

Memorandum

557.0420

Sacramento, California
April 7, 1953

To: ---

Account No. -- -- XX XXXXXX

From: W. W. Mangels
Tax Counsel

Subject: ---

This memorandum is concerned with --- (J) petition for redetermination (tax in the amount of \$XXX for the period April 1, 1948 to March 31, 1951,) with respect to the application of California sales and use tax to certain freight charges.

The factual situations involved are varied and a bit uncertain. Below are outlined several factual situations, together with recommendations of legal staff with respect thereto.

1. Sales of poles to ---

We understand that the poles are mostly shipped from the place of business of a third party Idaho supplier. ---'s purchase order (Sample #1) instructs --- to ship f.o.b. shipping point with freight allowed. Since December 27, 1949, most (but not all) of ---'s purchase orders are stamped with the notation that title in all instances passes at point of shipment except where purchased f.o.b. destination. Sometimes --- designates the carrier.

---'s invoice (Sample #5 indicates a unit basic price per pole plus a unit transportation price per pole (presumably based on estimated or arbitrary zone freight from the actual shipping point to destination point). Tax is only computed on the lesser total of basic price, that is, exclusive of the estimated unit freight price. Actual freight is always paid by --- to the carrier and is considerably less than the estimated freight.

---'s catalogue (at least as of December 11, 1950, see Sample #6) provides that it is the general intent of --- not to guaranty delivery at or to the destination and therefore all prices are quoted f.o.b. point of shipment with freight allowed. A confusing matter is the use of the term "freight allowed" in the catalogue, purchase order, and sales invoice. Freight prepaid and allowed normally means that the seller prepays the freight and deducts the amount paid by him from the amount he charges to the buyer. Freight collect and allowed means that that buyer pays actual freight to the carrier and deducts it from the sales price and remits the balance to the vendor.

Since our understanding is that the buyer actually remitted the total price to --- and was never given credit for actual freight, we consider that we merely have a f.o.b. shipping point freight prepaid situation here despite the use of the terminology "freight allowed" by the parties.

Assuming the above facts with respect to the sales of poles, that is, that the actual shipping point and freight basing point are the same, that the catalogue provision is understood by ---, and that ---'s purchase order states "f.o.b. shipping point", it is our opinion that to the extent only of actual freight paid by ---, the tax should not apply. This view should apply even in the absence of the stamped title clause on the purchase order, since the conflict as to the intent of place of passage of title (f.o.b. point of shipment versus freight prepaid) seems to be resolved by clear intent in catalogue that --- is not to bear risk of loss, and hence the buyer acquires title upon shipment.

2. Sales of hardware to --- in which the goods are actually shipped from the place where freight is estimated.

For the reasons stated under grouping #1 it is our opinion that actual freight paid should be exempt.

3. Sales of hardware to --- in which the goods are shipped to the Los Angeles warehouse of the seller who ships them to --- although freight is estimated from the out-of-state point.

As we understand it, the customer is charged the same total price as in group #2 situations and furthermore tax is computed by --- on the same amount as in group #2 inasmuch as the same estimated zone freight is added even where shipment goes through the Los Angeles office.

We are of the opinion that Los Angeles is the actual shipping point in this instance and that we should only exempt actual freight paid by --- to carriers for journeys from the Los Angeles warehouse to the destination point.

4. Sales of hardware items to --- in which the goods are picked up by --- at the Los Angeles warehouse, freight again being estimated from the out-of-state origin point to California Echo Five.

In this instance, we conclude that --- acquires title when the hardware is picked up at the Los Angeles warehouse and accordingly there should be no deduction for actual freight paid from the out-of-state point to the Los Angeles warehouse. In other words, tax should apply to the entire charge, taxpayer's control over the goods indicating, in the absence of other clear evidence, that he retains title until the goods arrive at the warehouse or are picked up.

5. Other types of transactions.

There are other types of transactions with --- which may be involved in this determination in which, in our opinion, actual freight should be taxable. For example, if ---'s offer (or invitation for an offer) shows "f.o.b. destination" (as in Sample #3) the freight charges appear to occur prior to passage of title.

Another example is if ---, in its purchase order, actually designates a specific f.o.b. shipping point such as Portland, and the hardware is shipped from Lima, New York, directly to the customer. It is difficult to believe that --- intended to acquire title at Lima and, accordingly, the tax should apply. In other words, where there is a specifically designated shipping point on the purchase order and the goods neither start, nor go through said point, we believe the intent of the purchaser cannot reasonably be said to be to acquire title at the actual out-of-state shipping point. Of course, if --- designated Los Angeles and the goods when from Lima, New York, to Los Angeles and from there to ---, in line with the reasoning under group #3 the tax would not apply to actual freight for shipment from Los Angeles to destination.

6. Sales of hardware to other than ---.

We do not know how these transactions are handled. The burden of proof should be on the taxpayer to show which transactions fall within exempt categories.

7. Final Notes.

As indicated in group #1, we do not believe we are concerned with a true freight prepaid and allowed situation where actual freight is deducted by the retailer inasmuch as the facts to date indicate that the buyers always pay the total billed price. Should further investigation actually reveal freight allowances the facts should be set forth for further review by the legal staff.

In reaching our conclusions with respect to groups #1, #2, and #3 we have assumed that ---'s earlier catalogues (See date of sample #6) also indicated that --- would not guarantee delivery from the shipping point. Therefore, unless earlier catalogs, or other evidence, clearly indicates that --- and its vendors understand the risk of loss will be on the buyer, we would not recommend exemption of transactions in group #1 go #3, occurring prior to December 11, 1950, without further review.

W. W. Mangels

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