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DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-204434 DATE: July 13, 1982

MATTER OF: Mayflower Corporation; Aero Mayflower Transit Co., Inc.; American Transfer & Storage Company

DIGEST:

1. Where Department of Defense Volume Movement Announcement invites rate offers for transportation of household goods and DOD regulations describe such service as a method of moving members' personal property, the term, "household goods" does not include public property and carrier's tenders submitted in response to announcement therefore does not encompass such public property.

2. Parent or affiliate corporation is not liable for overcharges collected by debtor corporation on theory of de facto merger where there is no evidence that corporations merged.

3. Where capital stock of debtor corporation was purchased by holding company and agency relationship with debtor's affiliate was established subsequent to collection of overcharges by debtor, latter's corporate identity cannot be disregarded to hold parent or affiliate liable for overcharges on basis of agency in absence of evidence that control was exercised over debtor at the time the act complained of took place.

The Mayflower Corporation requests our review of the action taken by the General Services Administration (GSA) relating to two of its subsidiaries -- American Transfer & Storage Company (American), a Texas corporation, and Aero Mayflower Transit Company, Inc. (Aero, Inc.).

American transported 10 intrastate Texas shipments on Government bills of lading (GBL) in 1977. Subsequently, GSA determined that the carrier collected overcharges on the shipments in the amount of $13,432.79, and when American declined to pay, GSA deducted the overcharges from monies otherwise due Aero, Inc., apparently because there were no monies due American available for that purpose.

Mayflower disputes the validity of the overcharges and of GSA's action in deducting the overcharges from Aero, Inc. We conclude that the determination of overcharges is correct, but the deduction from monies due Aero was improper.

Determination of Overcharges

All of the shipments were tendered to the carrier at Webb Air Force Base, Texas. Most consisted of public property; generally, they consisted of furniture that was tendered to American from various offices and other buildings on the installation, although apparently some shipments involved the private property of Air Force members.

Mayflower contends that the rates charged were applicable because they covered the transportation of household goods and that all the articles transported were included within that term. GSA contends that the term "household goods" includes only the personal property of members. From a reading of the carrier's tenders, we find that the interpretation urged by GSA is correct. The carrier's tenders indicate that American offered rates only on personal property. Item 13 thereof states: "Basis for submission is per MTMC-PPC Volume Movement announcement dated June 1977." The announcement relates to Department of Defense-sponsored personal property. The tenders, in Item 1, refer to the commodity of service as:

> "Household Goods - Domestic Door to Door Motor Van (Code 1)."

Based on the above, as well as on the Defense Department's Personal Property Traffic Management Regulation which defines household goods as excluding property not for the military member and his immediate family, we conclude that the tenders were applicable on shipments of personal property but not applicable to shipments of furniture and related articles shipped from offices and other buildings on a military installation. Therefore, we agree with GSA that different rates apply to these public property shipments.

With respect to the shipments of household goods belonging to members, GSA states that the tenders were applied where the resulting charges were the lowest available. Where they were not the lowest available, GSA applied different rates. In so doing, it relied on part J of the announcement and the alternation clause in the tenders, which make them inapplicable where the charges accruing thereunder exceed charges otherwise applicable for the same service. We agree with GSA's action. See, e.g., Hilldrup Transfer & Storage Co., B-192411, March 29, 1979.

Validity of Deduction Action

The right to make deductions, as a means of recovering overcharges, is expressly reserved to the United States. The statute, 31 U.S.C. § 244(a) (Supp. III 1979), authorizes deductions of:

> "* * * The amount of any overcharge by any carrier or forwarder from any amount subsequently found to be due such carrier or forwarder." (emphasis supplied)

Under the literal reading of this provision, the deduction can only be applied to monies due the overcharging carrier. The courts, however, have allowed various exceptions. See Ship-Rite Transporters, Inc., B-193966, April 12, 1979, for a discussion of these exceptions. One of these exceptions involves a de facto merger.

GSA reports that Mayflower purchased 100 percent of American's stock, that the three corporations share key management personnel, and that American's letterhead, captioned "American Mayflower," states "Agent for Aero Mayflower Transit Co., Inc". Citing Ship-Rite Transporters, Inc., supra, GSA concludes that there has been a de facto merger among Mayflower, Aero, and American.

However, Ship-Rite is inapposite to the facts of this case. Ship-Rite dealt with one company's acquisition of the assets, including operating rights, of another. Here, there is no evidence that American's assets were purchased by Aero or Mayflower. Although Mayflower purchased the capital stock of American, American continues to exist as a body corporate, and there has been no transfer of its operating authority. We fail to see how there has been a de facto merger under these circumstances.

Also, we point out that the courts will not disregard the separate corporate entities to hold shareholders liable on obligations of an agent corporation unless it appears that the corporate entity is being used as a sham to perpetuate fraud or to avoid liability. See Bell Oil & Gas Co. v. Allied Chemical Corp., 431 S.W.2d 336 (Tex. 1968); Maule Industries v. Gerstel, 232 F.2d 294 (5th Cir. 1956); Whayne v. Transportation Management Service, Inc., 252 F. Supp. 573 (E.D. Pa. 1966), affirmed 397 F.2d 287 (3rd Cir. 1967), cert. denied 393 U.S. 978 (1968).

Aside from de facto merger, GSA seems to suggest the existence of an agency relationship among the parties. Even assuming that elements of an agency relationship do exist, we note that Mayflower did not purchase American's stock until 1979, or nearly two years after American performed the services and collected the overcharges. For control (of an agent) to be the basis for liability to be imputed to the principal, it must have been exercised at the time the acts complained of took place. Huski-Belt, Inc. v. First Citizens Bank & Trust Co., 157 S.E. 2d 352 (N.C. 1967); 1 Fletcher Cyc. Corp. § 43. The record obviously indicates that American was not controlled by Mayflower at the time the services were performed and the overcharges were collected; therefore, Aero or Mayflower may not be held liable for the overcharges on the doctrine of agency.

Settlement should be made by GSA consistent with this decision.

for Milton J. Socolar
Comptroller General
of the United States