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MITCHELL WILLIAM A 80CV6795 111681 DANE CTY CIR CT

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 10

DANE COUNTY

524

WILLIAM A. MITCHELL,

Petitioner,

MEMORANDUM DECISION

-vs-

Case No. 80 CV 6795

WISCONSIN DEPARTMENT
OF REVENUE,

Respondent.

STATE OF WISCONSIN
DEPARTMENT OF REVENUE

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LEGAL DIVISION

This action involves a petition for the review of a decision of the Wisconsin Tax Appeals Commission (hereinafter Commission) decision dated October 21, 1980, affirming the disallowance of a retailer's discount claimed by petitioner pursuant to Section 77.51(11)(c)5, Stats., for the tax years 1974 and 1975 and the disallowance of a claim by petitioner that the sale of his business in 1976 constituted an occasional sale which is not subject to sales tax pursuant to Section 77.51(10)(a), Stats. Petitioner claims that the decision of the Commission is based upon an incorrect interpretation of the law and also constitutes an action outside the range of discretion delegated to it under law.

Narrative Facts

Until September of 1976 petitioner's business constituted placing coin-operated amusement machines (such as juke boxes, pinball machines, pool tables, bowling games) in various commercial

establishments under agreements with the proprietors that the proprietors received a certain percentage of the gross receipts from the machines. Petitioner collected the receipts from the machines, divided the receipts with the proprietors, and was responsible for the maintenance and repair of the machines. Petitioner sold the business and all the machines as placed in September of 1976 for \$104,200.00.

According to petitioner, when he purchased a machine, he paid a sales tax upon the purchase price. Subsequent to such purchase, he claimed a credit for the tax so paid as an offset against the sales tax otherwise due upon receipt from the machine. The credit was claimed with respect to the receipts from the machines until such time as the entire sales tax paid upon the purchase thereof was recovered. The assessments for 1974 and 1975 constitute a disallowance of such credits, and the assessment for 1976 constitutes an assessment of sales tax upon the sales price of the business.

Contentions of Parties

With respect to the assessments for 1974 and 1975, it is petitioner's contention that the receipts from the machines constituted rental payments for the use thereof by the general public, and, because the machines were purchased for resale via rentals, no sales tax was due upon the purchase thereof. Accordingly, petitioner was entitled to the credits which

he claimed. It is respondent's contention that the receipts from the machines constituted payment for services rendered by petitioner which are subject to sales tax and, therefore, petitioner's purchases of the machines were subject to sales tax.

With respect to the assessment for 1976, it is petitioner's contention that the purchaser of the machines purchased same for rental and, therefore, no sales tax was due upon the sale thereof. It is respondent's contention that the purchaser bought the machines to render a taxable service and, therefore, the sale thereof was subject to sales tax.

Statutes Involved

Section 77.52(1), Stats., provides as follows:

"(1) For the privilege of selling, leasing, or renting tangible personal property, including accessories, components, attachments, parts, supplies and materials at retail, a tax is imposed upon all retailers at the rate of 4% of the gross receipts from the sale, lease or rental of tangible personal property, including accessories, components, attachments, parts supplies and materials sold, leased, or rented at retail in this state."

Section 77.52(2), Stats. 1971, provides in part as follows:

"For the privilege of selling, performing, or furnishing the services described under par. (a) at retail in this state to consumers or users, a tax is imposed upon all persons selling, performing or furnishing the services at the rate of 4% of the gross receipts from the sale, performance or furnishing of the services.

(a) The tax imposed herein applies to the following types of services:

* * *

2. The sale of admissions to places of amusement, athletic entertainment or recreational events or places and the furnishing for dues, fees or other considerations, the privilege of access to clubs or the privilege of having access to or the use of amusement, entertainment, athletic or recreational devices or facilities." (Emphasis added).

Section 77.51, Stats., provides in part as follows:

"Section 77.51 Definitions. Except where the context requires otherwise, the definitions given in this section govern the construction of terms in this subchapter.

* * *

(10) 'Occasional sales' includes:

(a) Isolated and sporadic sales of tangible personal property or taxable services where the infrequency, in relation to the other circumstances, including the sales price and the gross profit, support the inference that the seller is not pursuing a vacation, occupation or part-time business as a vendor of personal property or taxable services. No sale of any tangible personal property or taxable service may be deemed an occasional sale if at the time of such sale the seller holds or is required to hold a seller's permit. (Emphasis added).

* * *

(11)(c)5. If a lessor of tangible personal property purchased such property before or after the change from a selective to a general sales tax law and reimbursed his vendor for sales tax on the sale by such vendor for sales tax on the sale by such vendor to him, the tax due from such lessor on his rental receipts on and after September 1, 1969, may be offset by a credit equal to, but not in excess of, the tax otherwise due on the rental receipts from such property for the reporting period. The credit shall expire when the cumulative rental receipts both before, on and after September 1, 1969, equal

the sales price upon which his vendor paid sales taxes to this state. Similarly, if a purchaser of tangible personal property before or after such change has reimbursed his vendor for sales tax on the sale to him and subsequently, prior to making any use of the property other than retention, demonstration, or display while holding it for sale or rental, makes a taxable sale of such property, the tax due on such taxable sale may be offset by the tax reimbursed. (Emphasis added).

