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Article 13

Defenses to a Charge of Offering Services and Facilities to Customers in Violation of the Robinson-Patman Act

George J. Maly Jr.

decision on the fact that the event was unexpected at the close of the taxpayer's tax year.

In summary then, it would appear that when a taxpayer on the accrual basis has correctly accrued an item according to recognized accounting procedures and has filed its return on that basis, it need not readjust that return to account for changes due to events occurring after the close of its fiscal year unless it could reasonably anticipate those events occurring within a reasonable time after the close of its fiscal year. In cases where an event can reasonably be anticipated, the taxpayer must hold his books open for a reasonable time in order to readjust, or else it will be required to reopen its books, if already closed, to adjust for the change.

The principal case extends this rule so as to allow an accrual taxpayer who has correctly accrued an item and closed its books but has not yet filed its tax return, to go ahead and file its tax returns on that basis even though an event has occurred after the close of its fiscal year which changes its tax liability; providing the event could not reasonably have been anticipated and it would be unreasonable to require the taxpayer to reopen its books for the past year and readjust them.

In these cases the proper procedure is to adjust for the change on the next year's return. However, if an item is incorrectly accrued the proper procedure is to go back to the year in which the mistake was made and file an amended return for that year.[14] The theory being: an erroneous reporting of income because of a mistake in a prior year does not authorize an erroneous reporting in a subsequent year in order to adjust for the prior mistake.[15]

ROBERT WATSON

Defenses To A Charge of Offering Services and Facilities To Customers in Violation of The Robinson-Patman Act—Petitioner, a corporation, was charged by the FTC with violation of Sec. 2 (e) of the Robinson-Patman Act[1] in that it gave services and facilities to customers on a discriminatory basis (other than a "proportionally equal" basis). Petitioner sells patterns for women's dresses. Its principal customers are of two types: "fabric" shops and "Red Front" stores. The "fabric" shops sell materials as their principal commodity and offer patterns to their customers primarly as a service. Many make

[14] §1.451 - 1 (a) and §1.461 - 1 (a) (3) INTERNAL REVENUE REGULATIONS (1958).
[15] Escanaba and Lake Superior R. R. Co. v. Commissioner, 24 B. T. A. 412 (1931).
[1] This section provides: "(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser . . . by contracting to furnish or furnishing . . . any services or facilities . . . not accorded to all purchasers on proportionally equal terms." 49 Stat. 1526 (1936), 15 U.S. C. §13 (1952).

no profit from the sale of such patterns and their volume is relatively small. "Red Front" stores sell patterns in bulk for a profit, usually handling no other commodity.

The findings of fact indicate that catalogues which depict patterns are essential to the business of selling patterns. Such catalogues were furnished free of charge to the "Red Front" stores. The "fabric" shops, however, were required to buy the same catalogues at a charge of $1.65 to $2.00 per copy. Cabinets for the storing of catalogues and patterns were likewise furnished free of charge to "Red Front" stores, but the "fabric" shops were required to pay rental for the more elaborate cabinets which their business required.

Petitioner offered evidence of "cost justification" for its discriminatory practices. The FTC refused to allow such evidence on the grounds "cost justification" was not a defense to a charge of violation of Sec. 2 (e) of the Robinson-Patman Act.

Held: The FTC erred in excluding evidence of "cost justification". Section 2(b) of the Act[2] provides for "justification" as a defense to a Sec. 2(e) charge and this "justification" includes "cost justification". *Simplicity Pattern Co., Inc. v. Federal Trade Commission,* 26 L.W. 2613, CCH TRADE REG. REP. para. 69,047 (D.C. Cir. May 1958).

Sec. 2(e) of the Robinson-Patman Act[3] provides that no seller shall give services or facilities to customers on other than "proportionally equal terms". It has been held that a tendency to create a monopoly or adversely effect competition is not essential to a violation of 2(e) in that the section does not so provide and thus a showing of mere discrimination is adequate to support a cause of action.[4] Likewise, it has been held that the defenses to a charge of price discrimination which are contained in Sec. 2(a)[5] are not to be read into Sec. 2(e).[6]

Thus the only valid defenses to a charge of violation of this section are set forth in Sec. 2(b) of the Robinson-Patman Act which provides:

> "(b) Upon proof being made . . . that there has been discrimination in price or services of facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made

[2] 49 Stat. 1526 (1936), 15 U.S. C. §13 (1952).
[3] See note 1 *supra.*
[4] Corn Products Refining Co. vs. F.T.C., 324 U.S. 726 (1945).
[5] 49 Stat. 1526 (1936), 15 U.S. C. §13 (1952).
[6] Elizabeth Arden Inc. vs. F.T.C., 156 F. 2d 132 (2d Cir. 1946), *cert. denied,* 331 U.S. 806 (1947).

> in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

It has been generally believed that the above section, when applied to a 2(e) violation, merely establishes the defense that the discrimination was done in good faith to meet competition. However, in the instant case the court has indicated that other defenses are possible under Sec. 2(b). The court states:

> "Congress certainly never wrote 2(b) with its varying facets only to have the entire section conditioned to situations arising under the proviso. Congress, we think, must have intended that the justification to be shown under the first clause of 2(b) as to a 2(e) charge of discrimination in facilities furnished to various customers, was to depend upon the facts in a particular case. That the term may include cost justification . . . seems clear enough."[7]

Thus it would seem there is no specific delineation as to what constitutes "justification" but each case must be decided on its own merits. Clearly, "cost justification" in some instances, will be a valid defense. One charged with service and facility discrimination should not consider "cost justification" as a panacea, however, as it has been etremely difficult to show "cost justification" for price discrimination under Sec. 2(a) and there is nothing to indicate it will be any easier to prove such justification for service and facility discrimination.

It is interesting to speculate what other defenses may be raised as "justification" to a charge of facility discrimination. Perhaps the fact that the discrimination could not possibly effect competition might be a defense under the appropriate facts. It seems that amplification on what constitutes justification will only come through judicial interpretation as varying defenses are raised on varying facts.

It is likewise interesting to note that Sec. 2(b) refers to price discrimination as well as service and facility discrimination. Thus, perhaps defenses other than those set forth in Sec. 2(a) and the *proviso* of Sec. 2(b) are possible to a price discrimination charge. The court in the instant case does not mention this possiblity but it is not beyond the realm of logical inference.

GEORGE J. MALY, JR.

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[7] C.C.H. TRADE REG. REP. para. 69,047, at para. 74,133.