M e m o r a n d u m

557.0440

To: File

Date: Sacramento
December 13, 1960

From: Headquarters – Tax Counsel (JJD)

Subject: --- --- Company
XXX --- Street
--- --- X Account - -XXXXXX

BA: XXX --- Boulevard
--- --- Account -- - XXXXXX

At the time of the preliminary hearing on this petition the data available such as contracts and sales invoices did not clearly show the intent of the parties regarding passage of title to the property in question. Since petitioner's representative did not present any concrete additional evidence, the hearing report recommended the transportation charges be considered taxable on the basis that part 5 of Civil Code Section 1739 was applicable.

More recently petitioner as introduced written statements by customers to the effect they were given a choice as to the carrier to be employed, understood they received title at the seller's plant and that they had all risk of loss during transportation.

It has also been shown that the ABC Transportation Co was not used exclusively by petitioner nor was freight prepaid except when ABC transported the acids. Petitioner pointed out the dange of the products being sold and stated a customer could use any carrier it wished provided its equipment complied with I.C.C. regulations. The reason freight was prepaid when Post did the hauling was petitioner's wish to accommodate the purchaser and the carrier by reducing the time and expense which would be spent should Post have to invoice each customer separately.

There appears to be no question that the ABC Company is a separate and distinct entity competitively engaged in hauling for hire. Petitioner pointed out that said company has been loosing customers to the DEF Trucking Company because of the latter's aggressive solicitation of petitioner's customers. Although petitioner would prefer to use ABC because of their proven ability, it has been using the DEF Co. or any othe carrier whenever so instructed by the customer.

In determining the application of tax to these transportation charges the undersigned has of course considered both the passage of title and separate statement of actual freight charges problems.

Although the first problem is not readily solved by reference to the contracts, it is clear that testimony by the petitioner and his customers could be introduced to explain the ambiguous portions thereof by reference to their understandings in light of actual dealing between them and established trade customers.

Such cases as Dow Chemical Co. v. Detroit Chemical Works, 208 Mich. 157, 175, NW 269 state that "the general rule is that title passes when the vendor has fully performed in the appropriation and delivery of the goods to the vendee, and delivery to a public carrier for transportation constitutes delivery to the vendee. There may, of course, be stipulations in the contract, or circumstances attending its performance wwhichindicate a contrary intention. This rule is, in effect, incorporated in the sections of the Uniform Sales Act above quoted." The general rule stated in the case appears applicable since Rule 5 of Civil Code Section 1739 does not fit this situation inasmuch as the contract does not clearly require the seller to deliver nor pay the freight to the buyer. It is, therefore, my conclusion that title to the acids passed at the time the property was delivered to the carrier whether said carrier was the ABC Company or others.

In this instance, freight has been separately stated but the customer has paid an amount less than the actual cost of transportation because of petitioner's competitive custom of freight equalization. Although said custom would appear to be at variance with the requirement of Ruling 58 that the transportation charge be the actual cost of transportation, said conclusion seems harsh if the theory of the ruling is considered. The ruling was, apparently, adopted as a means to exempt transportation charges merely by reducing their selling price while increasing delivery charges above actual cost. This problem is not present here.

In line with the above remarks, it is the undersigned's opinion that the delivery charges involved should be deleted from the measure of tax. If said amounts were not deleted, we would be in the position of holding that shipments made freight collect and shipments freight prepaid under the same master contract are to be treated differently for tax purposes solely because the contract did not contain an explicit title clause. The data submitted since the hearing does not conflict with the contract and cannot be ignored.

J. J. Delaney

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