





taxpayer of the final decision in the case 'J.C. Penney Co., Inc. vs. Wisconsin Department of Revenue' which is currently pending before the Circuit Court."

On July 27, 1982, the Court of Appeals issued its decision in the Penney case referred to in the stipulation. On August 20, 1982, the Department and J.C. Penney Company agreed not to appeal the Court of Appeals' decision. K Mart never gave notice to the Department of the Penney decision. On March 8, 1983, the Department denied K Mart's petition for redetermination. K Mart received the Department's denial on March 10, 1983.

On May 10, 1983, K Mart mailed to the Tax Appeals Commission (Commission) a petition for review of the Department's denial of the petition for redetermination. The Department moved the Commission to dismiss the petition for review on the grounds that it was filed late. K Mart asked the Commission to declare that the Department's assessment was null and void because the Department had failed to act within the time set by statute.

On January 27, 1984, the Commission ruled that it had no jurisdiction to hear the matter because K Mart's petition for review was filed after the statutory time for appeal to the Commission had expired.

It is undisputed that K Mart had 60 days from receipt of the denial of redetermination to appeal the Department's decision. It is further undisputed that K Mart received the denial of redetermination on March 10, 1983, and that its 60 days within which to file an appeal expired on May 9, 1983. Finally, it is undisputed that K Mart's appeal was untimely.

K Mart contends that the Department failed to make a final redetermination within the time permitted by statute, and thus lost

jurisdiction to collect the tax. Since the tax was thus rendered void by the Department's own actions, K Mart contends that it could not be late in appealing from the assessment of a void tax.

Additionally, K Mart argues that the Department should be estopped from asserting the validity of the tax and K Mart's untimeliness in appealing because the Department failed to hold a required conference and also sent K Mart allegedly misleading statements regarding the time to appeal.

The Department asserts that the Commission's decision was correct because K Mart's appeal was late. The Department maintains that it acted properly in assessing the tax before the time set forth in the stipulation expired, and that it never lost its authority to collect the tax. Moreover, the Department maintains that its failure to hold a conference and its correspondence with K Mart do not work an estoppel against it.

#### DECISION

##### A. The Stipulation.

Section 77.59(6)(a), Stats., provides that the Department shall make a redetermination within six months of a receipt of a request for redetermination. This statute does not expressly provide for extensions of time to make redeterminations. However, regardless of whether the Department had the authority to enter into a stipulation, I find that K Mart is estopped from denying its validity. The parties herein entered into a written stipulation which extended the time for a redetermination for over two years. The Department changed its position in reliance on the stipulation to its detriment because the statutory six months for issuing a redetermination passed. The Department's reliance on the stipulation was reasonable.

The more important question is the construction and effect of the stipulation. The relevant paragraph provides as follows:

That the time for action of the Wisconsin Department of Revenue with respect to the petition for redetermination filed by the above-named taxpayer is hereby extended for a period of six months after the Wisconsin Department of Revenue is notified by the taxpayer of the final decision of the case "J.C. Penney Co., Inc. vs. Wisconsin Department of Revenue" which is currently pending before the Circuit Court.

The "taxpayer" referred to in the above language of the stipulation clearly refers to K Mart, not to J.C. Penney Co. Contrary to K Mart's assertion, K Mart would have been in a logical position to notify the Department of the Penney decision. K Mart would have been closely following the case since the outcome would likely affect its own case. K Mart would have wished to trigger the time for the Department's redetermination of the tax rather than wait for the Department to act in the ordinary course -- particularly if the outcome were favorable to it.

The six months for the Department to act after K Mart notified it of the Penney decision is merely the outside limit on the Department's right to act on the petition for redetermination. This limit is in keeping with the public policy of section 71.59(6)(a), Stats., e.g., that a taxpayer should not be subjected to an indefinite time for redetermination of a tax and that there should be finality in tax cases. Nothing in the stipulation, however, precluded the Department from redetermining the tax before K Mart notified it of the Penney decision. K Mart was not entitled to have the Department reconsider the tax only during a specified six month period that K Mart could set into motion. Such a construction is unreasonable because K Mart could choose never to notify the Department and the Department would then be precluded from ever redetermining the tax.

Since the Department properly redetermined the tax within the stipulated time frame, I find that the tax is not void ab initio. Therefore, K Mart was required to appeal the Department's decision within sixty days of receipt of the Department's denial.

#### B. Estoppel.

K Mart argues that the Department should be estopped from asserting K Mart's untimeliness in filing the appeal because the Department failed to hold a conference and because the Department's own correspondence misled K Mart regarding the time to appeal.

