[J-010-00]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

FRANKLIN E. SKEPTON, JOSEPH BOZZELLI, INDIVIDUALLY AND T/A J.B. PLUMBING COMPANY AND DUAL TEMP CO., INC.,	:	Nos. 230 and 231 M.D. Appeal Dockets, 1999
v.	:	Appeal from the Order of Commonwealth Court entered January 12, 1999 at 3085CD97, affirming in part and reversing in part the Order entered August 6, 1997 at No. 1992-C-10688, of the Court of Common Pleas of Northampton County, Civil Division.
BOROUGH OF WILSON,	:	
APPEAL OF: FRANKLIN E. SKEPTON, JOSEPH BOZZELLI, Individually and t/a J.B. PLUMBING COMPANY (AT 230 M.D. APPEAL DKT. 1999)	:	SUBMITTED: January 31, 2000
APPEAL OF: DUAL TEMP CO., INC. (AT 231 M.D. APPEAL DOCKET, 1999)	:	

DISSENTING OPINION

MADAME JUSTICE NEWMAN **DECIDED: July 20, 2000**

I join the Majority's Opinion to the extent that it holds that the Commonwealth Court erred in finding that the Contractors failed to submit a written claim to the Borough requesting a refund. During the litigation of this matter the parties at all times assumed that Contractors had filed a claim and the Borough was on notice of the Contractors' request for a refund. There were no findings of fact on this issue and no presentation of argument in either the trial court or Commonwealth Court. The Borough does not even raise this issue in its briefs before this Court. I thus agree that the Commonwealth Court inappropriately injected the issue into this matter. However, I dissent from the Majority's disposition because I agree with the

Commonwealth Court that Contractors are not entitled to a refund since in reality, the School District, not Contractors, paid the excessive permit fees. Therefore, the Contractors are not really the person "aggrieved" and are not entitled to a refund pursuant to 72 P.S. § 5566b and 72 P.S. § 5566c.

While I am mindful of the arguments of the Majority, I reject the notion that such arguments lead to the conclusion that Contractors are entitled to a refund. At the outset, Girard Trust Co., 59 A.2d 124 (Pa. 1948) is inapposite to this case. It did not involve the situation where a commercial enterprise passed on the entire tax to its consumer, with the specific intent to make the consumer the actual taxpayer. The trustee did not pass the entire amount of the tax to a consumer and had suffered significant financial detriment in the payment of the erroneous tax. Thus, the Girard Trust was an aggrieved person entitled to a refund.

As set forth by the United States Supreme Court in upholding the propriety of an Internal Revenue Code provision that required a party to show that it had not passed a tax on to a consumer before issuing a refund:

> if (the party) has shifted the burden to the purchasers, they and not he have been the actual sufferers and are the real parties in interest…

United States v. Jefferson Electric Mfg. Co, 291 U.S. 386 (1934). Consequently, a commercial enterprise that has passed on the cost of the tax to its consumers would not be entitled to a refund for its coffers. See also, McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 47 (1990)(Supreme Court recognized continuing validity of Jefferson Electric in tax assessment matters that are based on actions in assumpsit.)

While the record shows that the Contractors wrote the actual check to the Borough, the School District paid the fees. In essence, it was the School District who was the taxpayer, not the Contractors. Accordingly, the Contractors are not the proper party to receive the refund. While this concept of disallowing a refund to a commercial entity where the de facto taxpayer is an end consumer appears to be one of first impression in this Court, the Commonwealth Court has applied it in several contexts.

For instance in Eglin's 30th Street Garage Corporation v. Tax Review Board of Philadelphia, 314 A.2d 543 (Pa. Cmwlth. 1974) the City of Philadelphia had enacted an ordinance that imposed a tax of ten percent on the gross receipts of all transactions in public parking lots within the City of Philadelphia. Eglin, an owner and operator of a parking lot adjacent to a train station, challenged the taxes as applied to him because the lot did not meet the definition of a public parking lot. He thus requested a refund of the taxes paid. The Commonwealth Court refused to award a refund to Eglin because:

> every cent of the $67,464.34 which Eglin now seeks to have refunded to it was paid to Eglin by its parking patrons specifically for taxes. Eglin gives no indication here of any intent to right the alleged wrong which has been done to its customers by arranging for returning any refund obtained from the City to them. Eglin simply seeks a windfall for itself. As between Eglin and the City of Philadelphia, the equity of Eglin is no greater than that of the City, and we will not accede to Eglin's claim for the money since it was only a conduit for collecting money for the City from those members of the public using Eglin's facilities.

314 A.2d at 544 (citing Travel Industries of Kansas, Inc. v. United States of America, 425 F.2d 1297 (10th Cir. 1970))(emphasis added). Also in Tredyffrin-Eastown School District v. Valley Forge Music Fair, 627 A.2d 814 (Pa. Cmwlth. 1993) the Commonwealth Court held that where Valley Forge Music Fair (Music Fair), a producer of an amusement facility, collected and was responsible for remitting a tax imposed on patrons of the Music Fair, the

"taxpayer" eligible for any refund was the patron, not the amusement producer. 627 A.2d at 819. Thus, while the Commonwealth Court found that the municipality had violated equal protection for selectively enforcing the tax on Music Fair patrons, it affirmed the trial court's refusal to grant the refund directly to the Music Fair because it would receive a windfall since it was the patrons, not the Music Fair, who had paid the tax. 627 A.2d at 822.[1] See also, Tillis v. City of Branson, 975 S.W. 2d 949 (Mo. Ct. Ap. 1998) (amusement owner not entitled to refund where she passed the tax on to patrons; any refund would act as windfall to owner); United States v. State of Colorado, 666 F. Supp. 1479 (D. Colo. 1987)(applying principles of restitution, district court refused to award refund of gas taxes where tax had been passed on to consumers.)

I find these authorities persuasive. Contractors have made no showing that they intend to return the refund to the School District, who actually paid the fee. Instead, they seek a windfall for themselves. Accordingly, I would hold that Contractors have suffered no injury in fact, are not the proper parties to receive the refund and are not a person aggrieved pursuant to 72 P.S. § 5566c. I would therefore affirm the Order of the Commonwealth Court.

Mr. Chief Justice Flaherty and Mr. Justice Nigro join this Dissenting Opinion.

[1] The trial court ordered the refund to be placed in trust to be used for children's education at the Music Fair.