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Article 21

Taxation - Sales for "Use or Consumption" under Retailers' Occupation Tax Act

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The next paragraph of the opinion states that "Where there is no mistake, unreasonable delay, or the like, there can be no injustice in holding the bidder to the conditions of the Invitation for Bids."[15] One might point out the injustice in denying to this plaintiff a right that all offerors have had for centuries, namely, the right to revoke an offer at any time before acceptance.

In the decision as a whole, the court seems to object to the grounds for the plaintiff's attempted revocation and to penalize the plaintiff for lacking what the court considers justifiable grounds for revocation. The groundlessness of this reasoning is apparent from the fact that the general rule is that revocation of an offer requires no such justification. An offer, not under seal or for a consideration, may be revoked at any time before acceptance, regardless of the offeror's reasons for so doing.[16]

It is probable that the court could have reached the same result on the more logical ground that Congress, under the powers to wage war and to maintain an army, could change the common law as to army contracts, and that the regulations, which were promulgated under an act of Congress, had the effect of rendering the offer irrevocable. One might speculate that Judge Madden who wrote such fine decisions in the *Miller* case and the *Dick* case, concurred in the seemingly unfounded legal reasoning promulgated in the instant opinion because he realized that he would have to concur in the result, if the above reasoning were adopted.

In the light of the *Dick* case and the *Refining Associates* case, a lawyer will now have a difficult time advising a client as to any contractual problem which might arise before the Court of Claims.

TAXATION–SALES FOR "USE OR CONSUMPTION" UNDER RETAILERS' OCCUPATION TAX ACT

Plaintiff dairy company brought this action against the Illinois Department of Revenue to obtain credit for taxes paid from 1944 to 1947 on gross receipts from sales of milk to a state mental institution. The milk was purchased by the institution for consumption by inmates. The Circuit Court of Kane County entered judgment for plaintiff, and defendant appealed. The Supreme Court of Illinois reversed and remanded, holding that the legislative intent in passing the Retailers' Occupation Tax was to reach sales to purchasers for use or consumption and that it intended the tax to apply wherever the contemplated use of the tangible personal property would take such property off the retail market. *Modern Dairy Company, Inc. v. Department of Revenue*, 413 Ill. 55, 108 N.E. 2d 8 (1952).

[15] Ibid.

[16] Rest., Contracts § 41 (1933).

The Illinois Retailers' Occupation Tax Act, the primary source of revenue for the state of Illinois, is in practical effect a sales tax. Because of the limitation of the Revenue Article of the Illinois Constitution which restricts the legislature to *ad valorem* property taxes or to occupation, license, or franchise taxes,[1] it is in form a tax on persons engaged in the occupation of selling tangible personal property.

The original Sales Tax Act was enacted in March, 1933,[2] but was promptly challenged in *Winter v. Barrett*[3] and was held invalid because of certain unauthorized exemptions and provisions relating to delegation of legislative powers of appropriation.

Almost immediately after this case, the legislature enacted the present Retailers' Occupation Tax Act which was challenged in *Reif v. Barrett*[4] and found not violative of any of the constitutional prohibitions raised.

The title of the invalidated Sales Tax Act had referred to "sales at retail," but to avoid possible contention that this limited the act to sales in small quantities, the title of the newer act omitted "at retail" and described sales "to the purchaser, for use or consumption."[5]

Although the words "at retail" were eliminated from the title of the new act, the phrase was retained in the body of the act and there defined as not including transfers "for resale in any form as tangible personal property, for a valuable consideration."[6] Thus, the title of the present act, which merely restricts the tax to sales for "use or consumption," if given a liberal construction, is much broader and embraces more than the body of the act, which excludes transfers for "resale in any form."[7]

From its inception, the Retailers' Occupation Tax was attacked by various groups of vendors who claimed either that their sales were not "for use or consumption" or were "for resale."

In a series of cases, it was held that vendors of leather to shoe repairmen were not liable for the tax because the shoe repairmen did not use or consume the leather within the meaning of the act.[8] The repairmen, on the other hand, were not subject to the tax because they were engaged in rendering services and their transfer was merely incidental to the rendering of such services.[9]

Similar results were achieved with respect to sellers of medical supplies

[1] Ill. Const. Art. IX, Sec. 1 (1870).
[2] Ill. L. (1933) § 2, p. 938.
[3] 352 Ill. 441, 186 N.E. 113 (1933).
[4] 355 Ill. 104, 188 N.E. 889 (1933).
[5] Ill. L. (1933) § 1, p. 924.
[6] Ibid.
[7] Modern Dairy Co. v. Dept. of Revenue, 413 Ill. 55, 108 N.E. 2d 8 (1952).
[8] Revzan v. Nudelman, 370 Ill. 180, 18 N.E. 2d 219 (1938).
[9] Babcock v. Nudelman, 367 Ill. 626, 12 N.E. 2d 635 (1937).

to hospitals and doctors[10] and optical goods to optometrists.[11] The fact that the purchaser would not be liable for a tax on his subsequent disposition of the goods was immaterial.[12] In these cases the Illinois Supreme Court stated that in the absence of definitions of the terms "use or consumption" in the statute, it would apply the usual and popular meaning of the words.[13]

Following this same reasoning, in *Material Service Corp. v. McKibbin*,[14] it was determined that neither material men, nor the building contractors which they supplied, were subject to the tax, each for its own peculiar reasons. It was there held that the fact that building contractors use and consume materials furnished them by materialmen does not fix the liability of the latter for a tax under the statute since the contractor purchases such materials for the purpose of processing and adding to a structure he has agreed to make for and deliver to the owner, and this is not a "consumption" of the article within the meaning of that word under the statute.

