

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

O.W. HUBBELL & SONS, INC.

CASE NO. 90-02053

Debtor

Chapter 11

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APPEARANCES:

MENTER, RUDIN & TRIVELPIECE, P.C.  
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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

On July 12, 1993, O.W. Hubbell & Sons, Inc. ("Debtor") filed an omnibus motion seeking an order amending, reducing, expunging, reclassifying or otherwise modifying claims of various creditors pursuant to §502(a) of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."). The motion was heard at a regular motion term of this Court on August 24, 1993, at Utica, New York, and adjourned to September 28, 1993, at which time the New York State Department of Taxation and Finance ("Department") raised an objection to the Debtor's motion which proposes to reduce

the Department's claim from \$91,863.28 to \$33,972.61. An evidentiary hearing on the matter was scheduled to be held on December 22, 1993, however, in lieu of the hearing, the parties (requested the opportunity to prepare a stipulation of facts along with memoranda of law. The parties' request was granted and the matter was submitted for decision on March 1, 1994.

#### JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this core proceeding pursuant to 28 U.S.C. §§1334(b), 157(a), (b)(1) and (b)(2)(B).

#### FACTS<sup>1</sup>

On August 22, 1990, an involuntary petition was filed against the Debtor pursuant to Chapter 7 of the Code. An Order for relief under Chapter 7 and an Order converting the case to Chapter 11 were both signed on September 26, 1990. On July, 1, 1993, the Debtor's plan of reorganization ("Plan") was confirmed by this Court.

The Debtor is involved in the manufacture, sale and installation of guardrails made of galvanized steel. On December 20, 1984, the Department's Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use

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<sup>1</sup> The parties have agreed to a stipulation ("Stipulation") of the facts found in the Tribunal's decision, which will be summarized by this Court for purposes of the matter herein.

Taxes Due for the period from June 1, 1981 - February 29, 1984. The Debtor filed a petition for revision of the determination, and a hearing was held before an administrative law judge ("ALJ") on October 20, 1988. See Exhibit "B" of the Stipulation. The decision of the ALJ, issued on May 25, 1989, was appealed to the New York State Tax Tribunal ("Tribunal"), which in turn issued a decision on March 22, 1990. See Exhibit "A" of the Stipulation. The documents indicate that the Debtor was represented at the hearing by Samuel D. Hester, Esq.<sup>2</sup>

At issue in the proceeding before the ALJ and the Tribunal was a determination regarding whether the Debtor's process of galvanizing guardrails for use on its road improvement projects, along with the utilities directly consumed in connection therewith, constituted the production of tangible personal property for sale within the meaning of §1115 (c) of the New York Tax Law ("NYTL") such that the utility purchases at issue were properly exempt from sales tax.

The Tribunal, relying on the facts determined by the ALJ, found that a portion of the guardrails manufactured by the Debtor were sold outright to other contractors, including affiliates of the Debtor. However, the remainder of the guardrails were installed by the Debtor pursuant to contracts with New York State and municipalities in the State of New York ("Government") and

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<sup>2</sup> The Court notes that the Debtor is represented in this Chapter 11 case by the law firm of Menter, Rudin & Trivelpiece, P.C., yet in this contested matter representation has been afforded Debtor by Coupe, Siegel, Hester, Stephens & Kahler, Esqs. The Court is unable to locate any order appointing the latter firm as special counsel to the Debtor pursuant to 11 U.S.C. §327(e).

resulted in a capital improvement to real property.

In allocating the Debtor's revenues between that generated by direct sales of the guardrails and that generated pursuant to the Debtor's installation contracts, the Division had determined that 21.81% of the revenues were from direct sales and the remaining 78.19% was from the installation contracts. The Division had concluded that 78.19% of the Debtor's utility bills used in the galvanizing process were not exempt pursuant to NYTL §1115(c) and, therefore, properly subject to sales tax. The Division had not considered sales to the Debtor's affiliates as direct sales. However, upon review, the ALJ determined that the utilities consumed in the production of guardrails ultimately sold to the affiliates were also entitled to exempt status and accordingly, the 78.19% figure was revised downward to 61.77%.

On March 1, 1993, the Department filed a proof of claim in the amount of \$91,863.28. This included \$38,152.23 in sales taxes and interest for the period of December 1, 1981 - February 28, 1984 pursuant to the ALJ's decision,<sup>3</sup> as well as \$53,711.05 for taxes and interest for the period of June 1, 1985 - May 31, 1988.

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<sup>3</sup> There appears to be a discrepancy between the \$38,152.23 claimed by the Department to be due and owing and the figure asserted by the Debtor in the amount of \$33,972.61. The parties attributed this to the calculation of interest. The Court takes notice that the Division's determination was for the period from June 1, 1981 - February 29, 1984. However, the Department's proof of claim references the period from December 1, 1981 - February 28, 1984. The question of any discrepancy, however, is not currently an issue before this Court.

