STATE OF MAINE

Inter-Departmental Memorandum Date October 4, 1961

To Ernest H. Johnson, State Tax Assessor Dept. Bureau of Taxation

From John W. Benoit, Asst. Att'y. General Dept. " " "

Subject Application of Maine sales and use tax to national banks.

INTRODUCTION

On August 18, 1961, you posed the following questions:

1. Whether sales to national banks are taxable under the Maine sales and use tax law?

2. Whether sales by national banks are taxable under the Maine sales and use tax law?

You state in your memo, that the position taken by your office is that sales to national banks are not taxable, while sales by national banks are taxable. Further, you state that your position is predicated upon Boyd L. Bailey's opinion to you on May 4, 1953. The answers to the questions you present necessarily require examination of the holding in the W. S. Libby case.

W. S. LIBBY COMPANY v. ERNEST H. JOHNSON
148 Maine 410, 1953

Facts

Plaintiff-manufacturer was retailer by reason of sales of foods and beverages to employees in plant cafeteria for consumption on premises. Plaintiff, in a fixed period, made such sales totaling $3,329.39 collecting $38.41 in sales tax. Two percent of gross sales amount to $66.59 of tax. The $28.16 deficiency resulted from sales of less than twenty-five cents for which plaintiff collected no tax because none was authorized on sales of twenty-four cents or less.

Issue

Whether plaintiff was liable for tax on sales of less than twenty-five cents? Yes.

Reason

The plaintiff contended it was not liable for the tax because the law levied the tax on the consumer; section 34.

Further, if the retailer could collect no tax from the customer, the sales were not intended to be taxed.

The Court, in holding against plaintiff's contentions, stated:

> "The . . . claim that the . . . law . . . imposed no tax on retailers, and that . . . sections 3, 5 and 14, declaring that they should pay such taxes, adding them to sales prices, and be liable thereof as for personal debts, were designed for no other purpose than to provide a 'method of collection,' is entirely untenable. . . ." (Underlining mine.)
>
> "The legislative intention to tax sales regardless of price is clearly apparent . . . (mentioning section 3). The later provisions . . . make no reference to sales prices, except in one instance . . . (citing section 3). Section 5 authorizes retailers to add taxes to sales prices in accordance with a schedule . . . . The closing provision of section 3 (10 cent sales, etc.) carries the only price recital and is in itself a complete answer to the claim that sales on which a retailer can collect no tax from a consumer under the section 5 schedule are not intended to be taxed. . . ." (Underlining and parenthesis mine.)
>
> "Construed in its entirety . . . (the sales and use tax law) makes the legislative intention entirely clear that all sales not specifically exempted shall be taxed, that retailers 'shall pay' the taxes levied, . . . which shall be their 'personal' debts to the state, . . . and that the consumer shall pay no more than the taxes retailers are authorized to add to sales prices by section 5, which as part of the price, 'shall be a debt of the purchaser to the retailer until paid.' There is no provision other than that carried in section 4, applicable to use taxes only, which charges a consumer with the duty of paying a tax to the state. There can be no doubt that it was the retailer, and not the consumer, who was intended to be taxed by the . . . Law, . . . or that the retailer was vested with the limited right to pass the tax . . . along to his customer so far, and so far only, as the schedule of section 5 permitted." (Parenthesis and underlining mine.)

The court indicated that the words "liability for, or the incidence of the tax" could be read as "the liability for, to

viz, the incidence of the tax', thus showing the reason for the amendment and the statement found in the legislative record, p. 2048 (legislature's desire to place incidence of tax on purchaser for income tax purposes.) Said the Court: "The 'incidence' of all taxes, in final analysis, falls on the consumer . . . ."

The words "average equivalent of said tax", and the "breakage provision" (both of section 5) indicate that retailers would collect more tax money under section 5 "than would be required to meet the liability imposed upon them by section 3 . . . ."

California and Tennessee levied taxes upon the privilege of selling tangible personal property at retail. Of this our Court said: "Our own law makes that entirely plain in the registration and license sections, . . . and the declaration of section 8 . . . ."

> "The intention of the law that every sale is taxable to the retailer unless specifically exempted is entirely apparent . . . ."

In answering your questions, I start with the proposition that under the Maine Sales and Use Tax Law the retailer is the taxpayer. The tax is upon the privilege of selling tangible personal property at retail. It is the consumer who suffers the economic burden of the tax out of the limited vested right in the seller to pass it on to him. There is no provision, other than the use tax section, which charges a consumer with the duty of paying a tax to the state.

THE STATUTES

Section 10. Exemptions. No tax on sales, storage or use shall be collected upon or in connection with:

. . . .