The Wisconsin Administrative Code on Tax, section 3.92, states as follows:

The taxpayer may request in its petition, or at any time before the department of revenue has acted thereon, an informal conference at which the facts and issues involved in the assessment or redetermination may be discussed. Any such conference will be held at a time and place determined by the department.

Clearly, this section provides the taxpayer with an opportunity to informally discuss and resolve any disputes without additional formal proceedings. However, this section does not mandate that the Department hold a conference, even though the taxpayer has requested one. Once the Department decides to hold a conference, it must set up the conference "at a time and place determined by the department." However, this language does not require the Department to hold a conference in every case.

K Mart also argues that the Department should be estopped from asserting untimeliness because of its misleading correspondence with K Mart. In connection with the denial of the petition for redetermination, the Department sent K Mart a cover letter dated March 3, 1983, and enclosed two documents labelled "Notice of Amount Due"

and "Notice of Action". (Tab 7, Petitioner's Appendix to Brief in Support of Petition for Review). The cover letter and enclosures were received by K Mart on March 10, 1983.

The last paragraph of the cover letter states that "unless you contemplate an appeal to the Wisconsin Tax Appeals Commission, please make your remittance, along with a copy of the enclosed bill, on or before May 15, 1983. (Emphasis added). The enclosed bill was entitled "Notice of Amount Due," and sets forth the amount of tax due, plus the amount of interest computed through May 15, 1983.

The "Notice of Action," which was also enclosed with the cover letter, states as follows:

Consideration has been given to your petition for redetermination of the additional taxes referred to above.

You are hereby notified, pursuant to Section 77.59(6)(a) of the Wisconsin Statutes, that the petition for redetermination resulting from this determination is denied.

If you disagree with the redetermination, you may appeal in writing to the

Wisconsin Tax Appeals Commission  
Room 1003  
131 West Wilson Street  
Madison, Wisconsin 53702

within 60 days after receipt of this notice. In the event of an appeal, a \$5.00 filing fee must be paid to the said Commission at the time your appeal is filed.

If you are in agreement with this redetermination, and wish to pay the deficiency before the due date, you may subtract \$17.54 of interest per day for each day paid before the due date.

If you decide to appeal this redetermination, you have several options concerning the payment of the ultimate deficiency. See Part II of the enclosed brochure on your appeal rights which is enclosed with this notice.

If no appeal is filed within the 60 day period, this redetermination will become final and payable

on or before the date indicated on the attached statement.

K Mart asserts that it interpreted these documents to mean that it had to pay or appeal by May 15, 1983; that it relied on this correspondence to its detriment; and that its reliance was reasonable. However, I disagree.

A careful reading of the "Notice of Action" informs K Mart that it had 60 days after receipt of the notice in which to appeal. The "Notice of Action" also informs K Mart of the consequences of failing to appeal within 60 days, i.e., that the redetermination becomes final and payable "on or before the date indicated on the attached statement." On the attached statement, the reader is informed that the taxes are payable by May 15, 1983. Both the letter and invoice indicate when the taxes are due if K Mart chose not to appeal, but do not specifically refer to the time limit for appeal. The Notice of Action clearly sets forth the deadline for appeal.

I find that the three documents together (as presented to K Mart) clearly inform a reader of the time for appeal. I find further that K Mart's reliance on the letter alone and its interpretation of the last sentence in the letter is not reasonable. Therefore, the Department is not estopped from asserting K Mart's untimeliness in filing its appeal to the Commission.

#### CONCLUSION AND ORDER

For all the above reasons, I conclude that the Department's denial of redetermination, before the stipulated time for redetermination expired, does not render the taxes void ab initio. I also conclude that the Department is not estopped from asserting K Mart's untimeliness in filing a notice of appeal with the Tax

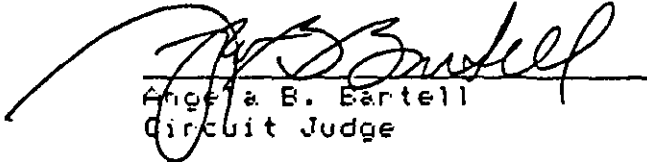


Commission. Finally, I conclude that K Mart's appeal was untimely.

Therefore, I hereby affirm the decision of the Tax Commission and dismiss K Mart's petition for review.

Dated this 21<sup>st</sup> day of August, 1985.

BY THE COURT

  
Angela B. Bartell  
Circuit Judge

cc: ✓ F. Thomas Creeron III, P.O. Box 7857, Madison WI 53707-7857  
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