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FILE

IN THE SUPREME COURT OF OHIO

On Appeal from the Public Utilities Commission of Ohio

SC# 16-0920

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PUCO

Robert Smith and Kathleen Smith	)	
	)	
	)	Case No.
Appellant(s),	)	
	)	
v.	)	Appeal from the Public Utilities
	)	Commission of Ohio Case No.
The Public Utilities Commission of Ohio,	)	13-2109-EL-CSS
	)	
Appellee.	)	

NOTICE OF APPEAL OF ROBERT AND KATHLEEN SMITH

Appellants Robert and Kathleen Smith, pursuant to R.C. 4903.11, hereby give notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal to the Supreme Court of Ohio from Appellee's Order and Opinion entered in its journal on December 3, 2014 and Entry on Rehearing in its Journal on April 27, 2016 in the above captioned case.

On January 2, 2015 Appellants timely filed an Application for Rehearing from the December 3, 2014 Opinion and Order pursuant to R.C. 4903.10. Appellants' Application for Rehearing was granted for further consideration of the matters specified in the Application. However, Appellants' Application for Rehearing was denied by an Entry entered in Appellee's Journal on April 27, 2016.

Appellant complains and alleges that Appellee's December 3, 2014 Opinion and Order and April 27, 2016 Entry are unlawful or unreasonable, and that Appellee erred as a matter of law in the following respects that were raised in the Appellants' Application for Rehearing.

The PUCO erred in the following respect:

1. The PUCO erred by ruling that the Tariff approved by the Appellee is sufficient to impose a tax on the Appellant, disregarding Title 26 of the United States Code.

The reasons for granting this Appeal are set forth in the attached Memorandum in Support.

Date: June 22, 2016

Respectfully submitted,

/s/ Kathleen Smith
Kathleen Smith (#0090587)
3517 Kerry Court
Columbus, Ohio 43221
Attorney for Appellants

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In its Opinion and Order of December 3, 2014 and Entry Denying Rehearing of April 27, 2016, the PUCO denied Appellants' request that Ohio Power Company dba AEP Ohio ("AEP") be responsible for all expenses of a primary line relocation. The PUCO ruled that Appellants' must pay the expenses, including taxes, to relocate the primary line from their property to the public right-of-way. Appellants' filed this Notice of Appeal to avoid paying tax on the relocation. While AEP's Tariff references the applicability of taxes to premium services, it makes no specific mention that customer requested work is taxable. Robert and Kathleen Smith respectfully request that the Court remand this case to Appellee with instructions to correct the errors complained of herein.

II. THE PUCO ERRED BY RULING THAT APPELLANTS MUST PAY TAXES FOR THE POWER LINE RELOCATION BASED ON AEP'S TARIFF

In its Order and Opinion dated December 3, 2014, the PUCO states that "Appellants presented no evidence or testimony proving that by not requesting a 'premium service' they are exempt from paying for standard overhead, which according to AEP includes taxes". *In the*

Matter of Robert Smith and Kathleen Smith v. Ohio Power Company, PUCO Case No. 13-2109-EL-CSS, Opinion and Order at 9 (December 3, 2014). However, Appellants did present sufficient evidence showing that the work they are requesting is not a "premium service" and is therefore not taxable. Section 10 of AEP's Tariff includes a section entitled "Definitions Used in This Section", which indicates that the definitions outlined apply solely to Section 10. Said definitions include the following:

> "Premium service" includes but is not limited to, customer-requested oversizing of facilities, underground construction, three-phase residential service, seasonal operations, and any customer request that is in excess of standard construction and requirements necessary to provide electric service to the customer.

Further on in Section 10 a section entitled "Line Extensions" goes on to say in part that "the payment for premium services ... shall be considered as contribution in aid of construction (CIAC) and shall be grossed-up by the effect of applicable taxes." Both parties to this case agree that Appellants are not requesting a "premium service" (Appellants' Initial Br. at 7; Tr. at 15-16, 22). Therefore, it stands to reason that the taxes imposed under Section 10 are not applicable to Appellants' relocation request.

