Memorandum

To: Mr. E. H. Stetson Date: March 16, 1965

From: Robert H. Anderson

Subject: Permitted Radial Highway Common Carriers and Highway Contract Carriers Who Transport Goods They Have Either Bought for Themselves or Sold to Someone Else

The question has been raised regarding a seller of tangible personal property who is also a carrier and who carries goods he has sold. Can he "wear two hats"? The case of Standard Oil Co. v. Johnson, 24 Cal. 2d 40, indicates this can be done and the courts will recognize a person as a carrier who was also the buyer of the goods he carries. However, they seem to do so only when the intent of the parties clearly shows this to be the case.

Evidence of intent becomes a problem in such cases when the contract to buy or sell and to haul is oral.

I called the Public Utilities Commission office in Sacramento last week and inquired about their requirements for documents when a permitted or certificated carrier is hauling goods for someone else. I talked to a Mr. REDACTED TEXT in Sacramento, who informed me that the commission does have a regulation requiring a carrier to issue a freight bill or bill of lading to the shipper. He said this requirement is strictly enforced.

The Public Utilities Commission does not concern themselves with carriers that transport their own goods since this is what they term proprietary hauling.

As a practical matter, at least in substance, if not in form, no charge is, in fact, made for transporting goods when title to the goods remains the seller until delivery to the buyer is complete. Any charge is substantively a part of the selling price of the goods since a person would not charge himself for transporting his own property.

Mr. REDACTED TEXT told me that where a carrier-seller claims he is hauling his own goods he must show clearly that he had not passed title to the goods before the transportation commenced. On the other hand, if he claims he is carrying goods belonging to someone else, he must issue a freight bill to the shipper. Regulations regarding freight bills include a form for same prescribed by the commission. The regulations prescribing the form to be used are issued in conjunction with the tariff rates set by the commission. Gardner v. Rich Mfg. Co., 68 Cal. App. 2d 725, was PUC rate case. At page 736 the court mentioned the PUC requirement that a freight bill be issued in substantially the form prescribed by the commission.

As far as sales tax is concerned, we have one guide or test in determining if a seller is acting in the capacity of a carrier and this is whether he has issued a freight bill to the buyer-shipper substantially in conformance with the forms prescribed by the commission. If he has not, it may not necessarily preclude finding or holding him to be acting in the capacity of a carrier; however, since he may merely be violating a PUC regulation, a second test would be whether the seller, who claims he is acting in the capacity of a carrier, reports and pays tax to the PUC on his hauling receipts. He may do this and still fail to give the shipper the required documents and this may mitigate penalties for failing to issue the required documents of shipping.

I can visualize a situation where a carrier-seller might contend to the board that title passed when the goods were loaded at the place of sale and at the same time argue to the commission that title did not pass until delivery at the point of destination. Obviously, it cannot be both.

The problem from our standpoint appears to be one of giving weight to a carrier's activities and its reports to the PUC as evidence of intent when the contract of sale and subsequent transportation is oral. It seems to me that where a carrier shows it has reported and paid tax to the PUC on hauling receipts, it evidences intent that it is acting in the capacity of a carrier even though it may innocently or negligently fail to issue shipping documents required by the PUC. Of course if it neither issued documents nor reported hauling receipts, it would be clear that it considered itself to be hauling its own goods.

In the East Bay Excavating case, heard on March 3 in San Francisco, the taxpayer was both the carrier and the seller. It did not issue freight bills to the buyer of its goods, but it claims it has always reported and paid tax on its hauling receipts. I think more weight could be given to reporting and paying tax on hauling receipts that on issuing freight bills inasmuch as the carrier would not have to pay tax on its transportation receipts if it could show that title passed only after the goods were delivered.

It should be noted that a taxpayer who is in the unique position of being both the seller and a certificated or permitted carrier would, in retrospect, prefer to pay tax to the PUC on its hauling receipts rather than pay sales tax to the board on delivery charges (where it has a choice) since the rate is must less. The East Bay people, however, were not confronted with such a choice or decision because they apparently have always reported and paid tax to the PUC, and I doubt if they ever considered one to be an advantage over the other. In other words, they are supporting their argument that they carry goods belonging to someone else by the fact that they report and pay tax to the PUC Maybe they would do this anyway rather than have to go to the trouble of proving to the PUC auditors that a per cent of their hauling receipts were not, in fact, charges for transporting goods belonging to someone else, but were part of a selling price of goods they sold.

Although the taxes are unrelated and one is not in lieu of the other they are related to the extent that the measure is delivery charges. Delivery charges are subject to sales tax are only so because they are part of the selling price. Where they are, in fact, part of the selling price they are not, in substance, delivery charges at all for the simple reason that one would not charge himself for delivering his own goods. Where this is the case, the PUC would consider the haul proprietary and tax exempt. Thus, where one tax would be applicable, the other would not, and vice versa.

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