

OPINIONS OF THE SUPREME COURT OF OHIO

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Weiss, Officer of Boardman Country Kitchen, Inc., Appellant,
v. Limbach, Tax Commr., Appellee.

[Cite as Weiss v. Limbach (1992), Ohio St. 3d .]

Taxation -- Sales tax -- Liability of original

incorporator who is a substantial shareholder and served as
company's president for unpaid sales tax -- Conditional payment plan
agreement negotiated with Attorney General's Office -- State not
estopped from collection effort against original incorporator.

(No. 91-1209 - - Submitted February 27, 1992 -- Decided June 17,
1992.)

Appeal from the Board of Tax Appeals, No. 89-F-662.

The Tax Commissioner assessed appellant, Richard C. Weiss,
as a responsible officer of Boardman Country Kitchen, Inc.
("Boardman C.K.") under R.C. 5739.33 for unpaid sales tax for
periods from February 1982 through September 1986. On appeal to
the Board of Tax Appeals ("BTA"), testimony and other evidence
were presented. Appellant contended that he was not a
responsible officer and that payment plan agreements relative to
the underlying sales tax obligation of Boardman C.K. estopped the
commissioner from pursuing appellant for the obligation. However,
the BTA found that appellant was personally responsible for the
corporation's failure to remit sales tax, and that the
commissioner was not estopped. Accordingly, it affirmed the
assessment.

Appellant's appeal to this court raises the single issue of
whether the state of Ohio is estopped from proceeding with its
collection effort against appellant.

Appellant was an original incorporator and a substantial
shareholder of Boardman C.K. During the audit periods, he served
as its president. Boardman C.K.'s unpaid sales tax balance
outstanding as of October 31, 1986, \$134,092.40, was certified
for collection to the Attorney General's Office. A conditional
payment plan agreement was negotiated.

The Attorney General agreed to withhold further legal action
against Boardman C.K. upon conditions set forth. These conditions
included an initial payment of \$15,000 and regular monthly
payments of \$1,000 for the first year, increasing thereafter. The
agreement did not constitute a settlement of the outstanding sales
tax obligation, a commitment relative to uncertified sales tax
obligations, or a release of the corporation or any of its
responsible officers. Some payments were made under the
agreement.

On December 1, 1986, Boardman C.K. sold its assets to a
corporation known as W.W.& W. C.K., Inc. The state of Ohio, the
Attorney General, and the Tax Commissioner were not parties to
this agreement. In the agreement, W.W.&W. C.K., Inc. indemnified
appellant against "Ohio State Sales Tax [of] \$105,000." By letter
of September 11, 1987, the Attorney General required payments of
\$1,000 per month against an outstanding obligation of \$206,000 in
tax delinquencies, including sales tax and withholding tax, for
sixty to ninety days, and a good faith effort to increase
payments after that time.

In appellant's appeal of the assessment against him, the BTA
found that "* * * principles of equitable estoppel generally may
not be applied against the State of Ohio or its agencies when the
act or omission complained of involves the exercise of a

government function. * * *

"Specifically, estoppel does not apply against the State of Ohio as to a taxing statute.* * *" (Citations omitted.)

The cause is now before this court upon an appeal as of right.

Walter, Haverfield, Buescher & Chockley, Perry B. Newman and Kevin R. Keogh, for appellant.

Lee I. Fisher, Attorney General, and Janyce C. Katz, for appellee.

Per Curiam. Appellant contends that the BTA erroneously construed the doctrine of estoppel and erroneously concluded that the state was not bound by equitable principles in its dealings with appellant. We disagree.

In the first paragraph of the

syllabus of *Recording Devices, Inc. v. Bowers* (1963), 174 Ohio St. 518, 23 O.O.2d 150, 190 N.E.2d 258, we stated: "Estoppel does not apply against the state of Ohio as to a taxing statute." However, we qualified this pronouncement at 520, 23 O.O.2d at 151, 190 N.E.2d at 260: "* * * yet where a long-established practice has been followed, such administrative practice does have much persuasive weight especially where the practice has gone on unchallenged for a quarter of a century."

In *Recording Devices, supra*, and in *Ormet Corp. v. Lindley* (1982), 69 Ohio St.2d 263, 266, 23 O.O.3d 257, 259, 431 N.E.2d 686, 689, we acknowledged the commissioner's grant of an exemption. In both of those cases, "* * * an exemption was granted, in writing, by the commissioner. Further, the error continued for an extended period of time." (In *Recording Devices*, it continued for twenty-five years; in *Ormet*, over twenty years.)

Here, we have no evidence of any longstanding administrative practice to exempt appellant from liability. Accordingly, the decision of the BTA is affirmed.

Decision affirmed.

Moyer, C.J., Sweeney, Holmes, Douglas, H. Brown and Resnick, JJ., concur.

Wright, J., concurs in judgment only.