IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

TRI-CON INDUSTRIES, LTD., Plaintiff, v. STATE OF NEBRASKA DEPARTMENT OF REVENUE, Defendant.	Docket 500	Page 116
	ORDER	

This is an appeal, pursuant to NEB. REV. STAT. § 77-27,127 (Reissue 1990) and § 84-917 (Cum. Supp. 1992), from an Order of the State Tax Commissioner, dated June 23, 1993, denying, in part, a Claim for Overpayment of Sales and Use Tax filed by the plaintiff Tri-Con Industries, Ltd. [Tri-Con]. In Tri-Con's claim, it requested a refund of tax and interest in the amount of $271,062.92. The Tax Commissioner allowed Tri-Con's claim in the amount of $88,108.43, an amount the parties agreed was refundable since it represented tax and interest on transactions previously reported and paid by Tri-Con. The Tax Commissioner denied the remaining $182,954.49 of Tri-Con's claim, finding that, while the statute of limitations barred the Nebraska Department of Revenue [the Department] from assessing or collecting use taxes against Tri-Con for tax periods prior to May 1989, it did not operate to extinguish the tax debt and Tri-Con's actions constituted a voluntary payment of taxes for those periods. Tri-Con has appealed that determination.

FACTS

Tri-Con, headquartered in Columbia, Missouri, has two separate business facilities located in Lincoln, Nebraska, a stamping facility and a motorcycle facility. This appeal concerns use taxes attributable to transactions involving Tri-Con's stamping facility.

In 1992, Arthur Baaso [Basso], a certified public accountant, and his firm, Basso, McClure and Goeglein, were retained by Tri-Con to conduct an independent audit of Tri-Con's financial records. During the course of the audit, Tri-Con's assets and liabilities were reviewed to determine if Tri-Con was liable for Nebraska sales and use tax on any transactions.

On February 12, 1988, Tri-Con had applied for tax incentives under the Nebraska Employment and Investment Growth Act [LB 775]. NEB. REV. STAT. §§ 77-4101 through -4112 (Reissue 1990). An LB 775 agreement was entered into between Tri-Con and the Department on March 22, 1989. As part of Basso's audit, he was assessing the receivables to Tri-Con resulting from the LB 775 investment tax credit. In an attempt to quantify the LB 775 receivables, Tri-Con employees began developing and revising, at Basso's request, a computer printout listing potential LB 775 assets. While reviewing the LB 775 receivables and assessing the status of Tri-Con's sales and consumer's use tax liability, questions arose as to whether Tri-Con had paid all of its Nebraska sales and use taxes.

Based on his review, Basso determined that Tri-Con potentially had a substantial liability for Nebraska use tax. He was not able to make a final, exact determination; however, he felt the contingent liability for collectible tax and interest could reasonably be in the range of $300,000 to $375,000. One of the issues confronting Basso was the applicable statute of limitations. In order to avoid the imposition of possible penalties and to halt the accrual of additional interest, Basso suggested that Tri-Con make a deposit with the Department.

On July 10, 1992, Basso met with Dale Carter [Carter], a Revenue Agent Supervisor in charge of Taxpayer Assistance at the Department. Basso had in his possession a Tri-Con check in the amount of $345,847.80,

payable to the Department, which he wanted to deposit with the Department. The purpose of the meeting was to discuss numerous unanswered questions concerning Tri-Con's use tax situation.

Early in their meeting, Basso and Carter discussed questions surrounding Tri-Con's potential use tax liability and, in particular, issues surrounding the determination of the applicable statute of limitations. Carter was not able to answer the questions. With those questions in mind and since Tri-Con had not prepared a tax return or tax returns corresponding with the check proposed by Basso to be deposited with the Department, Carter was not comfortable that the Department should accept Tri-Con's deposit. Carter attempted to contact the tax policy division of the taxpayer assistance area in an effort to get technical guidance as to whether the Department could accept Tri-Con's deposit, but was unsuccessful. Carter then called Kevin Herbel, [Herbel], Revenue Audit Supervisor for the Department, to see whether he could be of assistance in answering the statute of limitations questions and in helping Carter determine, among other things, whether it was ". . . going to be any problem if . . . [the Department] . . . took . . . [the] . . . check."