II. State and political subdivisions. Sales to the state or any political subdivision, or to the Federal Government, or to any agency of either of them.

(A national banking corporation is an instrumentality of the United States.) Thus, by the Maine Sales and Use Tax Law, sales to national banks as agencies of the Federal Government are exempt from taxation, i.e., the retailer may not collect the tax.

Notwithstanding the existence of federal statutes exempting federal instrumentalities from "federal, state and local taxation", abundant authority exists supporting the proposition that where the "legal incidence" of the sales tax is upon the retailer, a tax upon sales to the Federal Government violates neither the federal statutes nor the "doctrine of implied immunity."

In National Bank of Detroit v. Department of Revenue, 340 Mich. 573, 66 N.W. 2d 237, (1954) appeal dismissed (U.S. 1955) 75 S. Ct. 781, the State of Michigan (in 1949) revised its Sales Tax Act exemption provision thereafter permitting taxation of sales to corporations acting as agents or instrumentalities of the Federal Government but not wholly owned by the United States. Accordingly, the defendant department of revenue took the position that sales to plaintiff, a national banking institution organized under the national banking act, were taxable. The bank purchased office equipment and other items of tangible personal property. Too, it sold food to its employees in its cafeteria. Both sales to and sales by the banks were determined, by defendant, to be taxable transactions. The Court held that under the Michigan law the sales tax was imposed upon the retailer; he was in legal contemplation the taxpayer. It followed that sales to the bank were taxable but that sales by the bank were exempt. The bank's immunity was not violated even though the economic burden was upon it.

Note in above case that plaintiff held positions as both buyer and seller. Note, too, that the appeal to the Supreme Court was dismissed.

The case cited by Boyd Bailey in his opinion to you of May 4, 1953, (Federal Land Bank of St. Paul v. Bismark Lumber Co., 314 U.S. 95, (1941), is not in conflict with the Bank of Detroit case. The State, in the Bismark case, levied the tax on the purchaser. The purchaser had both the legal incidence and economic burden.

The interpretation of the Bank of Detroit case conveniently suits the Supreme Court's treatment of the federal immunity issue. It has ruled that federal immunity does not invalidate a state sales tax even when the economic burden is directly shifted to the Federal Government. (Alabama v. King and Boozer, 314 U.S. 1 (1941), upholding a sales tax imposed upon purchases of a contractor under a cost-plus contract with the Federal Government.) Instead the legal incidence is designated as the controlling factor in determining the validity of a state tax.

The Michigan court concedes that if a sales tax statute expressly requires the seller to collect the tax from the purchaser, the legal incidence falls on the latter. That the Michigan statute expressly permits the seller to pass on the amount of the tax and forbids him to hold out to the purchaser that it is not considered as an element in the sales price is thought to be sufficiently different from an explicit collection requirement to warrant the difference in result.

It is true that the Supreme Court has reaffirmed its prerogative

to review a state court's determination of the legal incidence of a tax where the result is determinative of the federal immunity issue. Kern-Limerick, Inc. v. Scurlock 347 U.S. 110, (1954); Richfield Oil Corp. v. State Board, 329 U.S. 69; Federal Land Bank v. Bismark Lumber Co., 314 U.S. 95.

In the Bismark Lumber case the state statute required the retailer, or the party liable to the State for the tax, to collect the same from the consumer; hence in that case the legal incidence of the tax, as well as its economic burden, fell upon the exempt agency.

OPINION

Our own sales and use tax law exempts from taxation sales to Federal Government instrumentalities, i.e., national banks. Do away with the exemption and you are faced with the question: Does our law place the legal incidence of the sales tax upon the retailer or upon the consumer?

One must answer the question: who has the legal incidence of the tax, in order to determine, under our law, if sales by national banks are taxable events.

Our statutes remind us that we are prevented from collecting a tax on sales "which this State is prohibited from taxing under the Constitution of the United States . . ." Section 10. Exemptions. I.

If the W. S. Libby case is taken to mean the legal incidence of the tax is upon the retailer, then sales by national banks are exempt from tax by reason of the federal statutes and the doctrine of implied constitutional immunity.

The word "shall" may be construed as merely permissive or directory, (as equivalent to "may") to carry out the legislative intention . . . Black's Law Dictionary, 3rd Edition.

Where the Court, in W. S. Libby, states that the retailer is "vested with the limited right to pass the tax on to the customer", and that retailers are "authorized to add (the tax) to sales prices", the word "shall" is being given the above definition.

Sales taxes on sales to national banks are uncollectible by reason of the specific exemption accorded these institutions by our sales and use tax law. Too, sales taxes on sales by national banks are not collectible due to the holding of the W. S. Libby case, existing federal statutes and the doctrine of implied constitutional immunity.

JWB:ep4