

THE TAX APPEAL BOARD OF THE STATE OF DELAWARE

ELMER T. GOVE AND)
THEODOSIA H. GOVE,)
)
Petitioners,)
)
v.) Docket No. 802
)
DIRECTOR OF REVENUE,)
)
Respondent.)

BEFORE: Joseph S. Yucht, Esquire, Chairman; James C. Eberly, Sr.,
Esquire, Vice-Chairman; Cyric W. Cain, Jr., Nettie C.
Reilly, Harry B. Roberts, Jr., Members

James T. Vaughn, Jr., Esquire, Attorney for Petitioners

John P. Fedele, Esquire, Deputy Attorney General for Respondent

DECISION AND ORDER

James C. Eberly, Sr., Esquire, Vice-Chairman: From the briefs,
Stipulation of Facts, and other documents filed by the parties to this action,
the following facts are agreed to by the parties, which facts are pertinent to
this decision and order:

1. Petitioner is a contractor.
2. Petitioner is a resident.
3. Petitioner does his job on a time and material basis.
4. The charges for materials which Petitioner makes for
customers on Petitioner's account is done as a matter
of convenience for the customers.
5. Petitioners have not paid any gross receipts tax at any
time relevant to this proceeding.

The Board finds the following facts, relevant to the issues in this case, based upon uncontroverted assertions and arguments by the parties:

1. Materials are purchased on behalf of the Petitioner's customer and Petitioner's customer pays for these materials through Petitioner.
2. Petitioner pays the supplier of materials for the customer with money the Petitioner receives for such purpose from the customer.
3. Petitioner's customers authorize Petitioner to purchase and pay for materials on their behalf and for their benefit.
4. Petitioner receives payment for the labor he expends on behalf of the customer and pays the supplier of materials for the customer with funds given to him for such purpose by the customer.

This case is a case of first impression and the pertinent issue before the Board is whether or not the Petitioner "received" the customer's payment for their materials, as contemplated by 30 Del. C., § 2501 (2), and is thus subject to taxation as a gross receipt of the Petitioner.

By purchasing supplies for the customer, at the customer's request, the Petitioner becomes, from the facts set forth above, an agent for the customer. In this regard Petitioner, without contradiction from the Respondent, states that often the customer would pick out the items to be purchased themselves, which items were later picked up and delivered to the customer by the Petitioner. In other instances the customer authorized, either expressly or impliedly, the Petitioner to make selections for them.

That an agency between the customer and the Petitioner exists is determined by the relations of the parties and the agreements or acts and their intentions (3 Am. Jur. 2nd, Agency 21). The question of the intentions of the parties is determined by the fact that one represents and is acting for another (ob. cit).

It is uncontroverted that the Petitioner delivered the supplies to the customer and charged on "add on", or profit thereon, and in many cases the customer picked out the supplies himself. It is also uncontroverted that the Petitioner paid the supplier with funds, provided by the customer.

The Respondent takes the position that regardless of the purpose of giving the money to the Petitioner the money, including Petitioner's labor charges and the costs of the customer's supplies all the monies received by the Petitioner are "received", as contemplated by 30 Del. C., § 2501 (2), and this is subjected to gross receipts taxes.

Thus, it has been held that the general rule on taxing statutes is that said statutes imposing taxes are to be construed most strongly against the Government and in favor of the taxpayer, (72 Am. Jur. 2nd, State and Local Taxation, § 707). Another principle of statutory construction is that statutes must be read and construed in the light of and with reference to the principles of common law in force at the time of the enactment of such statute, (73 Am. Jur. 2nd, Statutes, § 184).

In the situation that we have in this particular case where the customer pays the Petitioner money which in turn is entrusted to the Petitioner to pay to the supplier, it would appear as if the resulting or constructive trust is created in the Petitioner with the Petitioner becoming

a trustee for the customer, to pay to the supplier the amount of money necessary to reimburse the supplier for the costs of the supplies delivered to the customer by the Petitioner. A question which must be ultimately decided by the Board is whether or not a receipt of money by the Petitioner in trust for the customer to be paid to the supplier is in actuality "received" by the Petitioner for the purposes of 30 Del. C., § 2501 (2). That the Petitioner can not utilize the monies that have been given to him in trust to be paid over to the supplier by the customer for his own uses would abrogate the stated position that these monies were "received" by him. The interpretation of the term "received" as contemplated by 30 Del. C., § 2501 (2) means monies that are received by the Petitioner that can be utilized for his own general purposes, and not monies that were received by him for the specific purpose of reimbursing a supplier of the Petitioner's customer, which monies were given to the Petitioner in trust by said customer. It could be, however, that this matter would be greatly simplified if all monies received by the Petitioner from the customer, including monies to be paid over to the supplier, were deposited in an Escrow Account with the supplier being paid with one check from the Escrow Account and the remaining monies from said customer being paid directly to the Petitioner for his labor. While this was not the manner that was used in this particular case, the net results are the same to-wit:

The supplies were purchased on behalf of and at the behest of the customer and were delivered to the customer by the Petitioner. The customer

then paid the Petitioner for the supplies which payment was a reimbursement to the supplier, which service was provided by the Petitioner. Monies that were paid to the Petitioner for the payment of supplies were received by the Petitioner in trust for the customer, and were not in fact "received" by the Petitioner for the purpose of 30 Del. C., § 2501 (2). Therefore, it is adjudged and ordered as follows:

A. Monies received by the Petitioner in trust for the customer for payment of supplies delivered to the customer by the supplier are not subject to the gross receipts tax as contemplated by Chapter 25, Title 30, Delaware Code.

B. All monies received by the Petitioner other than those specifically mentioned above in this order are subject to the gross receipts tax and said gross receipts tax is due and payable thereon.

IT IS SO ORDERED.

Joseph J. Clark
Pattie C. Rieley
Harold B. Roberts
Eric W. Coiro

DATE: September 17, 1984

SYNOPSIS

DOCKET NO. 802

TAX SEGMENT: GROSS RECEIPT TAXES

ISSUE: Whether or not petitioner received the customer's payment for materials as contemplated by 30 Del. C., §2501 (2) and thus is subject to taxation as gross receipts of the petitioner.

TAB DECISION: The Tax Appeal Board held that monies paid to the petitioner for payment of supplies were received by the petitioner in trust for the customer and were not in fact "received" by the petitioner for purposes of 30 Del. C., §2501 (2). The Board, therefore, adjudged and ordered as follows:

(A) Monies received by the petitioner in trust for the customer for payment of supplies delivered to the customer by the supplier are not subject to the gross receipts tax as contemplated by Chapter 25, Title 30. Delaware Code.

(B) All monies received by the petitioner other than those specifically mentioned above in this order are subject to the gross receipts tax and said gross receipts tax is due and payable thereon.

DECISION: For Petitioner

DECISION DATE: September 14, 1984

ED. NOTE: Appealed to Superior Court by Division of Revenue (Civil Action No. 84A-SE-25) Court Decision dated May 22, 1985 reversed decision of Tax Appeal Board.