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ESTOPPEL BY INFORMAL ADMINISTRATIVE ACTION OR OPINION IN SALES AND USE TAX CASES

By Richard H. Wagner*

SINCE many sales and use taxes have a broad base and are relatively complex, the volume of regulatory materials and administrative decisions is probably greater in this area than in any other field of tax administration. For the same reasons, contacts with agency personnel regarding the application of the tax are more frequent. It is not surprising, therefore, that attempts to resort to estoppel are not unusual in sales tax enforcement. This was borne out in Pennsylvania's administrative experience when a 1 per cent sales and use tax was enacted in 1953,[1] followed by the 3 per cent (now 4 per cent) Selective Sales and Use Tax Act of 1956 with its maze of exemptions, exclusions and exceptions.[2]

Apart from its central office, the Pennsylvania agency has 22 field offices throughout the State, approximately 160 field auditors and 270 investigators. Personal contacts and telephone calls between covered vendors (approximately 200,000) and agency employees are numbered in the thousands weekly. With the possible exception of the Bureau of Employment Security, the Sales Tax Bureau is called upon to assist more people on program application than any other state agency. Although most of its estoppel cases originated in the earlier years of the tax, the Bureau is understandably concerned that even today, with its complex and far-flung operations, future estoppel arguments may arise. It is certain that if the rule of estoppel were held applicable to informal opinions of sales tax employees the agency could expect a large volume and infinite variety of controversies on this point. To avoid precedents which would open the door to such administrative chaos, the Pennsylvania Bureau of Sales and Use Tax and the Sales Tax Board have steadfastly adhered to the rule that estoppel is not operative against the Commonwealth. Cases and materials collected on the subject are presented herewith for the benefit of others who may be faced with similar problems.

All authorities agree that the first requisite of an estoppel is that the person against whom the estoppel is asserted must have engaged in conduct amounting

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[1] Act of 1953, P.L. 377.

[2] Pa. Stat. Ann. tit. 72, § 3403 (1956). Later amended by Acts of 1959, No. 14 and No. 131.

to a misrepresentation or concealment of material facts.[3] In the sales tax cases this basic requirement is not met. No misrepresentation of fact has been made. An erroneous statement by a government employee that a taxpayer is not liable for collection and remittance of tax is a mistake of law, not a misrepresentation of fact. Vendors seeking excuse from tax liability on such grounds have, therefore, failed to establish the basis for asserting an estoppel.[4]

The vendors agree with the principle established by numerous cases that no estoppel can be asserted against the Commonwealth.[5] However, they argue that since, under the Sales and Use Tax Act, a vendor is personally and directly liable for tax only if he has failed to collect tax from his purchaser, a distinction should be made where a representative of the Commonwealth has told a vendor he is not liable for collection of tax. They contend that estoppel should apply in such cases.

The Pennsylvania Sales and Use Tax Act gives the agency the option to hold accountable either the vendor who has failed to collect tax or the purchaser who has failed to pay tax on a taxable transfer.[6] The legal right of the Commonwealth to proceed initially against the vendor, purchaser, or both is clear. The act makes no distinction between primary and secondary or direct and indirect liability of a purchaser and vendor. The argument for the attempted distinction is that vendors, who have relied on representation made by government employees and have failed, therefore, to collect the tax, would often have to bear an inequitable burden, since in many cases it would be impractical or impossible to collect the tax from the purchasers when a later claim is made by the govern-

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[3] POMEROY, EQUITY JURISPRUDENCE 805 (5th ed. 1941).

For the elements of estoppel, see Pomeroy, Equity Jurisprudence, Par. 805 (5th Ed. 1941). In Northwestern Nat'l. Bank v. Commonwealth, 345 Pa. 192 at page 198, 27 A.2d at 23, 24 (1942) the court stated: "If the truth be known to both parties, or if they have equal means of knowledge, there can be no estoppel . . . one is not relieved who has the means of becoming acquainted with the extent of his rights."

[4] It is true that estoppel has rarely been applied to government and frequently to taxpayers. This is because a taxpayer's claim of estoppel will, in most cases, be the result of inquiries made of an administrative official for advise regarding the taxable or non-taxable nature of a given transaction or transactions. Under these circumstances, the "representation" made by the government official is merely an expression of his opinion as to the taxable or non-taxable nature of the transaction based on his understanding of the law, which unfortunately may be inaccurate. Atlas, *Doctrine of Estoppel in Tax Cases,* 3 TAX L. REV. 71.

