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**Tax Policy**

In Pennsylvania electric light companies are subject to a gross receipts tax. American Electric Power Service Corporation was an electric power wholesaler in Pennsylvania, but not an electric utility. In this article, Cozen O'Connor's Joseph Bright discusses a recent Pennsylvania Commonwealth Court case that found American Electric Power liable for the gross receipts tax because it was deemed to be an electric light company.

## **Sales to Industrial Development Authority Are Not Sales for Resale**



BY JOSEPH C. BRIGHT

A panel of the Commonwealth Court held that a taxpayer was not entitled to a sale for resale exemption for gross receipts tax purposes or sales to an industrial development authority (IDA). *American Electric Power Service Corp. v. Commonwealth*, 2017 Pa. Commw., LEXIS 174. The taxpayer was regulated by the Federal Energy Regulatory Commission (FERC) as a wholesale seller of electricity. It did not produce electricity and it was not a public utility. The court first held that the taxpayer was subject to the gross receipts tax. While the taxpayer was not a taxpayer under the terms of the utilities gross receipts tax, the court stated that it was a

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taxpayer by virtue of Section 2810(i) of the Electricity Generation Customer Choice and Competition Act (Competition Act), which provides that an electric light company is deemed to include an electric distribution company and an electric generation supplier. 66 Pa. C.S. §2810(i). While the taxpayer was neither, the court held that the use of the phrase *deemed to include* meant that other taxpayers could also be deemed to be electric light companies. The court repeated the holdings of prior cases that a taxpayer need not be regulated by the Public Utility Commission in order to be subject to the tax. The court then held that the taxpayer was not entitled to the resale exclusion which applies to sales to a county, city, borough, incorporated town, township, school district, vocational school district, and county institution district. Sales to the IDA were resold to other entities, but the industrial development authority was none of the listed entities. Finally, the court held that the commonwealth was not estopped from imposing tax because of erroneous contrary advice by a Department of Revenue official.

### **Expansive Approach**

The holding that the Competition Act brought the taxpayer within the scope of the gross receipts tax is suspect. The expansive approach is consistent with the approach in *Spectrum Arena Limited Partnership*, which applied the definition of a "sale" of electricity in the Public Utilities Code, as modified by the Competition Act, to hold that Sales Tax was properly charged on transmission services, distribution services, competitive transition charges, and intangible transmission

charges. *Spectrum Arena Limited Partnership v. Commonwealth*, 983 A.2d 641 (Pa. 2009). However, it seems a stretch to say that since A is deemed to include X and Y, it also includes Z.

## Estoppel

The holding that the state cannot be estopped by prior advice is contrary to other case law. In *Abbotts Dairies, Inc. v. City of Philadelphia*, 258 A.2d 634 (Pa. 1969), the city was estopped from retroactively imposing its mercantile license tax on various companies that had relied on their exempt status granted pursuant to a court injunction for 13 years. In *King Crown*, 415 A.2d 927 (Pa. Commw. 1980), the Pennsylvania Department of Revenue was estopped from attempting to collect additional taxes that were subject to a compromise agreement to the extent the taxpayer complied with it. In *Transcontinental Gas Pipeline Corp. v. Commonwealth*, 620 A.2d 614 (Pa Commw. 1993), the court held that the taxpayer could not be assessed utilities gross

receipts tax for tax periods before it had been notified by the Department of Revenue that it was subject to the tax, citing *Abbotts Dairies*. In *Estate of Margaret E. Leitham*, 726 A. 2d 1116 (Pa. Commw. 1999), the court stated: “It is now firmly settled that when all the traditional elements of estoppel have otherwise been established, its application should not be denied merely because it is being asserted against the government.” In *Borough of Wilkinsburg v. WIMCO Metals Inc.*, GD 97-11304 (C.P. Allegheny Co. Mar. 16, 2001), the borough was estopped from attempting to collect additional business privilege taxes for prior tax years based on a recent change in the interpretation of its ordinance by the borough’s new tax collector, where the taxpayer had relied on the borough’s long-standing interpretation of the ordinance. The courts should resolve what is the correct rule regarding estoppel.

In any event, if a taxpayer receives verbal advice from the Department, the taxpayer should consider requesting a private letter ruling requests to confirm the guidance.