

STATE OF TENNESSEE
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Opinion No. 04-169

Impropriety of Reducing Tax Refunds to Consumers by the Costs of Applying for the Refund

QUESTIONS

1. Is there any statute, case law, or other ruling that expressly prohibits a business from covering or recovering its costs associated with researching, applying for, and distributing a tax refund to the consumer?
2. Are businesses in Tennessee liable for the burden of researching, requesting, and distributing tax refunds without the possibility of recovering costs incurred?
3. If there is nothing expressly prohibiting a charge of some kind for the recovery of such costs, what would be the best legal terminology to use in describing this cost recovery charge?

OPINIONS

1. Yes. When read together, state statutes and case law make plain that these costs may not be recovered from consumers.
2. Yes, to the extent that refunds to consumers may not be reduced in order to recover costs related to researching, requesting, and distributing tax refunds.
3. This sort of cost recovery is prohibited by Tennessee law.

ANALYSIS

(1)

In order to address the question presented, it is important, first of all, to discuss the manner in which the State's sales and use tax provisions affect businesses and their customers. It is the seller that is responsible for payment of sales and use taxes to the State. As discussed in *Reimann v. Huddleston*, 883 S.W.2d 135, 137 (Tenn. Ct. App.1993):

the seller . . . making sales . . . or furnishing any of the things or services taxable . . . *shall* be liable for the tax imposed T.C.A. § 67-6-502 mandates that the tax shall be collected by the retailer from the consumer insofar as it can be done. Thus, T.C.A. § 67-6-501 places the legal incidence of the sales tax upon the seller, not the consumer, but T.C.A. § 67-6-502 requires the seller to collect the tax from the consumer. (internal quotations omitted)

If imposition of the taxes was inappropriate and a refund is due, the seller may request a refund from the State. The consumer, on the other hand, has a cause of action to recover the taxes paid from the seller. As stated in *Reimann, id.* at 137, “It is the taxpayer who must be afforded the opportunity to challenge the validity or legality of the tax; the consumer’s remedy is against a taxpayer . . . *to recover the amounts paid.*” (emphasis added). See also *Beare Co. v. Olsen*, 711 S.W.2d 603 (Tenn. 1986). The consumer may cause the seller to refund all monies that the consumer paid in taxes.

Tenn. Code Ann. § 67-1-1802(a)(1) directly addresses the manner in which the State is to provide refunds to sellers that have charged sales and use taxes. In pertinent part the statute states, “Sales or use taxes which were collected from or passed on to customers by the taxpayer shall not be refunded unless the taxpayer has refunded or credited the sales or use tax to its customers.” Only after the taxes collected from the customer have been returned by the seller may the State refund monies to the seller.

Reimann and Tenn. Code Ann. § 67-1-1802(a)(1) are consistent in stating that the customer is to be refunded the full amount of taxes paid. If a business sought to reduce the customer’s refund by subtracting administrative fees, the customer necessarily would not have been refunded the full amount of sales and use taxes paid. Furthermore, as a practical matter, a seller cannot reduce the amount returned to the customer. Tenn. Code Ann. § 67-1-1802(a)(1) directs that a seller can only receive a refund from the State in an amount equal to that refunded or credited to the customer. If the seller reduced a consumer’s refund, the seller’s recovery from the State would also be reduced. However, the customer could still maintain a cause of action against the seller for the full amount of the taxes paid under the authority of *Reimann*.

There is an additional statute to be considered where refunds of taxes paid on Internet access charges are sought. In 2004, the 103rd General Assembly passed a bill later codified as Tenn. Code Ann. § 67-1-1802(e). Section (e)(1) sets out a time by which customers must request a refund from Internet access providers. Section (e)(2) allows Internet access providers to request a refund from the State prior to providing a refund to the customer. This approach differs from the requirements of Tenn. Code Ann. § 67-1-1802(a)(1), which states that customers must be paid by the seller before the seller requests a refund from the State.

While the procedure for requesting a refund of taxes paid on Internet access charges is different from the norm, it does not change the fact that the customer is entitled to a refund of all of the taxes paid. And while Tenn. Code Ann. § 67-1-1802(e) may impose different timing

requirements on customers for filing of claims, if those filing deadlines are met *Reimann* still stands for the proposition that the customer may bring a cause of action against the seller to recover the full amount of the taxes paid.

(2)

Businesses in Tennessee are liable for the burden of researching, requesting, and distributing tax refunds, in that their customers' refunds may not be reduced by the costs of such efforts. There is no provision in case law or statute that allows for a seller to decrease a tax refund to a customer. Businesses making sales must incur the burdens and costs of complying with their duties under the tax laws as well as other laws governing their operations. This is a part of the cost of doing business. Formerly, the State provided vendors' compensation to sellers remitting sales taxes, in order to relieve the additional burden placed on them in administering the sales tax laws. *See* Tenn. Code Ann. § 67-6-509 (Repl. Vol. 1989). The General Assembly, however, limited this amount to fifty dollars in Chapter No. 529, §13, 1992 Public Acts; subsequently reduced it to twenty-five dollars in Chapter No. 412, 1999 Public Acts; and (except for out-of-state dealers lacking nexus in Tennessee) eliminated it entirely through Chapter No. 983, §7, 2000 Public Acts. But, in ceasing to allow this compensation to sellers, the General Assembly did not evidence any intent to permit businesses instead to pass on to their customers their costs in administering the sales tax laws.

(3)

The third question is answered by the foregoing discussion, which establishes that Tennessee statutes and case law prohibit this kind of recovery.

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