[5] Easton Bank v. Commonwealth, 10 Pa. 442, 12 Atl. 453 (1949); Delaware Division Canal Co. v. Commonwealth, 50 Pa. 399, 134 Atl. 407 (1865); Commonwealth v. Quaker City Cab Co., 287 Pa. 161, 134 Atl. 404 (1926); New Castle City v. Whithers, 291 Pa. 216, 139 Atl. 860 (1927); Commonwealth v. Central Nat'l. Bank, 293 Pa. 404, 143 Atl. 105 (1928); Commonwealth v. Taylor's Ex'rs., 297 Pa. 335, 147 Atl. 71 (1929); Cumberland County v. Lemoyne Trust Co., 318 Pa. 85, 178 Atl. 28 (1935); Commonwealth v. A. M. Byers Co., 346 Pa. 555, 31 A.2d 530 (1943); *cert. denied* 320 U.S. 757 (1943); Federal Deposit Ins. Corp. v. Board of Fin. & Rev., 368 Pa. 463, 84 A.2d 495 (1951); Commonwealth v. Western Md. Ry., 377 Pa. 312, 105 A.2d 336 (1954).

[6] PA. STAT. ANN. tit. 72, §§ 3403-2(m), 3403-201 (1955), 403-546(2) (1957).

ment. This argument is not supported by decisions in other jurisdictions administering sales and use tax statutes comparable to the Pennsylvania act.

In *Claiborne Sales Co. v. Collector of Revenue,*[7] the Supreme Court of Louisiana held that sales of ceramic tile and accessories to tile contractors constituted "sales at retail" within the Louisiana act. In reaching their decision, the Court stated that the refusal of the State's Deputy Collector of Revenue to grant the vendor its dealers' registration certificates on the ground that it was not liable for the tax did not estop the state from thereafter collecting the tax and the penalties due. It is interesting to note that the Collector's refusal was given on two separate occasions.

In *Michigan Sportservice v. Nims,*[8] the Supreme Court of Michigan ruled that sales of programs, score cards and racing forms, which carried advertising matter, to numerous customers by concessionaires at baseball games and race tracks were taxable sales and not exempt as "commercial advertising," since such advertising was not included in the programs, etc., on special order of the customers as required by the sales tax statute. The court handed down this decision despite the taxpayer's contention that a departmental regulation in effect at the time the sales in question occurred made such sales exempt. In so ruling the court said,

> Plaintiffs contend that the sales in which the assessments in controversy were based were exempt from taxation on the ground that the subject matter thereof was commercial advertising within the meaning of the provisions of the statute and of the rule (i. e. departmental regulation), above quoted. The provisions of the rule must, of course, be construed in connection with the statute itself. In case of conflict, the latter governs. It is not within the power of the Department of Revenue to extend the scope of the act. . . . For equally cogent reasons the rules and regulations of the Department may not grant exemptions not authorized by the legislature.[9]

In *Henderson v. Gill*[10] the Supreme Court of North Carolina ruled that a retail florist was liable for sales tax despite the fact that he had failed to collect tax on the sales in question because of his reliance on erroneous advice of agents of the Department of Revenue. In so ruling, the court said:

> The case of plaintiffs has an appeal stronger than that which usually supports a plea of estoppel. The official representations made to them are now conceded to have been incorrect and misleading, and because of the multitude of the transactions and want of any record of the purchasers they were thus

[7] 232 La. 1061, 99 So.2d 345 (1957).
[8] 319 Mich. 561, 30 N.W.2d 281 (1948).
[9] *Id.* at 566, 30 N.W.2d at 283.
[10] 229 N.C. 313, 49 S.E.2d 754 (1948).

> deprived of the opportunity to collect the three percent tax on sales made on products they were advised were exempt. Moreover, it must be noted that these plaintiff merchants were statutory agents for the collection of the tax on sales which were definitely imposed upon the consumer, and their responsibility arises on the assumption that they must so collect.
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> These facts, however potent in creating an estoppel in ordinary transactions between individuals, do not estop the State in the exercise of a governmental or sovereign right. . . .
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> The State cannot, by the conduct of its agents be estopped from collecting taxes lawfully imposed and remaining unpaid; and under the law as we understand it neither can their conduct or advice create an estoppel against the State by these retail merchants on the theory of their mere agency since they are the agent of the law, with a fixed liability to account for the tax imposed. . . .[11]