AEP argues that Section 12 of their Tariff is applicable to Appellants' request. (AEP's Initial Br. at ¶3; Testimony of Michelle Jeunelot at 4). Section 12 states the following:

> Whenever, at the request of a customer and solely to suit the convenience of the customer, work is performed on the Company's facilities or the Company's facilities are relocated, the customer shall pay to the Company, in advance, the estimated total cost of such work. This cost shall be itemized by major categories and shall include the Company's standard overheads and be credited with the net value of any salvageable material. The actual costs for the work performed will be determined after its completion and the appropriate additional charge or refund will be made to the customer.

Although Section 12 of AEP's Tariff maintains that standard overheads will be charged to the customer, the Tariff contains no definition for "standard overheads". Further, Section 12 makes no reference to premium service, Contributions in Aid of Construction, or the grossing up of taxes.

In its Opinion and Order filed December 3, 2014, the Appellee found that Appellants did not present evidence showing that taxes are not applicable (Opinion and Order at 9). However, the Appellants saw no need to present such evidence as there is no mention of taxes in Paragraph 12 of AEP's Tariff. The mere absence of a specific reference to taxes or CIAC in the event of customer requested work is sufficient to show that taxes are not applicable. The Appellee erroneously based its' findings on AEP's contention that taxes are included in overhead when the PUCO-approved Tariff fails to support the inclusion of taxes in Paragraph 12 in the same manner as Paragraph 10. AEP's claim that taxes are included in standard overhead is not supported to any degree in AEP's Tariff concerning customer requested work.

Further, in Paragraph 4 of AEP's Memorandum Contra Complainants' Application for Rehearing dated January 12, 2015, AEP contends that "the transaction would involve the payment of money for services performed." AEP goes on to say that there would be no exchange of like kind property under said transaction. *Id.* However, 26 U.S.C. §1031 (a) (1) states that:

> No gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment.

26 U.S.C. §1031 (d) also states in part that "if property was acquired on an exchange described in this section...then the basis shall be the same as that of the property exchanged." Further, Internal Revenue Service Fact Sheet 2008-18 dated February 2008, attached hereto as "Exhibit A", states the following under the section entitled "What are the different structures of a Section 1031 Exchange?":

> To accomplish a Section 1031 exchange, there must be an exchange of properties. The simplest type of Section 1031 exchange is a simultaneous

> swap of one property for another. Deferred exchanges are more complex but allow flexibility. They allow you to dispose of property and subsequently acquire one or more other like-kind replacement properties. To qualify as a Section 1031 exchange, a deferred exchange must be distinguished from the case of a taxpayer simply selling one property and using the proceeds to purchase another property (which is a taxable transaction). Rather, in a deferred exchange, the disposition of the relinquished property and acquisition of the replacement property must be mutually dependent parts of an integrated transaction constituting an exchange of property.

In the instant case there is no question that this transaction constitutes a like kind exchange of property. Existing transmission poles and lines will be removed and new transmission poles and lines will be installed at a different location as part of an integrated transaction that provides the same service to AEP's customers. This transaction will not involve the sale of one asset in order to purchase another asset.

III. CONCLUSION

Appellee cannot uphold the assessment of a tax based on the mere fact that AEP provides for a tax assessment somewhere in its' Tariff. The mere absence of any mention of a tax on customer requested work in Section 12 of AEP's Tariff shows that taxes are not applicable. The citations from 26 U.S.C. §1031 provided herein support the Appellants' claim that the tax is not applicable. Appellants cannot be held responsible for a tax that is not imposed by the Internal Revenue Code; AEP has no taxing authority and is subject to applicable Internal Revenue Code Sections.

Appellants respectfully submit that the Appellee's December 3, 2014 Opinion and Order and April 27, 2016 Entry is unreasonable or unlawful and should be reversed. This case should be remanded to Appellee with instructions to correct the errors complained of herein.

Date: June 22, 2016

Respectfully submitted,

/s/ Kathleen Smith

Kathleen Smith (#0090587)
3517 Kerry Court
Columbus, Ohio 43221
Attorney for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Notice of Appeal was served via ordinary mail upon the Chairman of the Public Utilities Commission of Ohio at the address listed below on this 22nd day of June, 2016.

