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STATE OF WISCONSIN

TAX APPEALS COMMISSION

WILLIAM A. MITCHELL, Petitioner, vs. WISCONSIN DEPARTMENT OF REVENUE, Respondent.	DOCKET NOs. S-7244 and S-7245 DECISION AND ORDER (Drafted by Chairman Boykoff)

The above-entitled matter was heard by the Commission. The petitioner, William A. Mitchell, appeared in person and by John A. Zerbel of John A. Zerbel & Co., CPAs of Brookfield, Wisconsin. The respondent, Wisconsin Department of Revenue, appeared by its attorney, Allyn Lepeska. Having considered the evidence and arguments of the parties, this Commission hereby finds and decides as

FINDINGS OF FACT

1. This involves timely filed appeals to this Commission for review of the respondent's decision on the petitioner's petitions for redetermination of two assessments of additional sales and use taxes, penalty and interest for the taxable years 1974, 1975 and 1976.

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.

4. Under date of January 11, 1979, respondent issued to petitioner a "Notice of Assessment of Additional Tax" for $9,223.30 (comprised of $7,386.74 sales tax and $1,836.56 interest) covering taxable years 1974 and 1976 (Docket No. 7244).

5. Under date of January 11, 1979, respondent issued to petitioner a "Notice of Assessment of Additional Tax" for $6,195.65,

later corrected to $4,513.92 (comprising sales tax, interest and penalties) covering taxable year 1975 (Docket No. 7245).

6. Under date of February 20, 1979, petitioner filed with respondent petitions for redetermination covering both assessments which petitions, under date of July 5, 1979, were denied by respondent.

7. Timely appeals were made to this Commission from respondent's actions on petitioner's petitions for redetermination and, on June 18, 1980, a hearing was held on both appeals, as they involved the same petitioner and related facts.

8. For taxable year 1974, petitioner filed sales tax returns and declaring $80,468.50 as his measure of tax, and $3,218.74 as his gross sales tax, all resulting from receipts from the coin operated amusement equipment he owned. Petitioner credited against the gross tax the amount of sales or use tax he paid on his purchase of the equipment. Respondent disallowed this credit.

9. For taxable year 1975, petitioner did not file a timely sales or use tax return. The record is conflicting, but from what appears to have been a late filed return or from information contained on petitioner's income tax returns or both, respondent determined that petitioner's gross receipts for measure of tax from his equipment was $68,698.11, resulting in $2,747.92 gross tax. Petitioner claimed as a credit against this gross tax due, the sales or use tax which he paid when he purchased coin

operated equipment for this business. Respondent disallowed this credit; disallowed any retailer's discount under s.77.61(4)(b), Wis. Stats., for this year; imposed interest under s.77.60(2), Wis. Stats.; imposed a $10 late filing fee under s.77.60(2), Wis. Stats. for each late filed return; and asserted the negligence penalty under s.77.60(3), Wis. Stats. for petitioner's negligent failure to file.

10. On September 10, 1976, petitioner terminated his business and sold all his coin operated amusement devices for $104,200 while he held a seller's permit and did not collect sales tax on the sale. Respondent assessed petitioner gross tax of $4,168 on this sale plus interest. Respondent claimed that this constituted an exempt occasional sale under s.77.54(7), Wis. Stats.

11. Petitioner testified that he merely ran his business and left all tax accounting, preparation and filing up to his accountant; that he signed any tax documents prepared by his accountant; and that he did not recall whether or not he signed or filed returns for taxable year 1975. Petitioner's accountant, Mr. Zerbel, stated that he believed he filed sales tax returns for petitioner for 1975 but he really was not certain that he did.

12. At the June 18, 1980 hearing on these matters before the Commission, under s.73.01(4)(dn), Wis. Stats., both parties consented to the Commission's rendering an oral decision on 2 of the 3 issues before the Commission. The Commission heard oral arguments on those issues and entered its decision, but not an

order, on the 2 issues as follows:

(a) Issue: Did petitioner prove that his failure to file a timely 1975 sales tax return "was due to reasonable cause and not due to neglect" under s.77.60(4), Wis. Stats. Decision: No.

(b) Issue: Was petitioner's September 10, 1976 sale of his coin operated amusement devices while he held a valid seller's permit an occasional sales and exempt under s.77.54(7), Wis. Stats.? Decision: No; Authority: Three Lions Supper Club, Ltd. v. Dept. of Revenue 72 Wis. 2d 546 (1976) and s.77.51(10)(a), Wis. Stats.

13. The parties were afforded the opportunity to submit written briefs on the issue of whether petitioner was a lessor of the coin operated amusement devices so that he is eligible for a credit for sales taxes while he paid on their purchase under s.77.51(11)(c)5, Wis. Stats.

ISSUES FOR DETERMINATION

1. Did petitioner prove that his failure to file a timely 1975 sales tax return was due to reasonable cause and not due to neglect under s.77.60(4), Wis. Stats.?

2. Was petitioner's September 10, 1976 sale of his coin operated amusement devices which he used in his business while he held a valid seller's permit for that business an occasional sale and exempt under s.77.54(7), Wis. Stats.?

3. Was petitioner a lessor of his coin operated amusement devices so as to be eligible for a credit for sales taxes which he paid on their purchase under s.77.51(11)(c)5, Wis. Stats?

WISCONSIN STATUTES INVOLVED
(1971)

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 vocation, occupation or business or a partial vocation or 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 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.

. . .

"(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."

Section 77.52 Imposition of selective retail sales tax.

"(2) For the privilege of selling, performing or furnishing the services herein described at retail in this state to consumers or users, a tax is hereby levied and imposed upon all persons selling, performing, or furnishing such services at the rate of . . .4%.
(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."

