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**STATE BOARD OF EQUALIZATION**

December 8, 1960

M--- W---  
Chicago 7  
Illinois

Attention: Mr. G. R. R---  
Legal Division

Gentlemen:

This is in reply to your letter of September 21, 1960, concerning the inclusion of transportation charges in the measure of tax in will-call situations.

California Sales and Use Tax Law includes transportation charges in gross receipts where title to the goods transported passes to the consumer after delivery. It is our conclusion that this is the case in the M--- W--- will-call sales situation.

In a will-call sale, the customer places an order at a M--- W--- catalogue order office. The order describes the merchandise by name and order number. This forms the basis of a contract to sell unascertained goods by description. The goods are unascertained because any one of a number of goods answering the description can be selected by the seller and appropriated to the contract. The parties come to no agreement on when title is to pass or who is to bear the risk of loss during transit. Prices are f.o.b. point of shipment with the delivery charges separately stated. It is understood that the buyer will take delivery at the catalogue order office.

Pursuant to this contract goods are selected and labeled with the customer's name at M--- W---'s mail-order house. They are then shipped via M--- W---'s trucks to the catalogue order office where the order was placed. The customer is notified of the arrival of the goods. He makes payment and takes delivery.

The question in issue is where in this procession of events does title pass. Since there is no express or implied agreement concerning passage of title by the terms of the contract, trade customs, or the circumstances, the presumptions provided for in the Uniform Sales Act (Civil Code Section 1739) supply the governing law.

Section 1739 is composed of five rules. The first two concern sales of specific goods, while Rule 3 concerns sales and returns and sales on approval, none of which concerns us here. Rule 4 deals with the problem of appropriating goods to the contract. It reads:

“Rule 4(1). Where there is a contract to sell unascertained goods by description and goods of that description and, in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied and may be given either before or after appropriation is made.”

Mere selection and labeling of the goods by the seller and placing the goods aboard their trucks is not, in our opinion, an act of appropriation sufficient to pass title. Rule 4 requires a bilateral act. Assent of the buyer to the seller's action is required before the act of identification becomes an appropriation of the goods to the contract. Familiar examples of appropriation include delivery to the buyer, setting the goods aside with the buyer's assent, and delivering the goods to a common carrier consigned to the buyer with the buyer's assent.

The act of M--- W--- of selecting and labeling serves to identify the goods, but there is no assent either express or implied on the part of the buyer. The act is unilateral. The seller may substitute other goods or may deliver these goods elsewhere.

The only act of appropriation which is assented to is that of delivering the goods to the buyer and this he assents to by taking possession. It is at this point that title passes.

The same result is reached by applying Rule 5. Rule 5 provides:

“If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place or to pay freight or cost of transportation to the buyer or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.”

In the will-call situation, M--- W--- makes it clear to the purchaser that the goods will be delivered to the catalogue order office and the customer may pick them up there. M--- W--- employees and trucks carry the goods from the mail-order house to the catalogue order offices. A clearer case of undertaking delivery is difficult to imagine.

The leading California case applying Rule 5 is Capitain v. L. A. Wrecking Co., 37 Cal. 2d 527. In this case the seller of a house undertook to deliver it to the location of the buyer. After it had been placed on a foundation at the buyer's location, but before the roof, which had been removed to facilitate transportation, was replaced, the house was destroyed by fire. The California Supreme Court held that Rule 5 applied, and since the seller had undertaken delivery, title to the house had not passed to the buyer because delivery was not complete.

In two recent cases, California courts have held that Rule 5 applies to sales tax situations. In both cases the tax was held applicable to transportation charges where the seller had

undertaken delivery on the ground that title did not pass until delivery was complete. O'Kelley-Eccles v. State Board of Equalization, 160 Cal. App. 2d 60; Select Base Materials v. State Board of Equalization, 51 Cal. 2d. 640.

We believe these cases to be indistinguishable from the present one. In the will-call situation delivery is to be made to the buyer at the will-call office. This is squarely within Rule 5 and the cited cases. Any other conclusion would place the risk of loss on the buyer while the seller still has possession and care of the goods.

For the reasons stated, we conclude that title to the goods passed subsequent to their transportation to the catalogue order office. Therefore, the transportation charges must be included in taxable gross receipts under Revenue and Taxation Code, Section 6012.

Very truly yours,

E. H. Stetson  
Tax Counsel

EHS;rg

cc: --- -- Administrator  
Chicago - --