Herbel joined Carter and Basso at the taxpayer assistance window and the situation was explained to him. Herbel understood that Basso was an auditor in the process of doing an audit of Tri-Con. The issues were discussed and Herbel was also unable to answer Basso's questions about the applicable statute of limitations.

Carter, Herbel and Basso agreed that there were a number of unanswered questions. Herbel, agreeing with Carter, expressed reservations about whether the Department should accept the proposed deposit. Herbel commented to that effect and Basso offered to keep Tri-

Con's check, rather than leave it as a deposit. In response, Herbel suggested that, despite the unanswered questions, the Department would accept the deposit and get the issues resolved with its legal department. The entire amount of Tri-Con's deposit was accepted by the Department and was credited to Tri-Con's most current tax period, June 1992.

As mentioned previously, no use tax returns were provided by Basso allocating the amount of the deposit to specific tax liabilities or periods. Basso did have in his possession a copy of an incomplete audit worksheet which was being prepared. Attached to it was a copy of the computer printout which Tri-Con's employees were preparing as a list of the LB 775 qualified transactions. At Herbel's and Carter's request, the worksheet was shared with them. Basso specifically explained that the worksheet was incomplete, that it was not reliable as an estimate of collectible use taxes, that it was not to be relied upon by the Department and that its only function was to serve as a starting point.

On July 10, 1992, after the Department accepted Tri-Con's deposit and credited the entirety of the deposit to June 1992, Carter prepared the Advice of Remittance, the Department's internal payment-on-account document, showing the check as a deposit to Tri-Con's account for the tax period "June 1992." The Department also prepared a receipt, which was given to Basso, indicating the check was accepted as a deposit to "June 1992." Basso then left the meeting. At that time, the Department had not made a determination to apply portions of the deposited check to tax periods prior to June 1992.

Subsequent to the July 10, 1992, meeting, Basso proceeded to follow up with the Department to get answers to the unresolved questions and to reach an agreement on how the deposited funds should be allocated to

particular tax periods open under the applicable statute of limitations. It was Basso's understanding that any balance would then be refunded to Tri-Con. As had been discussed on July 10, 1992, this follow-up included several telephone calls between Basso and Herbel attempting to answer the outstanding questions, including determining how to apply the funds to collectible taxes within periods open under the statute of limitations. In mid-August, after several telephone calls, Herbel informed Basso that future decisions/discussions on this matter were going to be handled by the Department's legal department. Herbel told Basso that he (Herbel) was no longer willing to speak with him (Basso) and that the matter would have to be handled through the legal department.

In late August 1992, Cynthia A. James [James] of the Department's legal department telephoned Basso. James stated that, had she been at the July 10, 1992, meeting, she would have advised that the Department not accept Tri-Con's deposit. She also informed Basso that the Department was going to treat the deposit as a voluntary payment, was going to treat the audit worksheet and computer printout as a return and was going to apply the deposited funds according to the audit worksheet and computer printout. Basso explained to James that the audit worksheet and computer printout was incomplete and unreliable and not intended by Tri-Con to be a return.

On September 1, 1992, a meeting was held involving representatives of Tri-Con and the Department. The position of the Department expressed by James earlier was reiterated. Tri-Con protested the Department's position. Subsequent to that meeting and September 22, 1992, the Department reallocated the deposit funds from June 1992 and applied them to particular transactions and tax periods, including some

which were beyond the applicable statute of limitations for collectible and assessable taxes and some on which Tri-Con had previously reported and paid taxes.

On January 5, 1993, Tri-Con filed a Claim for Overpayment of Sales and Use Tax, Form 7, requesting a refund in the amount of $271,062.92. The claim, with the exception of $88,108.43, was denied. That denial serves as the basis for this appeal.

DISCUSSION

The parties having stipulated that, on July 10, 1992, the Department was barred from assessing Nebraska sales or consumer's use tax against Tri-Con for all periods prior to May 1989, the first question to be addressed is whether the deposit of July 10, 1992, was a voluntary payment by Tri-Con on its tax liabilities. The court finds that it was not.