(24) With respect to the services covered by s. 77.52(2), no part of the charge for the service may be deemed a sale or rental of tangible personal property. (Emphasis added).

DECISION

The issue in this case is not whether the gross receipts from petitioner's coin-operated amusement devices are subject to Wisconsin sales tax -- the parties agree that sales tax is due on the gross receipts. Rather, the issue is whether that tax is properly imposed under Section 77.52(1), Stats., as rental receipts for the use of tangible personal property, or under Section 77.52(2)(a)2, Stats., as receipts for providing one of the services which is subject to a selective tax on specified services provided in this state.

The significance of the distinction is the following: If the tax on the gross receipts is imposed under Section 77.52(1), for rental of tangible personal property, then the tax on those gross receipts can be offset against the sales tax paid on the purchase for the machine under Section 77.51(1)(c)5, Stats., (as claimed by petitioner). However, if the gross receipts

are taxed as a "service" under Section 77.52(2)(a)2, Stats., then such tax pursuant to Section 77.51(24), Stats., may not be offset against that sales tax paid at the time of the purchase of the machines (as determined by the Commission).

The Findings of Fact of the Commission, upon which the legal determination must rest, is the following:

- "2. During the period under review, the petitioner was doing business as Mitchell Vending Company, a sole proprietorship with its principal office in Menomonie Falls, Wisconsin, and held Wisconsin seller's permit No. 157976 issued to him on May 1, 1970.
- "3. During the period under review, petitioner was in the business of providing coin-operated amusement devices (for example, juke boxes, pinball machines, pool tables, bowling games, and other coin-operated amusement devices) to business establishments, such as bowling alleys, bars and restaurants. Petitioner agreed with the owners of the business establishments that in exchange for the privilege of locating his equipment on their premises, the owners would retain a percentage of the gross receipts of the equipment. The percentages varied between owners and types of business premises and did not appear to have had an established pattern. There was no testimony or evidence that any of the gross receipts splitting arrangements were done by written agreement; testimony appears to imply that the arrangements were verbally agreed to. Petitioner collected the receipts from his equipment, divided them with the owners of the business premises and was responsible for the equipment's maintenance and repair."
(Finding of Fact No. 2 and No. 3, Decision and Order of Commission herein)

These findings are not challenged by petitioner.

In light of these findings, it is apparent that petitioner was providing at retail to the patrons of the establishments, into which he was able to place his machines, the privilege of the use

of entertainment devices. Section 77.52(2)(a)2, Stats. See also, Telemark Co., Inc. v. Dept. of Taxation, 28 Wis. 2d 637 (1965). While petitioner's business relations might have been structured as rentals so as to yield perhaps a different conclusion, the Court is bound on review by the description of those business relations which petitioner himself gave under questioning by the Department of Revenue's attorney, as reflected in the Commission's Findings of Fact.

The Commission's interpretation of Section 77.52(2)(a)2, Stats., under the facts in this case makes unnecessary the metaphysical inquiry of when a patron has purchased merely the privilege of access to a machine as opposed to purchasing the actual access to the machine, or when the purchase was of the privilege of the use as opposed to the purchase of the actual use of the machine. This inquiry might depend on whether the patron used a token or his or her own coin; or upon whether the patron stayed to listen to the jukebox or left before the record had finished playing; or upon whether the device is an active, participatory activity (such as a target shoot) or a passive activity such as listening to a jukebox. None of these considerations, however, change the nature of the business service provided by the petitioner, who placed and maintained the devices in the establishments, thereby giving access thereto to both the business proprietor and public patrons.

CONCLUSION

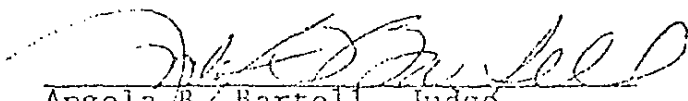
I conclude that the respondent Commission correctly determined that a sales tax on the gross receipts from petitioner's amusement devices was imposed under Section 77.52(2)(a)2, Stats. I conclude further that the Commission correctly determined that since petitioner held a seller's permit at the time he sold the business in 1976 and since the business was apparently to be continued in the same fashion by the new owner, that the transaction did not qualify as an occasional sale under Section 77.51(10)(a), Stats.

ORDER

For the reasons stated above, and based on the entire record herein, the decision of the Wisconsin Tax Appeals Commission dated October 21, 1980, is hereby affirmed.

Dated this 10th day of November, 1981.

BY THE COURT:


Angela B. Bartell, Judge
Circuit Court Branch 10
Dane County, Wisconsin

cc: Lawrence Trebon
P. Thomas Creeron III
Ewald L. Moerke, Jr.