Chairman Asim Haque
The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

/s/ Kathleen Smith

Kathleen Smith (#0090587)

INTERNAL REVENUE SERVICE

IRS Fact Sheet

Media Relations Office | Washington, D.C. | Media Contact: 202.622.4000

www.irs.gov/newsroom | Public Contact: 800.829.1040

Like-Kind Exchanges Under IRC Section 1031

FS-2008-18, February 2008

WASHINGTON— Whenever you sell business or investment property and you have a gain, you generally have to pay tax on the gain at the time of sale. IRC Section 1031 provides an exception and allows you to postpone paying tax on the gain if you reinvest the proceeds in similar property as part of a qualifying like-kind exchange. Gain deferred in a like-kind exchange under IRC Section 1031 is tax-deferred, but it is not tax-free.

The exchange can include like-kind property exclusively or it can include like-kind property along with cash, liabilities and property that are not like-kind. If you receive cash, relief from debt, or property that is not like-kind, however, you may trigger some taxable gain in the year of the exchange. There can be both deferred and recognized gain in the same transaction when a taxpayer exchanges for like-kind property of lesser value.

This fact sheet, the 21st in the Tax Gap series, provides additional guidance to taxpayers regarding the rules and regulations governing deferred like-kind exchanges.

Who qualifies for the Section 1031 exchange?

Owners of investment and business property may qualify for a Section 1031 deferral. Individuals, C corporations, S corporations, partnerships (general or limited), limited liability companies, trusts and any other taxpaying entity may set up an exchange of business or investment properties for business or investment properties under Section 1031.

What are the different structures of a Section 1031 Exchange?

To accomplish a Section 1031 exchange, there must be an exchange of properties. The simplest type of Section 1031 exchange is a simultaneous swap of one property for another.

Deferred exchanges are more complex but allow flexibility. They allow you to dispose of property and subsequently acquire one or more other like-kind replacement properties.

To qualify as a Section 1031 exchange, a deferred exchange must be distinguished from the case of a taxpayer simply selling one property and using the proceeds to purchase another property (which is a taxable transaction). Rather, in a deferred exchange, the disposition of the relinquished property and acquisition of the replacement property must be mutually dependent parts of an integrated transaction constituting an exchange of property. Taxpayers engaging in deferred exchanges generally use exchange facilitators under exchange agreements pursuant to rules provided in the Income Tax Regulations. .

EXHIBIT A

A reverse exchange is somewhat more complex than a deferred exchange. It involves the acquisition of replacement property through an exchange accommodation titleholder, with whom it is parked for no more than 180 days. During this parking period the taxpayer disposes of its relinquished property to close the exchange.

What property qualifies for a Like-Kind Exchange?

Both the relinquished property you sell and the replacement property you buy must meet certain requirements.

Both properties must be held for use in a trade or business or for investment. Property used primarily for personal use, like a primary residence or a second home or vacation home, does not qualify for like-kind exchange treatment.

Both properties must be similar enough to qualify as "like-kind." Like-kind property is property of the same nature, character or class. Quality or grade does not matter. Most real estate will be like-kind to other real estate. For example, real property that is improved with a residential rental house is like-kind to vacant land. One exception for real estate is that property within the United States is not like-kind to property outside of the United States. Also, improvements that are conveyed without land are not of like kind to land.

Real property and personal property can both qualify as exchange properties under Section 1031; but real property can never be like-kind to personal property. In personal property exchanges, the rules pertaining to what qualifies as like-kind are more restrictive than the rules pertaining to real property. As an example, cars are not like-kind to trucks.

Finally, certain types of property are specifically excluded from Section 1031 treatment. Section 1031 **does not** apply to exchanges of:

- Inventory or stock in trade
- Stocks, bonds, or notes
- Other securities or debt
- Partnership interests
- Certificates of trust

What are the time limits to complete a Section 1031 Deferred Like-Kind Exchange?

While a like-kind exchange does not have to be a simultaneous swap of properties, you must meet two time limits or the entire gain will be taxable. These limits cannot be extended for any circumstance or hardship except in the case of presidentially declared disasters.