It is undisputed that Tri-Con voluntarily deposited $345,847.80 with the Department on July 10,1992. That, however, does not equate with a voluntary *payment* on Tri-Con's tax liability. In fact, Tri-Con's tax liability on July 10, 1992, if any, was not known to Tri-Con or to the Department. For the Department to find, over two months after the deposit was made, that the deposit was to be credited against tax liabilities barred by the statute of limitations when that, clearly, was not the purpose of the deposit and was not the intent of the parties, will not be sanctioned by the court.

It may very well be that the Department should not have accepted the deposit on July 10, 1992, without proper tax returns, but it did. Whether the Department is a financial institution with authority to establish trust or escrow accounts and administer deposits and withdrawals according to taxpayer wishes is not the issue. In this case, the

Department elected to accept the deposit. It did so with the understanding that a decision or decisions would be made on the various issues raised and then a determination would be made on how to allocate the deposited funds, with any excess being returned to Tri-Con. It cannot reasonably be inferred that Tri-Con, through Basso, agreed that that process would be unilaterally conducted by the Department. In fact, the opposite is quite apparent from the record.

The court having found that the deposit was not a voluntary payment of a tax liability, the next question is whether a refund is due to Tri-Con.

Insofar as relevant, NEB. REV. STAT. § 77-2708(2) (Supp. 1993) allows a refund "[i]f the Tax Commissioner determines that any sales or use tax amount, penalty, or interest has been paid more than once, [or] has been erroneously or illegally collected or computed . . .." Although the court is not willing to find that the action of the Department constituted an illegal collection or computation, it does find that the tax was erroneously collected by the Department. The error occurred when the Department did not follow through with its representations of July 10, 1992, and unilaterally determined the allocation of the deposited funds.

The next issue relates to the amount of refund to which Tri-Con is entitled.

NEB. REV. STAT. § 77-2708(2)(b) (Supp. 1993) requires that claims for refund of sales and use taxes be filed "within three years from the required filing date following the close of the period for which the overpayment was made . . . or within six months from the date of overpayment . . ., whichever of these . . . period expires later . . .. Failure to file a claim within the time prescribed in this subsection shall constitute a waiver of any demand against the state on account of

overpayment."

The claim filed by Tri-Con on January 5, 1993, for $271,062.92, was within the six-month period provided for by § 77-2708(2)(b). At the hearing held before the designated hearing officer on May 12, 1993, testimony was elicited that the actual amount of the claim was $309,578.90. No claim was filed within six months of July 10, 1992, for $309,578.90.

At the May 12, 1993, hearing, when the testimony and exhibit were offered concerning the discrepancy in the amount of the filed claim ($271,062.92) vis-à-vis the amount actually being sought by Tri-Con to be refunded ($309,578.90), no objection was made by the Department to the increase. It is only in its brief that the Department has raised the limitation of § 77-2708(2)(b). The issue of whether Tri-Con could present evidence to increase the amount of its timely filed claim should have been raised at or before the hearing before the designated hearing officer. Failure to do so constituted a waiver by the Department of that defense to any increase. The court finds that Tri-Con is entitled to a further refund from the Department of $221,954.49 ($309,578.90 - 88,108.43).

The last issue is whether the designated hearing officer erred in failing to grant Tri-Con's request for the production of the records of attorney James. Having found in Tri-Con's favor, the court does not specifically address the many questions raised concerning this issue. It is noted, however, that an attorney who functions in a decision-making position cannot avail herself of the privileges available to the attorney who engages in an attorney-client advisory relationship.

CONCLUSION

The State Tax commissioner erred in not granting Tri-Con's claim

for refund in its entirety. The Order of the State Tax Commissioner of June 23, 1993, is reversed and a refund of the remaining $221,954.49, is awarded to Tri-Con. The costs of this action are taxed to the Department.

A copy of this Order is sent to counsel of record.

Dated May 23, 1994.

SO ORDERED.

BY THE COURT:

Paul D. Merritt, Jr.
District Judge