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DECISION

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

FILE: B-186940 DATE: OCT 20 1976

MATTER OF: Coffeetime, Inc.

DIGEST:

Amendment to food and beverage vending contract vested title to products in Federal agency immediately upon delivery and increased amount of agency's commission by 5 percent. Amendment was made as accommodation to agency and would not have been made but for mutual mistake of law--that new provision would make Rhode Island State 5 percent sales tax inapplicable. Exemption claim was denied by State tax auditor. Amendment should be rescinded and restitution made to contractor of additional commission paid to agency to restore parties to same position as before mistake induced amendment.

This decision responds to a letter (file reference: 133) from the Director of the Veterans Canteen Service (VCS), Veterans Administration, which submits for our consideration a claim against VCS by Coffeetime, Inc., Warwick, Rhode Island. The claim is for reimbursement for sales taxes assessed against Coffeetime by the State of Rhode Island on merchandise purchased by the VCS for resale at the Veterans Administration Hospital, Providence, Rhode Island.

By agreement dated April 1, 1971, Coffeetime contracted with VCS to provide food and beverage vending service at the Veterans Administration Hospital, Providence, Rhode Island, from April 1971, to December 1975. Coffeetime's original proposal was based on a commission type vending contract, under which VCS would receive 12.2 percent of the gross sales as its commission. However, prior to execution of the agreement, Coffeetime modified its original proposal so as to provide for the reduction of the VCS commission to 7.2 percent and for Coffeetime's assumption of liability for the Rhode Island 5 percent sales tax on merchandise sold through vending machines. The proposal as modified was incorporated into the contract with VCS covering the period April 1, 1971, through December 3, 1971. The contract also contained the following standard provision:

> "The operator [Coffeetime] assumes liability for State, County, and Municipal license fees and for any and all taxes (Federal, State, and local) levied upon its business, sales, income, and property."

On August 1, 1971, the contract was amended by mutual agreement to provide that VCS would take title to all food and beverages vended after that date immediately after delivery of the merchandise and that

VCS would retain 12.2 percent of the gross sales as commission. Coffeetime takes the position that it agreed to these amendments because of the representations of an officer of VCS that the provision vesting title to all food and beverages vended in VCS immediately upon delivery would avoid liability for the State sales tax since VCS, a Federal Government instrumentality, was constitutionally exempt. Therefore, Coffeetime would suffer no loss as a result of the 5 percent increase in its commission payments to VCS.

Upon execution of the contract amendments, Coffeetime ceased to remit the tax to the State of Rhode Island. However, on March 31, 1975, Coffeetime informed VCS that the Tax Commission of the State of Rhode Island had made a preliminary audit of its contract. The results of this audit showed that Coffeetime was liable for sales taxes on gross receipts received under the contract subsequent to August 1, 1971. At Coffeetime's request, a formal hearing on the subject of the audit was held by the Tax Administrator for the State of Rhode Island on May 28, 1975, but the Tax Administrator upheld the assessment of the tax. The contractor's claim is for reimbursement of sales taxes found owing on sales made under the contract during the period August 1, 1971, through March 31, 1975.

In this context, the Director of VCS requests our decision on the following questions:

"1. Is Coffeetime, Inc. liable to the State of Rhode Island for sales taxes on merchandise purchased by VCS for resale?

"2. If the answer to question 1 is affirmative, is the VCS liable to reimburse Coffeetime, Inc. for sales taxes assessed on merchandise purchased by VCS under the contract?

"3. If transactions of this type of contract are subject to state or local taxes, would they not then be excluded from the provisions of the Service Contract Act of 1965, as amended?"

The general rule governing the tax status of transactions involving the Federal Government is that if the incidence of the tax, by State law, is placed on the vendee (ultimate purchaser), and the United States is the vendee, it is constitutionally immune from payment of the tax. On the other hand, if the incidence of the tax is on the vendor, the United States is not constitutionally immune from payment of the amounts passed down from the vendor, and it may be required to bear the economic burden of the tax unless the State statutorily exempts sales to the United States from the tax. See, e.g., B-184823, B-184318, August 17, 1976, 55 Comp. Gen. ____, and authorities cited.

With reference to the sales tax involved here, section 44-18-19 of title 7, General Laws of Rhode Island (1970 reenactment), provides in part:

> "The retailer shall add the tax hereby imposed to the sale price or charge, and when added such tax shall constitute a part of such price or charge, shall be a debt from the consumer or user to the retailer, and shall be recoverable at law in the same manner as other debts * * *."

Section 44-18-31 of the State statute provides:

> "There shall be exempted from the computation of the amount of the sales tax the gross receipts from the sale of any tangible personal property to the United States, its agencies and instrumentalities."

It is clear that the incidence of the Rhode Island sales tax is on the vendee, with the result that if the United States may be considered to be a vendee it would be constitutionally immune from payment. Compare 49 Comp. Gen. 204, 205 (1969). In any event, the State statutorily exempts sales to the United States from the tax.

