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RQ-0220-JC

April 5, 2000

Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548
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FILE # ML-41366-00
I.D. # 41366

Re: Request for Attorney General's Opinion

Dear General Cornyn:

On behalf of the Honorable Mary Horn, Tax Assessor-Collector of Denton County, Texas, we respectfully request an opinion from your office as to the proper interpretation of Sections 23.1241 and 23.1242 of the Tax Code relating to the pre-payment of taxes on the inventory of heavy equipment dealers. Specifically, should monies which were paid to the Tax Assessor-Collector as pre-paid inventory taxes for a year in which the dealer did not open his business until after January 1 of the year for and in which monies were paid be refunded to the owner/dealer?

BACKGROUND

A system of taxation of a heavy equipment dealer's inventory as of January 1 of each year is established under Section 23.1241. For purpose of the computation of the appropriate tax, the market value of the dealer's inventory on January 1 is the total annual sales, less sales to dealers, fleet transactions, and subsequent sales, for the twelve month period corresponding to the preceding tax year, divided by 12. Id. §23.1241(b). If an owner was not a dealer on January 1 of the preceding tax year, the chief appraiser estimates the market value of the dealer's inventory. Id., §23.1241(c). In making the estimate, the chief appraiser makes extrapolations using sales data, if any, generated by sales from the dealer's heavy equipment inventory in the preceding tax year. The dealer is required to file an inventory declaration form adopted by the State

Comptroller not later than February 1 of each year or, in the case of a dealer not in business on January 1, not later than 30 days after commencement of business. Id., §23.1241(f).

Section 23.1242 establishes a system which requires dealers to file monthly inventory tax statements and to deposit with the tax assessor-collector an amount equal to the calculated taxes due on sales for the preceding month. The statement and deposit are due on or before the 10th day of each month. Id., §23.1242(b) and (f). The tax assessor-collector establishes and maintains an escrow account in the county depository for each dealer. Id., §23.1242(b) and (c). The money received is deposited to each owner's escrow account for the prepayment of property taxes. Id. §23.1242(b) Interest generated by the escrow account is the sole property of the collector to defray the cost of administration of the payment procedure. Id., §23.1242(c). Importantly, the owner or dealer "may not withdraw funds in an escrow account created under this section." Id., §23.1242(d).

A dealer who was not in business on January 1 is required to file the tax statement but, according to statute, may not remit money with the statement unless he has assumed that duty by contract in the purchase of the business. Id., §23.1242(g) (1) and (g)(2).

In the case of a dealer who has been in business for more than a year, the tax assessor-collector annually applies the money in the owner's escrow account to the taxes imposed and delivers a tax receipt to the owner. Id., §23.1242(h). If the amount in the escrow account is not sufficient to pay the taxes in full, the collector applies the money to the taxes imposed and bills the owner for the amount of any deficiency. Id., §23.1242(i). No provision is made in the statute for any extra or excess funds in the account, apparently because it is assumed that the dealer will make no deposit of extra funds in this self-reporting system.

FACTS

A heavy equipment dealer in Denton County first opened his business in April, 1999. He was advised by the Personal Property Division of the Denton Central Appraisal District that the law required him to file the initial declaration and the monthly inventory tax statements. The owner maintains that he was also advised that he was required to file the monthly deposits along with his inventory tax statements. The Central Appraisal District says that he was not so advised so there is a dispute as to the instructions the dealer received concerning filing the deposits. It is not in dispute, however, that the dealer was provided with Comptroller-approved inventory tax statement forms and that he did, in fact, file his monthly statement forms beginning in May, 1999. The form clearly instructed the dealer "If you were not in business for the entire year, you must file this statement each month after your business opens, but you do not include any tax payment until the beginning of next year." A copy of the inventory tax statement form is attached.

None of the monthly inventory tax reports beginning in May, 1999 indicate either in any of the reports or by other means that the payments were being made under protest. The total amount pre-paid into the escrow account was $1,724.58 which the dealer is now demanding be refunded to him. (See attached dealer's escrow account.) The tax assessor-collector has refused to refund the monies to the dealer relying on Section 23.1242(d) and instructions she has received from the Property Tax Division of the State Comptroller's Office. (See also the attached ruling by the Comptroller's Office involving pre-payments made by a motor vehicle dealer.)

DISCUSSION:

We do not believe that the tax assessor-collector is required or even permitted to refund the pre-payments made by the dealer in this case. We are of the opinion that the requested refund is not permitted by both Section 23.1242(d) and by the voluntary payment rule.

Section 23.1242(d) provides that an owner/dealer may not withdraw funds in a heavy equipment inventory tax escrow account. An almost identical statute dealing with motor vehicle dealers, Section 23.122(d), has been cited with approval by your office in at least one opinion. Tex. Atty. Gen. Op. JC-0149(1999).

