

**M e m o r a n d u m****557.0052**

To: Oakland – Auditing

September 20, 1985

From: Headquarters – Legal  
John Abbott, Tax CounselSubject: M--- S--- SR --- XX-XXXXXX  
Transportation charges – conflicting F.O.B. delivery terms

In your July 19, 1985 memorandum to me, you ask me to reconsider a portion of my letter dated June 28, 1985 to M--- S---, on the subject of transportation charges. In summary, I noted that if M--- S---'s bid quotation to its customer included F.O.B. factory delivery term (with no title clause and delivery by common carrier), but its customer's purchase order included an F.O.B. jobsite delivery term, then the two delivery terms would be in conflict with each other, and neither term would be considered to be part of the contract, as each party would be considered to have objected to the delivery term of the other party under Commercial Code Section 2207.

You write:

If neither clause is acceptable, then we have no title clause at all and, seeing as how we are giving the goods to a common carrier for delivery, title passes when the property is delivered to the carrier because there is no evidence that title is to pass upon delivery at destination. This is quoted from the December 1982 Tax Information release to taxpayers, copy attached, where underlined.

The Tax Information Bulletin of December 1982 states:

When delivery of property is by other than facilities of the retailer, by common or contract carrier, title passes when the retailer delivers the property to the carrier unless there is evidence that title is to pass upon delivery at the destination.\*

Having reconsidered this issue, I now agree that the result with respect to the taxation of the seller's transportation charges should be the same in both cases. Where there are no delivery terms stated in the contract, the Tax Information Bulletin states the correct result, that title passes on delivery by the retailer to the carrier, because Commercial Code Section 2401(2)(a) provides that if the contract requires or authorizes the seller to send the goods to the buyer, but does not

require him to delivery them at destination, title passes to the buyer at the time and place of shipment.

Where there are conflicting F.O.B. terms, Commercial Code Section 2207(3) provides that:

...the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code.

Those supplementary terms referred to in Section 2207 are provided by both section 2401(2) and Commercial Code Section 2504, which states in relevant part that:

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

- (a) Put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case....

The net effect, then, of conflicting F.O.B. terms, is that the contract becomes a “shipment” contract, rather than a “destination” contract, by operation of sections 2401(2) and 2504(a), and title passes on the retailer’s delivery of the property to the carrier, prior to the commencement of transportation. In this case, just as when there are no F.O.B. terms at all, the seller’s transportation charges are excluded from the measure of the tax.

I appreciate your calling this matter to my attention, and I will send a follow-up letter to M--- S--- with a copy to you.

JA:hb

cc: Hayward District Office

bc: Mr. Don Hennessy

\* This is misleading. Under the UCC, the situation is slightly counter-intuitive. You can not retain title after the time you complete your duties w/respect to physical delivery. Thus, if the contract simply says title passes at destination, that is merely a security interest, & title actually passes at shipment upon handing it to the common carrier. However, if the contract provides FOB destination, then the seller has not completed its duties w/respect to physical delivery until destination. Under such circumstances, title passes at destination unless there’s an explicit provision passing it sooner (e.g., at time of shipment).

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