However, in reaching his determination that Coffeetime must remit taxes for the sales here involved, the Rhode Island Tax Administrator apparently did not consider the vesting of title to merchandise in VCS, pursuant to the amended contract, sufficient to establish the purported "sale" to the United States for purposes of invoking the Federal exemption and disposing of the tax question. Rather, he seems to have viewed the taxable transaction as the sale of merchandise to vending machine patrons, wherein the incidence of the tax is on the patrons (rather than VCS) and Coffeetime (rather than VCS) is the retailer. On the latter point, the Tax Administrator's decision noted that, under the contract, Coffeetime collects all monies deposited in the vending machines and pays a percentage to VCS, thus bringing the facts within the provision of the Regulations, Rules and Bulletins Issued by the Tax Administrator under the Sales and Use Tax Law which states in pertinent part:

> "Vending Machines. If the owner or lessee of the premises where the vending machine is located has access to the monies in the machine and remits whatever is owed to the company owning the machine after deducting his profits or commissions, he is considered to be the retailer. If, however, the owner has no access to the monies in the

> machine and the monies are collected by the distributor of the machine who then pays a percentage or commission to the owner or lessee of the premises, then the distributor is the retailer." (Emphasis supplied.)

Thus under the Tax Administrator's theory, VCS was not directly involved at either end of the taxable transactions, so that the tax exemption accorded to the United States would not apply.

With reference to the first question as to Coffeetime's tax liability to the State, the Tax Administrator's decision that Coffeetime is liable for payment of taxes on the sales involved has apparently been accepted by Coffeetime without further appeal. We have no authority to challenge this determination of State law, which does not purport to affect the Federal Government's tax immunity.

With reference to the second question, VCS is not liable under the contract as written to reimburse Coffeetime for sales tax payments. As noted previously, the contract specifically provides that Coffeetime assumes liability for, inter alia, State sales taxes. Nevertheless, several decisions of our Office have afforded equitable relief by, in effect, reforming a Government contract where the contract price fails to reflect State tax costs to the contractor due to a mutual mistake of law; namely, that the Government's tax exemption applies. See B-180071, February 25, 1974; B-169959, August 3, 1970; B-159064, May 11, 1966; B-153472, December 2, 1965. Thus we observed in B-159064, supra:

> "It has been held that where, in connection with a Government contract, the Government apparently negligently misstated a material fact and thereby misled the plaintiff to its damage, and where the plaintiff was negligent in not discovering the misstatement and ascertaining for itself what the facts were before submitting its bid, the position of the parties is that of persons who have made a mutual mistake as to a material fact relating to the contract and the court should therefore, in effect, reform the contract by putting them in the position they would have occupied but for the mistake. Virginia Engineering Co., Inc., v. The United States, 101 Ct. Cl. 516. The general rule is that a contract made through mutual mistake as to material facts may either be rescinded or reformed. See 12 Am. Jur, Contracts, Sec. 126 and 17 C.J.S., Contracts, Sec. 144. Further, it is an additional rule that

mistake on one side and misrepresentation, whether willful or accidental, on the other, constitutes a ground for rescission where the party misled has relied on the misrepresentation of the party seeking to bind him. 76 C.J.S., Rescission of Instruments, section 29. Rescission in these circumstances may be obtained on the premise that it would be unjust to allow one who made the misrepresentation, though innocently, to retain the fruits of a bargain which was induced, in whole or in part, by such misrepresentation. See Williston on Contracts, Rev. ed., sections 1570 and 1599 and the cases therein cited. Accordingly, it is considered that the contract property may be reformed to include the amount of $261, the amount of the applicable Federal excise tax on the transaction as administratively recommended."

We conclude that circumstances justifying rescission are present in this case. It is not necessary for us to determine whether it was reasonable for Coffeetime, an experienced contractor in the State of Rhode Island, to rely on the representations of the VCS representative as to the tax liability without making an independent check with the State. The terms of the August 1971 contract amendments--addition of the clauses vesting title to merchandise in VCS and increase of the VCS commission by the exact percentage as the sales tax--suggests that the basis, perhaps the sole, purpose of the amendments was to transfer to VCS revenues previously payable to the State as sales tax.

Coffeetime's assertion gains further credence from the fact that VCS, relying primarily on the vesting of title contract clause, supported Coffeetime's asserted tax exemption in connection with the proceedings before the Rhode Island Tax Administrator. The amendment appears to have been executed as an accommodation for VCS since Coffeetime did not benefit in any way from the new arrangement. It could therefore be argued that there was a failure of consideration for the amendment. In any event, it is clear that but for the mutual mistake of the parties as to the applicability of VCS's tax exemption, the amendment would not have been adopted. Accordingly, the amendment should be rescinded and restitution should be made to Coffeetime of the additional 5 percent commission paid to VCS from August 1, 1971, on, in order to place the parties as nearly as possible in the position they would have occupied but for the mistake.

The final question raised by the Director of VCS is "If transactions of this type of contract are subject to state or local taxes, would they not then be excluded from the provisions of the Service Contract Act of 1965, as amended?" Included with the Director's submission to us is a letter dated January 19, 1970, from the Administrator of the Wage and Hour and Public Contracts Divisions, Department of Labor, to the Veterans Administration, which concludes that the Act does apply to VCS contracts of the type here involved.

The Service Contract Act of 1965, as amended, 41 U.S.C. §§ 351 et seq. (1970 & Supp. V, 1975), requires, with certain exceptions, that provisions relating to employee wages, benefits, and related matters be included in Government contracts "the principal purpose of which is to furnish services in the United States through the use of service employees * * *." Whether these provisions are applicable to particular contracts or types of contracts is a matter that lies primarily within the jurisdiction of the Secretary of Labor. The Secretary has given an affirmative response to the Director's final question and we have no basis to disagree with his determination.

Deputy

R.F. KELLER
Comptroller General
of the United States