The government's position is also sustained by decisions of the United States Supreme Court. In *United States v. Globe Indemnity Co.*,[12] the Court approved a decision of the Second Circuit Court of Appeals in which a person not directly liable for payment of a tax was denied the right to assert estoppel against the United States Government. In that case a surety had furnished a bond for a taxpayer. After a series of negotiations the Collector of Internal Revenue, in response to the taxpayer's request, supplied the taxpayer with a certified letter stating "There are no unpaid income taxes appearing on the records of this office in your name. . . ." The surety, relying on the Collector of Internal Revenue's letter, returned the collateral to the taxpayer. Thereafter, the government sued and established its right to the taxes in question. The taxpayer was insolvent and the government, therefore, sued the surety on the bond. The Court ruled that the Collector of Internal Revenue did not have authority to furnish a tax search binding on the Commissioner and also that he could not be estopped by the erroneous interpretations of the law communicated by his agents to taxpayers or persons secondarily liable for the amounts owed by a taxpayer.[13]

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[11] *Id.* at 316, 49 S.E.2d at 756. See also State v. J. Watts Kearny & Sons, 181 La. 554, 160 So. 77 (1934); Dent. v. Obert, 144 Ohio St. 492, 59 N.E.2d 931 (1945); Crane Co. v. Arizona State Tax Comm'n., 63 Ariz. 426, 163 P.2d 656 (1945); Arizona State Tax Comm'n. v. Frank Harmonson Co. Metal Products, 63 Ariz. 452, 163 P.2d 667 (1945): In Duhame v. State Tax Comm'n., 65 Ariz. 268, 281, 179 P.2d 252, 260 (1947) the Supreme Court of Arizona said, "It is true that during the time plaintiff was engaged in the contracting here in question he might have passed this tax on to the government had he not been misled, by an improper interpretation of the Act by The Commission, into believing no tax was due. Still, it is the settled law of the land and of this jurisdiction that as taxation is a governmental function, there can be no estoppel against a government or governmental agency with reference to the enforcement of taxes. Were this not the rule the taxing officials could waive most of the state's revenue."

[12] 94 F.2d 576 (2d Cir. 1938), *cert. denied* 304 U.S. 575 (1938).

[13] The United States Supreme Court has recently reaffirmed the immunity of government from claims of estoppel asserted by taxpayers in the case of Automobile Club of Michigan v. Commissioner, 353 U.S. 180 (1957).

In support of their argument[14] some Pennsylvania vendors have cited the case of *Commonwealth v. Welsbach Co.*[15]

In that case agents of the Commonwealth notified a corporation prior to 1900 that it need not assess and collect tax upon its corporate indebtedness under the provisions of the applicable statute. In December 1906 the Auditor General informed the corporation of the current Commonwealth's position, which was that the corporation should pay the tax in question. The Commonwealth subsequently sued the corporation for the tax for the period 1900 to 1911. The Dauphin County Court ruled that the corporation was liable for tax for the period 1907 to 1911 and that it was not liable for the payment for the period 1900 to 1906, since the corporation was merely the collector of the tax. The court maintained that to require the corporation to pay the tax for the period 1900 to 1906, after it had relied on the representations of the Commonwealth's agents that no tax had to be collected, would impose a penalty upon the corporation since it had failed to collect tax from the bondholders and would probably no longer be able to recover from said bondholders the amount of tax payable to the Commonwealth.

The *Welsbach* case was decided in 1913. In a more recent case (1956) before the same court, *Commonwealth v. I.T.E. Circuit Breaker Co.*,[16] the Dauphin County Court, holding that the Commonwealth cannot be estopped by actions of any of its officers in the performance of a governmental function, said:

> The defendant argues that Commonwealth v. Welsbach, 16 Dauphin County Reports, 130 (1913) supports his contention. We think not. The court there held that they were dealing with a penalty rather than with a tax due. Furthermore, if that case should be construed contra to the Western Maryland Railway case . . . the latter would of necessity prevail.[17]

The *Western Maryland Railway* case,[18] cited by the Dauphin County Court, held that a corporation, which was required by law to act as an agent of the Commonwealth in collecting tax on interest paid to the corporation's bond-

[14] It has been suggested that the vendor's position is strengthened by decisions of the Pennsylvania Supreme Court holding that the appraisement of an inheritance tax appraiser is binding on the Commonwealth. See Heberton Estate, 351 Pa. 564, 41 A.2d 654 (1945); Darsie Estate, 354 Pa. 540, 47 A.2d 815 (1946). These cases hold only that the Commonwealth and the taxpayer are bound by a res judicata determination of a quasi-judicial official where no timely appeal is taken from his determination. They are not in point in deciding the question of whether or not a taxpayer is bound by erroneous legal advice given orally and informally by an administrative employee.

[15] 16 Pa. Dauphin County Rep. 130 (1913).

[16] 69 Pa. Dauphin County Rep. 265 (1956).

[17] *Id.* at 267.