In regard to contractors, it was said that the occupation of a building or construction contractor is the rendering of a service of skill in producing a completed structure under his contract with the owner, and such occupation was not subject to tax under the Retailers' Occupation Tax Act regardless of whether the materials used are consumed in completing the structure and thereby lose their identity or whether they are attached as fixtures.[15]

In 1941, in an effort to plug the gaps which had been created and to clarify the situation, the legislature passed two amendments to section 1 of the act. One of these provided that " 'Sale at retail' shall be construed to include any transfer of the ownership of, or title to, tangible personal property to a purchaser, for use or consumption by any other person to whom such purchaser may transfer the tangible personal property without a valuable consideration."[16]

The other amendment stated that " 'Use or consumption,' in addition to its usual and popular meaning, shall be construed to include the employment of tangible personal property by persons engaged in service occupations . . . , where as a necessary incident to the rendering of such services, transfer of all or of a part of the tangible personal property employed in connection with the rendering of said services is made from

[10] Mallen Co. v. Dept. of Finance, 372 Ill. 598, 25 N.E. 2d 43 (1939).

[11] American Optical Co. v. Nudelman, 370 Ill. 627, 19 N.E. 2d 582 (1939).

[12] Revzan v. Nudelman, 370 Ill. 180, 18 N.E. 2d 219 (1938).

[13] Modern Dairy Co. v. Dept. of Revenue, 413 Ill. 55, 108 N.E. 2d 8 (1952).

[14] 380 Ill 226, 43 N.E. 2d 939 (1942).

[15] Ibid.

[16] Ill. L. (1941) Vol. I, § 1, p. 1080.

the person engaged in the service occupation . . . to his customer or client."[17]

In 1944, the latter amendment was declared to be unconstitutional in *Stolze Lumber Co. v. Stratton*,[18] where the court stated that this amendment, rather than substituting a new definition for "use or consumption," had sought to add to the commonly known definition a new and additional one, at the same time retaining the settled, popular meaning. The court then strongly asserted that although the legislature may make reasonable definitions of terms found in an act, it is well settled that it may not declare that to be a fact which is not a fact.

Undoubtedly influenced by the Supreme Court's views in the *Stolze* case, the legislature in 1945 dropped the loophole-plugging definition of "use or consumption" from the Act.[19]

However, in the more recent case of *Fefferman v. Marohn*,[20] in which the facts were somewhat similar to those in the present case, the purchasers were held to be the users and consumers of the commodities as contemplated by the act as long as they did not transfer further the commodity purchased "for a consideration."

It was declared in this case that where the state and county purchase merchandise from sellers of textiles and clothing material, and use it in caring for the patients in their hospitals and the inmates of their institutions, the state and county, not being in the business of providing such merchandise for resale, are the consumers of the articles so purchased in caring for their wards, and such sales to them are sales at retail within the definition of the act.[21]

In the *Modern Dairy* case, the court follows this new trend of giving effect to the legislative intent. In fact, they go so far as to question the propriety of the court's refusal, in the *Stolze* case, to give effect to the clearly expressed intention of the legislature. The previously strict and narrow construction of the terms "use or consumption" is criticized and the court goes on to point out that if the legislature, after the courts construe the terms used in an act, attempts by amendment to define those terms, the reasonable presumption is that the court's construction was not in accord with the original intent of the legislature.[22]

In the instant case, the court did not feel that the remaining 1941 amendment, defining "sales at retail,"[23] goes beyond the scope of the

[17] Ibid.

[18] 386 Ill. 334, 54 N.E. 2d 554 (1944).

[19] Ill. L. (1945) § 1, p. 1278.

[20] 408 Ill. 542, 97 N.E. 2d 785 (1951).

[21] Ibid.

[22] Modern Dairy Co. v. Dept. of Revenue, 413 Ill. 55, 108 N.E. 2d 8 (1952).

[23] Ill L. (1941) Vol. I, § 1, p. 1080.

act, as urged by the taxpayer, and stated that the legislature has the power to make any reasonable definitions of the terms in a statute, and such definitions, for the purpose of the act, will be sustained.[24]

Thus, although they necessarily base their decision on other grounds, the courts through their language seem to indicate that they would probably have taken a much more receptive view of the invalidated 1941 amendment than did the court in the *Stolze* case.[25]

[24] Smith v. Murphy, 384 Ill. 34, 50 N.E. 2d 844 (1943).

[25] Modern Dairy Co. v. Dept. of Revenue, 413 Ill 55, 108 N.E. 2d 8 (1952).