The first limit is that you have 45 days from the date you sell the relinquished property to identify potential replacement properties. The identification must be in writing, signed by you and delivered to a person involved in the exchange like the seller of the replacement property or the qualified intermediary. However, notice to your attorney, real estate agent, accountant or similar persons acting as your agent is not sufficient.

Replacement properties must be clearly described in the written identification. In the case of real estate, this means a legal description, street address or distinguishable name. Follow the IRS guidelines for the maximum number and value of properties that can be identified.

The second limit is that the replacement property must be received and the exchange completed no later than 180 days after the sale of the exchanged property or the due date (with extensions) of the income tax return for the tax year in which the relinquished property was sold, whichever is earlier. The replacement property received must be substantially the same as property identified within the 45-day limit described above.

Are there restrictions for deferred and reverse exchanges?

It is important to know that taking control of cash or other proceeds before the exchange is complete may disqualify the entire transaction from like-kind exchange treatment and make ALL gain immediately taxable.

If cash or other proceeds that are not like-kind property are received at the conclusion of the exchange, the transaction will still qualify as a like-kind exchange. Gain may be taxable, but only to the extent of the proceeds that are not like-kind property.

One way to avoid premature receipt of cash or other proceeds is to use a qualified intermediary or other exchange facilitator to hold those proceeds until the exchange is complete.

You can not act as your own facilitator. In addition, your agent (including your real estate agent or broker, investment banker or broker, accountant, attorney, employee or anyone who has worked for you in those capacities within the previous two years) can not act as your facilitator.

Be careful in your selection of a qualified intermediary as there have been recent incidents of intermediaries declaring bankruptcy or otherwise being unable to meet their contractual obligations to the taxpayer. These situations have resulted in taxpayers not meeting the strict timelines set for a deferred or reverse exchange, thereby disqualifying the transaction from Section 1031 deferral of gain. The gain may be taxable in the current year while any losses the taxpayer suffered would be considered under separate code sections.

How do you compute the basis in the new property?

It is critical that you and your tax representative adjust and track basis correctly to comply with Section 1031 regulations.

Gain is deferred, but not forgiven, in a like-kind exchange. You must calculate and keep track of your basis in the new property you acquired in the exchange.

The basis of property acquired in a Section 1031 exchange is the basis of the property given up with some adjustments. This transfer of basis from the relinquished to the replacement property preserves the deferred gain for later recognition. A collateral affect is that the resulting depreciable basis is generally lower than what would otherwise be available if the replacement property were acquired in a taxable transaction.

When the replacement property is ultimately sold (not as part of another exchange), the original deferred gain, plus any additional gain realized since the purchase of the replacement property, is subject to tax.

How do you report Section 1031 Like-Kind Exchanges to the IRS?

You must report an exchange to the IRS on Form 8824, *Like-Kind Exchanges* and file it with your tax return for the year in which the exchange occurred.

Form 8824 asks for:

- Descriptions of the properties exchanged
- Dates that properties were identified and transferred
- Any relationship between the parties to the exchange
- Value of the like-kind and other property received
- Gain or loss on sale of other (non-like-kind) property given up
- Cash received or paid; liabilities relieved or assumed
- Adjusted basis of like-kind property given up; realized gain

If you do not specifically follow the rules for like-kind exchanges, you may be held liable for taxes, penalties, and interest on your transactions.

Beware of schemes

Taxpayers should be wary of individuals promoting improper use of like-kind exchanges. Typically they are not tax professionals. Sales pitches may encourage taxpayers to exchange non-qualifying vacation or second homes. Many promoters of like-kind exchanges refer to them as "tax-free" exchanges not "tax-deferred" exchanges. Taxpayers may also be advised to claim an exchange despite the fact that they have taken possession of cash proceeds from the sale.

Consult a tax professional or refer to IRS publications listed below for additional assistance with IRC Section 1031 Like-Kind Exchanges.

References/Related Topics

- Publication 544, Sales and Other Dispositions of Assets
- Form 8824, Like-Kind Exchanges (PDF)
- Tax Tips - Real Estate
- Form 4797, Sales of Business Property