557.0540

Memorandum

To: Mr. E. H. Stetson Date: February 25, 1953

From: John H. Murray

Subject: REDACTED TEXT

Taxpayer is engaged in the business of selling hardwood flooring and nails. Apparently much of its business is with two affiliated companies REDACTED TEXT.

There was included in the measure of tax for the audit period charges for delivery of merchandise by taxpayer's trucks aggregating $42,523.25. Taxpayer contended that a portion of these delivery charges were in connection with sales to affiliated companies for delivery of flooring on which title had passed prior to delivery. Also, that some of the contractors purchasing from taxpayer had no warehouse facilities and therefore used taxpayer's facilities as an accommodation. Apparently, it is here contended that, as to these customers, title passed prior to delivery.

At the hearing held August 25, 1952, it was contended that specific lumber was set aside for the customer in the taxpayer's warehouse, that title passed at that time, and that the customer was responsible for any loss or damage prior to delivery. Petitioner did not know who paid the property tax on that lumber and apparently insurance was held jointly by petitioner and its customers, the affiliated companies.

Petitioner was requested to submit a copy of the agreement with its customers for the sale and storage of lumber and a statement of the manner in which segregation of the lumber was made in the warehouse.

It appears that taxpayer sold the flooring at prices quoted f.o.b. warehouse plus cartage charges. Taxpayer also did not collect Federal transportation tax for the cartage which would seem to be necessary where taxpayer is transporting property of another person for hire. Apparently, taxpayer did pay the California Motor Vehicle Transportation Tax which would be applicable except where taxpayer transported his own goods and did not make a specific charge for transportation (Consolidated Rock Products Co. v. State of California, 57 Cal. App. 2d 959).

Taxpayer has submitted the following information in accordance with the understanding at the hearing.

1. Agreement between taxpayer and REDACTED TEXT dated March 5, 1952, to the effect that in all future purchases by REDACTED TEXT, title to the merchandise purchased is vested in REDACTED TEXT from the date of purchase of such merchandise and taxpayer shall cease to be the owner from and after the date of purchase. Also, that risk of loss for any reason after the date of purchase and prior to the date of delivery shall be at the risk of purchaser. The agreement further recites that it is for the purpose of confirming in writing the arrangement that has been made by

these corporations and has been carried out and place in effect during the past four years. (This statement that title passes at the time of purchase seems to be the equivalent of saying that title passes when title passes.)

2. A similar agreement between taxpayer and REDACTED TEXT.

3. A statement signed “REDACTED TEXT by REDACTED TEXT, Warehouseman". In this statement it is said that it has been the policy of taxpayer in connection with sales to REDACTED TEXT, as well as other customers, to hold merchandise in storage for the customers after it is sold until such time as the customer may either use or sell it "and to handle merchandise or consignment, both in connection with sales and purchases. The consignment merchandise particularly affects the Sacramento and Palo Alto warehouses operated by the owners of this corporation." (What is meant by, or what is the effect of, the statement in quotes, I do not know.) The statement continues by stating that "there may at times be actual physical segregation in separate stacks in the warehouse, more frequently a portion of a stack is marked 'hold' or otherwise earmarked by the warehouseman, either on the lumber itself or in the perpetual inventory kardex records, or on both, in order that such merchandise will not be sold or delivered to someone other than the customer to whom it has already been sold."

Payment for merchandise has customarily been made in advance of billing and delivery if the warehouse (taxpayer?) needed money. If not, payment may be deferred. Delivery never has been a prime consideration in determining when payment was to be made.

4. An opinion by Attorney REDACTED TEXT.

Under Ruling 58 tax does not apply to transportation charges separately stated if the transportation occurs after the sale or purchase of the property. Tax does not apply to transportation charges when property is sold f.o.b. the retailer's place of business provided that (a) a sale as defined in the Sales and Use Tax Law is made at the f.o.b. point (b) the transportation charges are separately stated, and (c) transportation charges equal the actual amounts paid to the carrier by the retailer or the purchaser or bona fide charges for delivery by means of facilities operated by the retailer.

