pennies, the following brackets shall be applicable to all two percent taxable transactions;
>
> "(1) On sales of less than twenty-five cents no tax shall be added;"

Under the provisions cited, the court held that the vendor was not required to collect or pay a tax on items sold for less than 25¢.

At the time of the decision, the Missouri statute differed from the New York statute in that whereas in Missouri the vendor was required to remit the taxes collected or required to be collected, the New York statute (Article 28) requires the vendor to pay the tax imposed.

In the Utah case, Hinckley, Inc. v. State Tax Commission (Utah Supreme Court, August 4, 1965), the petitioner was engaged in retailing hot and cold drinks, candy and other foods through coin-operated machines. While the state's sales tax regulations declared it "unlawful for the vendor to absorb or in any way waive the collection or imposition of the tax or to consider that the tax is included and collected as part of the sales price" there was also a sales tax regulation in effect which provided that the total receipts from vending machines would be considered as the total selling price of the personal property distributed through the machines, and must be reported as the amount of sales subject to tax. Their statute provided that "in no case shall he collect an amount (without regard to fractional parts of one cent) in excess of the tax computed at the rates prescribed." The court stated that the tax is imposed upon the transaction and its payment to the state is not dependent upon whether it is collected or whether the consumer pays it. Sale of a large number of articles on which no tax can be collected under the "bracket system" does not make the system discriminatory or arbitrary.

However, the court in the Hinckley case, supra, did say "Our attention has not been called to any provision in our Sales Tax Act which forbids the collection of the correct amount due from a purchaser regardless of the fact that the consideration is so small that there is no coin of the realm that can be used." The court gives the following example of how a vending machine operator could collect a tax of a fraction of a cent from a customer. Rather than using the bracket schedules promulgated by the Utah Tax Commission, the court says the vendor under a 3% tax could collect 10¢ from the customer, allocated 9 7/10¢ to the price and 3/10¢ to the tax. The New York State statute does have a provision which forbids the promulgation of any schedule which provides that a tax shall be collected from the customer upon receipts from retail sales of tangible personal property which produces a tax of 5 mills or less (last sentence of section 1132(b) of the Tax Law already quoted above). Nevertheless, this provision only refers to sales of tangible personal property and does not mention sales of services. Therefore, the Hinckley case supports the position that Bethlehem Auto Laundry is liable for the tax on its 10¢ and 25¢ sales of services through coin-operated machines, but the case is not as forceful a precedent where only a sale of tangible personal property at 10¢ or 25¢ is involved.

Payment under bracket schedules has also been the subject of litigation in New York under the former New York City sales tax from which our own statute is drawn. With respect to bracket schedules, the New York City statute provided that "Such schedule

or schedules may provide that no tax need be collected from the purchaser upon receipts below a stated sum, * * *".

The New York State statute provides that "Such schedule or schedules may provide that no tax need be collected from the customer upon receipts, amusement charges or rents below a stated sum * * *. Such schedule or schedules shall provide that no tax shall be collected from the customer upon receipts from retail sales of tangible personal property which * * * produces a tax on five mills or less."

Under the New York City statute the tax on minimum sales has been sustained in Queens Vending Corp. v. City of New York, 16 Misc 2d 968, aff'd 246 A D 594, cited with approval in Matter of Atlas Telephone Company, 273 N.Y. 51, 57 in which the court said "The duty of payment to the city is laid upon the vendor, not the purchaser. His liability is not measured by the amount actually collected from the purchaser but by the receipts required to be included in such return * * *. He must pay the tax even if failure to collect is due to no fault of his own."

The same situation appeared in New York Automatic Canteen v. Joseph, 8 AD 2d 385, aff'd 8 N Y 2d 853, and the above decisions were followed.

In a release to Prentice-Hall, Inc. dated October 5, 1965, Counsel to the State Tax Commission stated that vendors are not exempt from liability for sales tax on below minimum sales. He pointed out that even before its amendment by Chapter 575 of the Laws of 1965, section 1132(b) of the Tax Law provided for bracket schedules designed to produce collections equal so far as practicable to the statutory percentage of the total receipts of the vendor "upon whom a tax is imposed by this article."

Also, Chapter 588 of the Laws of 1965 added to section 1115 a paragraph exempting sales at 10¢ or less if made through coin-operated vending machines by a vendor primarily engaged in making such sales, thereby recognizing that without such an amendment sales at 10¢ or less were taxable regardless of the vendor's inability to collect the tax from his customers.

Accordingly, the proposed determination has been drafted denying the application, and I recommend that it be signed by the Commission.

If you agree, kindly sign one original and three copies of the proposed determination and return the same together with the entire file to the Law Bureau for further processing.

/s/ VINCENT P. MOLINEAUX
Hearing Officer

Enc.

March 8, 1967
VPM:kon

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

BETHLEHEM AUTO LAUNDRY, INC.

TO REVIEW THE DETERMINATION OF SALES TAX UNDER ARTICLE 28 OF THE TAX LAW FOR THE PERIOD ENDING FEBRUARY 28, 1966 AND MAY 31, 1966

Bethlehem Auto Laundry, Inc., having filed an application to review the determination of sales tax pursuant to Article 28 of the Tax Law, and a hearing having been held at the office of the State Tax Commission, State Campus, Albany, New York on December 14, 1966 before Vincent P. Molineaux, Hearing Officer of the Department of Taxation and Finance, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer, Bethlehem Auto Laundry, Inc., is engaged in the operation of car wash and waxing services through coin-operated machines. The machines are activated by the customer by the insertion of 25¢ coins. The customer uses the apparatus to wash or wax his car. In conjunction with the rendition of such services the taxpayer also has coin-operated machines which provide towels and other commodities on the insertion of 10¢ coins.

(2) The taxpayer filed New York State sales tax returns for the periods ending February 28, 1966 and May 31, 1966 from which were excluded the aforesaid receipts of 25¢ and 10¢.

(3) That the State Tax Commission issued notice #9550355 dated September 16, 1966 assessing additional sales tax against Bethlehem Auto Laundry, Inc. in the amount of $68.09 for the

period ended February 28, 1966 and $100.78 for the period ended May 31, 1966.

(4) That the amount of the assessment was paid under protest and application was made for a hearing pursuant to section 1138 of the Tax Law.

(5) That taxpayer's business is located at 9 Woodridge Road, Delmar, New York, which is in an area where the applicable sales tax is 2% and that no tax has been collected from the customers on receipts of 25¢ or 10¢.

(6) The taxpayer contends that its only duty is to collect the tax pursuant to section 1131 of the Tax Law as trustee for and on account of the State pursuant to section 1132 of said law and that the taxpayer is not liable to pay any tax on receipts of 25¢ or less under the schedules promulgated by the Tax Commission pursuant to section 1132 of the Tax Law.

(7) That section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property and section 1105(c)(3) imposes a tax on the receipts from "maintaining, servicing, repairing tangible personal property not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment * * *".

(8) Section 1137 of the Tax Law provides that "Every person required to file a return * * * shall, at the time of filing such return, pay to the tax commission the taxes imposed by this article * * *".

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby,

DETERMINES:

(A) That all of the receipts from the sales made and the services rendered by the taxpayer by means of coin-operated machines are subject to the sales tax imposed by section 1105 of the Tax Law whether or not the tax is collected by the taxpayer.

(B) That the notice assessing additional sales tax against Bethlehem Auto Laundry, Inc. for the periods ending February 28, 1966 and May 31, 1966 is correct and,

(C) That the taxpayer's application is hereby denied.

DATED: Albany, New York this 23rd day of March , 1967.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
President

Commissioner

Commissioner