[18] Commonwealth v. Western Md. Ry., 377 Pa. 312, 105 A.2d 366 (1954).

holders, could not assert estoppel against the Commonwealth. Mr. Chief Justice Stern, speaking for the Supreme Court of Pennsylvania, said:

> It is a fundamental legal principle that a State or other sovereignty cannot be estopped by any acts or conduct of its officers or agents in the performance of a governmental as distinguished from a proprietary function. No errors or misinformation of officers or agents can estop the government from collecting taxes legally due. However firmly established the rule as to private individuals or corporations that where a person has been induced to act to his detriment by the representations of an agent he can hold the principal on the theory of estoppel, that rule does not apply when a government is the principal . . . the rights of the Commonwealth are not liable to be compromised by the nonfeasance of her agents. Nor can her debtor escape through the mistake of her servants acknowledging a sum less than the whole due, as received in full.[19]

This language is forceful, direct and persuasive in sales tax cases even though the issuing corporation in the *Western Maryland Railway* case had issued the bonds tax free.

The Supreme Court of Pennsylvania handed down a similar ruling in *Cumberland County v. Lemoyne Trust Co.*[20] In that case a statute imposed tax on the interest payments made by a trust company to holders of certain certificates. The County Commissioners had demanded and received the taxes for the year in question from some of the holders of the certificates. The trust company, knowing of this practice, did not withhold and remit the tax on its interest payments to certificate holders. Despite the fact that the trust company was essentially a collecting agent for the county and the fact that the County Commissioners had made no effort prior to the year in question to assess the tax against the trust company, the court ruled that the trust company could not assert estoppel against the government.

Although the postion of the Supreme Court of Pennsylvania on the question of government estoppel is clear, vendors have contended that the result reached by that court in the *Western Maryland Railway* and *Lemoyne Trust Co.* cases is not fair as applied to them. Let us examine this contention. It should be noted that most of the claimed exemptions allegedly were "granted" through the medium of informal conversations in which administrators gave to vendors or lawyers their own views on a question of law, that no confirming regulatory or written exemption was issued, and that no portion of the Selective Sales and Use Tax Act authorized the agency employee to grant such an exemption.

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[19] *Id.* at 320, 105 A.2d at 341.

[20] 318 Pa. 85, 178 Atl. 32 (1935).

It must be remembered that we are not dealing in these cases with an agreement authorizing prospective remittances of tax under a formula granted by the Bureau pursuant to Regulation 502 and Section 581 of the Pennsylvania act.[21] If such an agreement reflects a taxpayer's true liability with reasonable accuracy, it is clearly an exercise of power within the limits of the authority granted to the Department by the Legislature. Further, we are not dealing with a taxpayer's reliance on an officially promulgated and published rule or regulation. In the rare event of a regulatory amendment imposing tax, it is the general practice of the Pennsylvania Bureau to apply such amendments only prospectively to vendors previously ruled to be non-taxable.[22]

What we are dealing with here is a claim of complete freedom from liability for tax based on actions of an administrative official in no way authorized by statute to so act. The Pennsylvania Selective Sales and Use Tax Act gives the Department authority to make inquiries, determinations, and assessments of the tax imposed by the act.[23] It also authorizes the Department to prescribe and promulgate rules and regulations *not inconsistent* with the provisions of the act.[24] *Such rules and regulations, following their approval as to legality, are filed in the Department of State in accordance with Section 21 of the Administrative Agency Law of 1945,*[25] whereupon they officially become effective. This is far removed from legislative authorization of an administrative employee to grant orally and informally to an individual taxpayer a dispensation from liability based on the employee's own mistake of law. Can it be said that a vendor has acted prudently and reasonably in soliciting and relying on an agency employee's informal oral opinion regarding liability under the act? Is it desirable to have tax liability under a legislative enactment depend not upon the standards prescribed by the legislature but upon the statements and conduct of government employees with respect to each individual? [26]

Much has been said of the "unfairness" of the rule that prevents a taxpayer from asserting an estoppel against the government. It is contended that modern

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[21] 2 CCH STATE TAX CAS. REP. PA. ¶ 61016.

[22] Bureau Regulation No. 1 so provides. See footnote 26. This is in accord with the results reached in City of Phila. v. Westinghouse Elec. Corp., 55 Pa. D. & C. 343 (1945), and Hoffman v. City of Syracuse, 2 N. Y. 2d 484, 141 N.E.2d 605 (1957). Query as to whether a taxing agency has the power to make interpretative regulations effecitve only prospectively in the absence of a legislative grant of such authority. See INT. REV. CODE OF 1954 § 7805(b), under which the Secretary or his delegate is expressly authorized to prescribe the extent to which any ruling or regulation may be applied without retroactive effect.

