

**M e m o r a n d u m****490.0440**

To: Mr. T. P. Putnam

Date: March 14, 1969

From: W. E. Burkett

I have reviewed the transcript of hearing and the post-hearing memorandum submitted by the taxpayer in support of its petition for redetermination. It is my recommendation that the petition for redetermination be granted.

Heretofore, we have proceeded on the basis that the manufacturer's promise to provide the dealer with a credit represented a continuing offer with the performance of the act by the dealer (the making of the sale at the reduced price) constituting both the acceptance of the offer and the consideration for the sales contract. (Unilateral contract.) This analysis tied the receipt of the compensation in with the sales contract under the theory that it was bargained for and given in exchange for making the sale. However, on the basis of the evidence presented, it now appears that the parties were mutually obligated to carry out these performances prior to the time the sales contract was entered into. That is, the manufacturer was obligated to provide the dealer with a credit adjusting his purchase price for parts to an amount equivalent to the distributor's sales price if the dealer made sales to a certain class of customers at the wholesale price. Correspondingly, the dealer was obligated to make sales to a certain class of customers at the wholesale price. The promise to sell to a certain class of customers at a reduced price imposed a legal detriment upon the dealer and it had value to the manufacturer independent of the sale because it provided him an outlet to service customers authorized to buy a wholesale.

The antecedent agreement to provide an alternate purchase price in exchange for the promise to sell to certain customers at reduced prices is evidenced by the various policy memoranda, price lists, and other information which make it clear that the manufacturer was required to provide a credit equivalent to the difference between the independent distributor's price and the retailer's cost price if the stated condition occurred (the sale). It is equally clear that the dealer was bound to make a sale at the specified reduced price if a qualified customer requested him to do so. The fact that their performances were conditioned upon the happening of a condition precedent did not make the agreement any less binding. (See Witkin Contracts, section 233.)

Thus far, we have seen that each party was bound prior to the date of execution of the sales contract to performances which they could not accept or reject at their option. Since both parties were under a preexisting contractual duty to carry out these performances for a consideration other than the making of the actual sale the credit received is not legal consideration for the sale contract. The performance of an act is not consideration for a contract when the person is already legally bound to perform it. (General Motors Acceptance Corp. v. Brown, 2 Cal. App. 2d 646.) Additionally, it has been held that a promise by one to fulfill his own contract with another is not consideration for a promise by a third party (ie, the buyer promise to pay, see

Bailey v. Breetwor, 206 Cal. App. 2d 287.) Accordingly, the credit granted by the manufacturer was not consideration bargained for and given in exchange for the sale. It is properly characterized as an adjustment of the purchase price.

WEB:cc [1b]