CONCLUSIONS OF LAW

1. Petitioner did not prove that his failure to file a timely 1975 sales tax return "was due to reasonable cause and not due to neglect" under s.77.60(4), Wis. Stats. Both the petitioner and his practitioner did not demonstrate failure due to reasonable cause. Negligence of a practitioner is imputed to a taxpayer and, in this case, petitioner's reliance on his practitioner and the practitioner's negligence in not filing does not excuse petitioner.

2. Petitioner's September 10, 1976 sale of the coin operated amusement devices which he used in his business while he

held a seller's permit for that business is not an occasional sale and exempt from the sales tax.

AUTHORITY: ss.71.51(10)(a) and 77.54(7), Wis. Stats.
Sec. Tax 11.10, Wis. Adm. Code
Three Lions Supper Club, Ltd. v. Dept. of Revenue 72 Wis. 2d 546 (1976)
Ramrod, Inc. v. Dept. of Revenue, 64 Wis. 2d 499 (1974)

3. Petitioner was not a lessor of his coin operated amusement devices. Petitioner purchased tangible personal property (the devices) then used the property to provide a taxable service.

AUTHORITY: ss.71.51(24) and 77.52(2)(a)2, Wis. Stats.
Telemark Co., Inc. v. Dept. of Taxation 28 Wis. 2d 637 (1965)

Therefore,

IT IS ORDERED

That respondent's actions on petitioner's petitions for redetermination are affirmed.

Dated at Madison, Wisconsin, this 21st day of October, 1980.

WISCONSIN TAX APPEALS COMMISSION

Thomas M. Boykoff

Thomas M. Boykoff, Chairman

Thomas R. Timken

Thomas R. Timken, Commissioner

John P. Morris, Commissioner

Catherine M Doyle

Catherine M. Doyle, Commissioner

Keith R. Clifford, Commissioner

STATE OF WISCONSIN

TAX APPEALS COMMISSION

WILLIAM A. MITCHELL, Petitioner, vs. WISCONSIN DEPARTMENT OF REVENUE, Respondent.	DOCKET NO. S-7244 and S-7245 O P I N I O N

Both the petitioner and respondent agree that the gross receipts from petitioner's coin operated amusement devices are subject to Wisconsin's sales tax. The disagreement arises over which statute imposes the sales tax, s.77.52(1) or s.77.52(2)(a)2, Wis. Stats.

Petitioner contends that the sales tax on his gross receipts is imposed by s.77.52(2), Wis. Stats., and that these gross receipts arise from his renting of his equipment to owners of premises. Under this theory, petitioner contends that he may claim as a credit against the sales tax on these gross receipts, the sales tax which he paid on the acquisition of the devices, relying on s.77.51(11)(c)5, Wis. Stats. A more appropriate contention appears to be that petitioner's purchases of the devices were initially exempt from the sales tax as purchases for resale under s.77.51(4)(intro.), Wis. Stats. (i.e., their purchase for resale is not included in the definition of "sale" for purposes of s.77.52(1), Wis. Stats).

Respondent contends that the sales tax on petitioner's gross receipts is imposed by s.77.52(2)(a)2, Wis. Stats., which imposes the sales tax on admissions to places of amusement or entertainment. The admission fee is the coin deposited in the device which is then used for amusement or entertainment. Under this contention, the tax is imposed on a service and under s.77.51(24), Wis. Stats.,no part of the charge for the service may be deemed a rental of tangible personal property. In addition, the petitioner, as provider of the service, is the ultimate consumer of tangible personal property (the devices) purchased for the service and, as such, must pay sales tax on its purchase and cannot claim that tax as a credit against taxable gross receipts from the service.

This Commission agrees with the respondent. While it appears to have long been assumed that the gross receipts from coin operated amusement devices are subject to the sales tax, there is no clear statement in the statutes to this effect. Nor does there appear to be much case law explicitly and directly on this point. However, this Commission regards respondent's contention and interpretation of various statutes as set out above as reasonable, logical and persuasive.

Respondent's contention is supported by a statement in Telemark Co., Inc. v. Dept. of Taxation 28 Wis. 2d 637 which upheld the sales tax on the service of furnishing rides on a ski tow. At page 641, the Supreme Court, in discussing what constituted a place of amusement, stated: "Some activities do not depend upon admission

to a confined place but upon access to or use of facilities whether they be a place, such as a golf course, or equipment such as a pool or billiard table. It is apparent that sec. 77.52(2)(a)2 is more extensive than a strict admission-tax statute. . ." (emphasis added). While this language constitutes dictum, it is a statement by this state's highest court on the statute and cannot be ignored. Also while the case involved the selective sales and use tax rather than the general sales and use tax, effective September 1, 1969, the statutory provision was identical to the statute involved in the case before the Commission.

Other cases which support the respondent's position include Reid & Associates, Inc. v. Dept. of Revenue 8 WTAC 212 (1970) affirmed by Dane County Circuit Court, Case No. 132186 (1971), and Francis L. Fish v. Dept. of Revenue 9 WTAC 40 (1971).

The record does not appear to support the contention that petitioner rented the devices to owners of premises. No rental agreements, either verbal or written, appear in the record. Only 3 things appear to have been agreed upon:

(1) petitioner would maintain and repair the devices; (2) owners of premises would allow the machines to be placed; and (3) a division of the gross receipts of the devices was agreed upon. The owners of the premises do not appear to have exercised any control over the manner of use of the devices. The arrangement was simply that the petitioner placed his devices on the premises of others and agreed to share a portion of the gross receipts with the

premises' owners for this privilege. Petitioner's payments might be characterized as rental payments for the use of the space on which the machines were located. Petitioner has not proven his contention.

WISCONSIN TAX APPEALS COMMISSION

Thomas M. Boykoff

Thomas M. Boykoff, Chairman