Apparently one contention of taxpayer is that title to lumber sold to affiliated companies and some other customers passes while still in the seller's warehouses by reason of segregation, either physically or by marking the lumber or by marking kardex cards.

Under Civil Code Section 1737, where there is a contract to sell unascertained goods, title does not pass to the buyer until the goods are ascertained. Where no different intention appears Section 1739 sets out a series of rules for determining when title passes. Under Rule 4, where there is a contract to sell unascertained goods, title passes when goods of the description and in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer, or the buyer with the assent of the seller. The assent may be either expressed or implied and may be given before or after the appropriation. Cases interpreting this rule indicate that in order for title to pass upon appropriation under this rule the goods must be ascertained and applied irrevocably to the contract with the assent of the buyer, either express or implied. See Bundy v. Meyer (Minn.) 181 NW 345; Byrne v. Hulett Motor Car Co., 198 NY Sup. 232; Funt v. Shiffman, 187 NY Sup. 666.

It would seem therefore that, in order for title to pass under this section, it would be necessary to have a physical segregation in the seller's warehouse. Certainly mere entering on kardex inventory files would not be sufficient. However, under this rule, it would seem that when the goods are set

apart or placed on the truck for delivery there would be an irrevocable appropriation with the necessary assent.

Section 2 of Rule 4 provides that, where in performance of a contract to sell the seller delivers goods to the buyer, he is presumed to have unconditionally appropriated the goods to the contract except in cases provided in Rule 5 and in Section 1740 (which latter section is inapplicable here).

Rule 5 provides that, if the contract to sell requires the seller to deliver the goods to the buyer or at a particular place, title does not pass until the goods have been so delivered. There is nothing in the file to indicate that any of the contracts of sale entered into by taxpayer either require him to deliver or do not require him to deliver the goods. The price quoted is f.o.b. seller's warehouse. This is not necessarily determinative that title passes at the seller's warehouse. The place where title passes must be determined from all the provisions of the contract and the circumstances and conditions surrounding the sale. See Southern Pacific Co. v. Hyman-Michaels Company, 63 Cal. App. 2d 757 and Standard Oil Co. v. Johnson, 24 Cal. 2d 40.

In the present situation it appears that under the usual method of doing business taxpayer does in fact deliver the goods to the buyer or at the buyer's job site and charges a delivery charge for this. It would seem, therefore, that delivery is an essential part of the contract of sale and that the seller is required to deliver the goods. Therefore, Rule 4, Section 1, does not apply to this transaction and under Rule 4, Section 2, passage of title is determined by Rule 5. Under Rule 5, title passes upon delivery to the place agreed upon.

From the above, it would appear that under taxpayer's method of doing business there is in fact no real segregation or appropriation of the lumber sold under Rule 4 at the time a purchaser order is placed with taxpayer and since taxpayer is required to deliver the goods under the contract of sale (assumed from the manner of doing business) then under Rule 5 title to the goods passes upon delivery of the goods to the buyer or at the designated place. This being so, transportation charges prior to the time when title passes are properly includible in the measure of the sales tax.

In his brief, taxpayer's attorney states, after arguing that title passes prior to delivery, "furthermore the State recognizes this situation and has been charging a transportation license tax for the delivery charges". The California Motor Vehicle Transportation License Tax would apply even though title to the goods did not pass to the purchaser until delivery to the purchaser or at the job site. That tax does not apply when a person is transporting his own goods except where a specific charge for such transportation is made. Here taxpayer could be transporting his own goods to the buyer, but since he makes a specific charge for such transportation the Motor Vehicle Transportation License Tax would apply to that charge. See Consolidated Rock Products Co. v. State of California, 57 Cal. App. 2d 959.

It is recommended that the protest be denied.

John H. Murray

JHM: ja