STATE OF TENNESSEE
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Opinion No. 11-55

Invalidity of Contracts that Contravene Obligation to Collect and Pay Sales Tax

QUESTIONS

1. May the State of Tennessee, by contract, waive the obligation of a purchaser to pay sales tax on an otherwise taxable item that is not statutorily exempt from taxation?

2. May a private insurance entity, by contract, obligate a pharmacist to violate state law by prohibiting the collection of sales tax on an otherwise taxable item that is not statutorily exempt from taxation?

OPINIONS

1. No. State statutes obligating sellers to collect sales tax from purchasers of tangible personal property at retail cannot be waived by contract.

2. No. Contracts that require the violation of state law are void as against public policy.

ANALYSIS

1. Pursuant to the Retailers' Sales Tax Act, Tenn. Code Ann. §§ 67-6-101 et seq., Tennessee levies a tax "on the sales price of each item or article of tangible personal property when sold at retail in this state." Tenn. Code Ann. § 67-6-201. The sales tax is a tax on "the privilege of engaging in the business of selling tangible personal property at retail in this state." Id. The rate of the tax is seven percent. Id. Tenn. Code Ann. § 67-6-501 provides, in pertinent part, that

> (a) Every dealer making sales, whether within or outside the state, of tangible personal property, for distribution, storage, use, or other consumption in this state, or furnishing any of the things or services taxable under this chapter, is liable for the tax imposed by this chapter.
>
> (b) The tax shall be collected from the dealer as defined in § 67-6-102 and paid at the time and in the manner as provided for in this part.

> (c) The tax imposed in this part shall be at the rate provided by law of the retail sales price, as of the moment of sale, or of the purchase price, as of the moment of purchase, as the case may be, shall be collectible from all persons, as defined in § 67-6-102, engaged as dealers, as defined in § 67-6-102, in the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of tangible personal property, or in the furnishing of any of the things or services taxable under this chapter.

Tenn. Code Ann. § 67-6-501. "Dealer" includes "every person . . . who . . . [s]ells at retail, or who offers for sale at retail, or who has in such person's possession for sale at retail, or for use, consumption, distribution, or storage to be used or consumed in this state, tangible personal property as defined in this section." Tenn. Code Ann. § 67-6-102(25)(C). "Tangible personal property" is defined as "personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses" and "includes electricity, water, gas, steam, and prewritten computer software." Tenn. Code Ann. § 67-6-102(92)(A). The sales tax "shall be collected by the retailer from the consumer insofar as it can be done." Tenn. Code Ann. § 67-6-502.

The question presented presupposes that the item being purchased is taxable tangible personal property and that no statutory exemption from the sales tax applies. A statute enacted by the General Assembly is an expression of the public policy of this State. *See Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 717-18 (Tenn. 1997). The General Assembly has unambiguously declared that the retail sale of tangible personal property is subject to tax and that retailers are responsible for collecting the tax from purchasers at the point of sale. *See* Tenn. Code Ann. §§ 67-6-201; 67-6-501; 67-6-502. The State cannot contravene this legislative directive by contract, because contracts that violate public policy are invalid and unenforceable. *See Baugh v. Novak*, ___ S.W.3d ___, 2011 WL 1935839, at *7-8 (Tenn. May 20, 2011). If State officials wish to waive the requirement that purchasers of certain items of tangible personal property pay sales tax at the point of sale, only the General Assembly can achieve that result by enacting a statutory exemption. *See* Tenn. Code Ann. §§ 67-6-301 *et seq.* (outlining exemptions from Tennessee sales and use taxes). The State cannot create such an exemption by contract.

2. For similar reasons, the answer to the second question is likewise no. A private insurance entity cannot, by contract, obligate a pharmacist to violate state law by prohibiting the pharmacist from collecting tax on sales of tangible personal property. The Retailers' Sales Tax Act requires retailers to collect sales tax from purchasers of tangible personal property. *See* Tenn. Code Ann. § 67-6-502. A contract that requires a party to violate Tennessee law is void as against public policy. *See McDaniel v. McCall*, 655 S.W.2d 155, 157-58 (Tenn. Ct. App. 1983) (holding that contract under which mining operator agreed to pay excavating contractor for his mining activities conducted without a permit was unenforceable as violation of public policy underlying statute requiring mining operators to obtain permits). A contract prohibiting pharmacists from collecting tax on retail sales of taxable tangible personal property would thus be unenforceable as a violation of the public policy behind the Retailers' Sales Tax Act.

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