[23] PA. STAT. ANN., tit. 72 § 3403-540(1956).

[24] PA. STAT. ANN., tit. 72 § 3403-380(1955).

[25] PA. STAT. ANN., tit. 71 § 1710.21(1945).

[26] Adoption of the position that any taxpayer who has been erroneously advised that a transaction is not taxable is excused from tax apparently would conflict with the uniformity requirement of Article IX, Section 1 of the Pennsylvania Constitution. It would also produce chaos in the enforcement of tax laws.

society should not harbor the ancient rule that "the sovereign can do no harm," and the argument paints a word picture of the hapless individual victimized by an educated colossus going its irresponsible way at the expense of individual rights. This argument ignores the realities on which the doctrine against estoppel has subsisted through years of self government in common law jurisdictions.

The rights to be considered in these cases are those of private interests in relation to the public interest. In this relation the individual has a right to expect fair and honest dealings from his government [27] and considerate, courteous treatment at the hands of its officials. On the other side, individuals dealing with agents of the public should act with candor and a higher degree of care than might be expected in purely private transactions. Any idea that public agents and employees are possessed of legal infallibility or knowledge and skills superior to everyone else is not borne out by common experience or records of past litigation. Even judicial and quasi-judicial branches of government, responsible for high level review and resolution of legal questions, divide, reverse, rule and overrule in their search for the law. In every case heard and decided there are at least two theories of the correct result, and government, unfortunately, does not have a corner on the most expert opinion, legal or otherwise. In areas not covered by specific rule and regulation, the individual, particularly the practitioner, who queries a public employee more often than not has knowledge or access to knowledge equal or superior to that of the public servant. When the facts are probed, the public is just as likely to be the innocent victim of a knowledgeable individual as the other way around.

In appraising the "fairness" of the rule in question, one must also consider the practical difficulties inherent in any other method of protecting the Commonwealth against loss of revenue and fraud. One way which has been suggested is to "inform administrative employees that they should refrain from giving legal advice." Upon reflection, it must occur to anyone with first-hand experience that the erring employee usually is unaware that he is giving "legal advice;" rather, he honestly thinks there is no serious question as to the matter on which he speaks. He may be completely wrong in his premise, or the facts supplied him may be woefully inadequate for any determination, but he realizes none of this. The levels at which such errors may be made are not limited to inferior positions. It is axiomatic that higher echelons in public as well as in private management deal with general rather than specific problems. There is, perhaps,

[27] An assessed taxpayer, for example, is entitled to ample notice of the basis of the assessment so that he may clearly understand the grounds on which it is based, and even the necessary schedules which reflect the tax liability are his to examine in order that he may have a fair hearing of his case. Decision of the Board at Docket No. 399 (May 15, 1958).

less danger of serious specific misapplication of the law on the part of rank and file operating officials than at some higher levels of management.

Of course, there are bound to be cases in which the mistaken employee was careless in making the statements in question. However, it must be assumed that, if a rule of government estoppel were adopted, situations would occur in which government employees would give erroneous advice to enable others with whom they are acting in concert to evade legal liability. How this latter situation could be detected and overcome is something which should give pause to anyone espousing the theory that the public loses and private interests gain whenever a government employee makes mistakes.

If this rule of government estoppel became law, it would mean that all employees in positions where their mistakes could bind the public would have to be bonded. For, would it not be ridiculous to hold that an employee who handles public monies and negotiable securities must be insured, and that an employee who can amputate a million dollar public claim by erroneous and unauthorized legal advice requires no bond?

Finally, a vendor who is uncertain as to the taxability of transactions is not without methods of obtaining a definitive ruling. He has several practical alternatives for obtaining an official determination of the law as applied to his situation. He may request the promulgation of a rule or regulation which, when filed in the Department of State will protect him, and all other vendors alike, from retroactive revisions with penal effect. He may declare certain typical transactions on which he has not collected the tax, receive an assessment and petition for hearing and review, or he may pay the tax and petition for hearing and refund. In these instances, if he has disclosed all of the facts of his situation, the possibility of a subsequent overruling of the decision will be remote.[28] Since the vendor has these methods of obtaining an administrative ruling, it is only reasonable that he should be required to use them rather than rely on the advice of officials whose determinations should not bind the government.

[28] See Appendix "A" to Sales Tax Regulations No. 1 for procedure under which a taxpayer may obtain an official decision or ruling. However, even where petition for refund has been heard and allowed, our Legislature has expressly provided that the Commonwealth may, within the prescribed period of limitation, recover the amount of the refund if it was erroneously granted. PA. STAT. ANN., tit. 72 § 3403-542.1 (1955).