The dealer claims that he is entitled to refund of his monies under Section 31.11 of the Tax Code which does provide for refunds for overpayments or erroneous payments made by a taxpayer in appropriate circumstances. We submit that Section 31.11 is not, however, applicable to this case. First, § 23.1242(d), as previously pointed out, prohibits the withdrawal of monies deposited to the escrow account. Being the more specific statute, §23.1242(d) prevails over the general statute, §31.11. Secondly, we submit that §31.11 only applies in cases in which a tax has actually been assessed. In the present case, no inventory taxes were assessed against the dealer during the prepayments in 1999 and could not, in fact, be legally assessed or required of the dealer until after January 1, 2000. In Texas National Bank of Baytown v. Harris County, 763 S.W.2d 823 (Tex. App. – Houston [14th Dist.] 1988, writ denied) the Court held:

> It is clear from the language of the statute itself that Section 31.11 applies only in cases where the tax is correctly ***assessed*** but the tax payer erred in paying it.

See also Cockerell v. Taylor County, 814 S.W.2d 892 (Tex. App. – Eastland 1991, writ denied); First Bank v. Deer Park Independent School District, 770 S.W.2d 849,853 (Tex. App. – Texarkana 1989, writ denied).

Under the voluntary payment rule recognized in Texas, a tax voluntarily paid can not be recovered even if the underlying tax is illegal. City of Houston v. Feizer 13 S.W. 266, 267 (Tex. 1890); Austin National Bank v. Sheppard, 71 S.W.2d. 242,245 (Tex. 1934); Texas National Bank v. Harris County, supra; Hunt County Tax Appraisal District v. Rubbermaid, Inc. 719 S.W.2d 215 (Tex. App. – Dallas 198, writ ref'd n.r.e.); San Antonio Independent School District v. National Bank of Commerce, 626 S.W.2d 764, 797 (Tex. App. – San Antonio 1981, no writ); Johnson Controls, Inc. v. Carrollton-Farmers Branch Independent School District, 605 S.W.2d 688, 689 (Tex. Civ. App. – Dallas, 1980 writ ref'd. n.r.e.) One of the purposes of the rule is to discourage litigation and to secure the taxing authority in the orderly conduct of its affairs.

Taxes voluntarily paid may not be recovered by the taxpayer except in cases of fraud, express or implied duress, or mutual mistake of fact. Salvaggio v. Houston Independent School District, 709 S.W.2nd 306 (Tex. App. – Houston [14th Dist.] 1986, writ dism'd.) None of the exceptions to the voluntary payment rule are applicable in this case. There is no basis for fraud. Duress is not applicable since there was no requirement that the payments be made in 1999 under § 23.1242. Further, the implied duress or business compulsion exception has not been extended to ad valorem tax cases. First Bank v. Deer Park Independent School District, supra; Johnson

Controls, Inc. v. Carrollton-Farmer Branch Independent School District, supra. There is also no mutual mistake fact exception here. A mistake of fact occurs where one understands the facts to be other than they are. The mistake of fact must be mutual and not merely the product of the complaining party's inattention. In contrast, a mistake of law occurs where one cognizant of the facts reaches an erroneous conclusion as to the legal consequences or effect of the facts. The mistake here is a unilateral mistake of law which is not an exception to the voluntary payment rule. Texas National Bank of Baytown v. Harris County, supra; Amplifone Corp. v. Cameron County, 577 S.W.2d 567 (Tex. Civ. App. - Corpus Christi 1979, no writ).

A mistake of law, as in the present case, does not excuse the taxpayer from the consequences of the voluntary payment of tax without protest because everyone is presumed to know the law. City of Houston v. Feizer, supra. The Legislature, in 1995 did, however, enact Section 31.115 of the Tax Code to provide a means for a taxpayer to demonstrate that his payment was involuntary. Under § 31.115, payment of a tax is involuntary if the taxpayer indicates that the tax is paid under protest either (1) on the instrument by which the tax is paid (the inventory tax statement form) or (2) in a document accompanying the payment. A taxpayer who complies with §31.115 is freed from the presumption of voluntary payment and generally may pursue any claim he or she may have for reimbursement or refund. Tex. Atty. Gen. Op. LO 98-050 (1998). As previously stated, the heavy equipment dealer in this case never availed himself of § 31.115 and never indicated his payments were being made under protest.

We respectfully request an opinion from your office as to whether the pre-paid heavy equipment inventory taxes must be refunded to the owner/dealer.
Thank you.

Sincerely,

Thomas F. Keever

Thomas F. Keever
Assistant District Attorney