

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

SYLVIA COREN,)	Docket 478	Page 31
Petitioner,)		
)	ORDER	
vs.)		
)		
THE NEBRASKA DEPARTMENT)		
OF REVENUE,)		
Respondent.)		

This is an appeal from an order of the State Tax Commissioner, which accepted a recommended decision and order of a hearing officer, which sustained a deficiency assessment.

In mid-April of 1985, petitioner, Sylvia Coren, bought a fur coat in Kansas for \$2,695.00. She did not take possession of the coat at the time of purchase; instead, the vendor shipped it to her home in Omaha. Had Mrs. Coren bought the same coat for the same price in Omaha at that time, she would have owed state and city sales taxes totaling \$134.76. In fact, Mrs. Coren paid no sales or use tax in Kansas, Nebraska, or in any other state with respect to this fur.

In 1990, the Department learned of this untaxed purchase and use of tangible personal property. The Department requested Mrs. Coren to report and pay a use tax obligation with respect to the coat. On advice of counsel, Mrs. Coren declined. On October 19, 1990, the Department issued a notice of deficiency determination, assessing \$134.76 tax, \$25.00 penalty, and interest. Mrs. Coren petitioned for redetermination on grounds that the attempt to assess came too late and so was barred by the statute of

limitations on assessment.

The sole question is whether or not the Department's consumer's tax deficiency assessment issued to Mrs. Coren on October 19, 1990, for the fur coat purchased in Kansas on April 12, 1985, is barred by the statute of limitations.

The applicable statute of limitations governing the issuance of deficiency assessments in the sales and use tax program is found in section 77-2709(5)(c), (Reissue 1943), which provides:

Every notice of a deficiency determination shall be personally served or mailed within three years after the last day of the calendar month following the period for which the amount is proposed to be determined or within three years after the return is filed, whichever period expires the later. In the case of failure to make a return, every notice of determination shall be mailed or personally served within five years after the last day of the calendar month following the period for which the amount is proposed to be determined.

As Mrs. Coren did not file a use tax return, there is no disagreement between the parties that the above underscored portion of the law, or the five-year assessment limitation is applicable to the coat purchase. The area of disagreement is from what target date the five-year clock starts ticking.

The petitioner argues that the "triggering event" is the date of purchase of the coat, April 12, 1985, and that the statute of limitations began to run on the 25th day of the month following the month of purchase (May 25, 1985) in accordance with the general due dates for sales and use taxes established in section 77-2708 (1)(a), (Reissue 1943):

The sales and use taxes imposed by the Nebraska Revenue-Act of 1967, shall be due and payable to the Tax Commissioner monthly on or before the twenty-fifth day of the month next succeeding each monthly period, unless otherwise provided pursuant to the Nebraska Revenue Act of 1967.

Therefore, it is reasoned by the petitioner, the five-year assessment limitation tolled in May of 1990, several months prior to the Department's issuance of the deficiency assessment.

Although petitioner cites section 77-2708(1) (a), supra, as the "rule" for the due date of the sales and use tax, the first sentence of section 77-2708(1)(b)(i), (Reissue 1943), sets out the due date of the associated tax return:

On or before the twenty-fifth day of the month following each monthly period or such other period as the Tax Commissioner may require, a return for such period, along with all taxes due, shall be filed with the Tax Commissioner in such form and content as the Tax Commissioner may prescribe and containing such information as the Tax Commissioner deems necessary for the proper administration of the Nebraska Revenue-Act of 1967.

There is no question that both subsections specifically recognize and authorize other than monthly sales and use tax due dates.

The third and last sentence of section 77-2708 (1)(b)(i), supra, also authorizes the Tax Commissioner to permit or require departure from monthly returns and tax remittances for taxpayers with small tax liabilities. At the time Mrs. Coren purchased the fur coat (April 12, 1985), such sentence provided:

The Tax Commissioner may by rule and regulation, permit or require quarterly, semiannual, or annual reports and tax payments from sellers, retailers, or purchasers as the case may be, who have small tax liabilities, but no such reports or payments may be permitted or required when the tax liability exceeds sixty dollars in any quarter, one hundred twenty dollars in any semiannual period, or two hundred forty dollars in any year.

Pursuant to the authority granted in the above-quoted sentence, the Tax Commissioner promulgated a regulation requiring an annual reporting and tax remittance period for taxpayers, who have small tax liabilities:

Persons not required to hold either a sales tax permit or a retailers use tax permit but who are liable for consumer's use tax, shall obtain a consumer's use tax return and report and pay the tax directly to the Nebraska Department of Revenue. Unless otherwise required by the Nebraska Department of Revenue, such consumers shall file returns annually or, if the tax for any annual period may reasonably be expected to exceed \$240, returns shall be filed monthly. Reg.1-002.09.

The plain language of the regulation has, since its enactment, required annual returns and payment for taxpayers with small tax liabilities as authorized by the last sentence of section 77-2708 (1)(b)(i), supra.

The purchase of any item, not otherwise exempt, is a key event. It establishes liability for the tax. The date and the manner which this liability is satisfied is prescribed in section 77-2708 (1)(b)(i), supra, and depends on the specific circumstances of the taxpayer. It is clear that the payment of the tax and the filing of the return are to be accomplished concurrently on the applicable prescribed

date. The tax is due when the return is due, regardless of the actual date or dates of the transaction(s) that gave rise to the tax liability. Likewise, the statute of limitations begins to run on the applicable prescribed due date of the tax and accompanying return.

THE COURT FINDS:

(1) The Tax Commissioner through a duly promulgated regulation, has required an annual use tax payment and reporting period for taxpayers with small tax liabilities.

(2) The due date of the use tax and associated return attributable to Mrs. Coren's fur coat purchase, was January 25, 1986.

(3) In accordance with section 77-2709 (5) (c) (Reissue 1943), the statute of limitations on the Department's October 19, 1990 issuance of the deficiency assessment to Mrs. Coren, did not begin to run until February 1, 1986, and is therefore timely.

IT IS ORDERED that the order of the State Tax Commissioner, dated January 24, 1992, accepting the Recommended Decision and Order of the hearing officer dated January 23, 1992, is affirmed.

Costs taxed to petitioner/appellant.

Dated this 15 day of July, 1992.



DISTRICT COURT JUDGE