## ARGUMENTS

The Debtor concedes that the Court is without jurisdiction to make a determination regarding the tax assessment for the years 1981-1984 pursuant to Code §505(a)(2) (A) . However, as there has been no adjudication by a judicial or administrative tribunal as to the assessment for the years 1985-1988, the Debtor seeks a determination by this Court regarding the legality of the sales tax assessed against it for those years. Debtor asserts that since title or possession of the guardrails is transferred to the state or other government entity under the terms of the installation contracts that the transaction constitutes a "sale" as defined by NYTL §1101(b)(5). Therefore, the Debtor makes the argument that the purchases of gas and electricity were for use in the production of tangible personal property, i.e. the guardrails, which the Debtor ultimately transferred to the Government in accordance with the installation contracts. Pursuant to NYTL §1115(c), the Debtor contends that the utility purchases should be deemed exempt from sales tax.

The Department relies on the prior determination by the Tribunal for the years 1981-1984 in arguing that its claim for the years 1985-1988 should be allowed in full.

## DISCUSSION

Pursuant to Code §505(a)(1), the Court may determine the legality of any tax as long as there has been no adjudication by a

judicial or administrative tribunal prior to the commencement of the case. As the Debtor concedes, the Court is precluded from reviewing the Debtor's tax liability for the years 1981-1984 since it has previously been adjudicated by the ALJ and affirmed by the Tribunal. See generally In re Galvano. 116 B.R. 367, 372 (Bankr. E.D.N.Y. 1990) (citations omitted).

The arguments made by the Debtor herein appear to be the same as those it raised in the administrative proceeding before the ALJ, namely that the transfer of ownership and possession of the guardrails to the Government pursuant to the installation contracts constituted a "sale" of tangible personal property. The ALJ, as well as the Tribunal, dismissed this argument, citing inter alia to Matter of Midland Asphalt v. Chu. 136 A.D.2d 851, 523 N.Y.S.2d 697, 699, appeal denied 72 N.Y.2d 806, 529 N.E.2d 177, 532 N.Y.S.2d 847 (1988) and Matter of Southern Tier Iron Works v. Tully. 66 A.D.2d 921, 410 N.Y.S.2d 711, 713 (1978) for the premise that there is no "sale" when the property is being manufactured primarily for use in services provided by the producer. The ALJ concluded that the Debtor was galvanizing the guardrails for its own use and was not primarily in the business of selling the guardrails separately from the services it provided pursuant to its installation contracts.

The doctrine of collateral estoppel is applicable to give conclusive effect to the determinations of administrative agencies as long as the procedures employed are substantially similar to those used in a court of law. Ryan v. New York Tel. Co.. 62 N.Y.2d 494, 499, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984); see also Fed.Sav. and Loan Ins. Corp. v. Director of Revenue, 650 F.Supp.

1217, 1223 (N.D.Ill. 1986); Galvano. supra. 116 B.R. at 373 (concluding that "[t]he State of New York has a thorough procedure by which taxpayers may contest tax assessments through administrative hearings ..."). The initial proceeding must have provided the parties with a full and fair opportunity to litigate the issue. The doctrine precludes a party from relitigating an issue of fact or law previously decided against that party. Ryan. supra at 500. It must be an issue which is identical to that currently before the Court, and it must have been material to the first proceeding and the decision rendered therein. Id. Under the doctrine of collateral estoppel, once an issue of fact and/or law has been actually and necessarily determined, that determination is conclusive in suits based on a different cause of action involving a party to the prior litigation. Montana v. United States. 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979); see also ITT Corp. v. United States. 963 F.2d 561, 563-564 (2d Cir. 1992). However, the doctrine is to be applied narrowly in tax cases. ITT, supra. 963 F.2d at 564. As the Supreme Court noted in Commissioner v. Sunnen. 33 U.S. 591, 599-600, 68 S.Ct. 715, 720, 92 L.Ed. 898 (1949),

where two cases involve income taxes in different taxable years, collateral estoppel must ... be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged.

Sunnen was later modified by Montana, supra. 440 U.S. 147, 99 S.Ct. 970, which held that the application of collateral estoppel in tax cases does not require direct identity of issue. ITT, supra, 963

Lastly, the Court finds no special circumstances which would warrant an exception to the normal rules of preclusion.

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Having analyzed the matter sub judice in terms of the three prong test of Montana, the Court concludes that collateral estoppel applies to this case. The determination made by the ALJ and affirmed by the Tribunal regarding the tax assessment for the years 1981-1984 is given preclusive effect with respect to the assessment for the years 1985-1988. On that basis, the Court determines that the Debtor's utility purchases which were consumed in the galvanizing of the guardrails for the years 1985-1988 and later installed by the Debtor pursuant to its installation contracts with the Government were properly subject to tax.

For the foregoing reasons, it is

ORDERED that the Department's claim for sales and use taxes based upon its assessment for the period June 1, 1985 - May 31, 1988 is allowed in full.

Dated at Utica, New York  
this 3rd day of June 1994

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Stephen D. Gerling  
U.S. Bankruptcy Judge