

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years
1951 - 1954

November 16, 1954

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Military Leave

I have your memorandum of October 27th relating to military service, more specifically to subsection VI of Section 3 of Chapter 60, R. S. 1944, where it is provided that an employee who enlists or is inducted into the Armed Forces of the United States in time of war . . . or while the provisions of Public Law 759, 80th Congress (Selective Service Act of 1948) or any amendment thereto or extension thereof shall be in effect . . . and shall have all the benefits thereof.

You ask if the provisions of these two statutes are still operative. In the first instance, I do not believe that we are now in a time of war there being no formal declaration by Congress and no active fighting now going on. Second, the Act referred to in subsection VI, commonly called the Selective Service Act of 1948, is still in effect. That statute is now cited as Sections 451-473, both inclusive, of Title 50, U. S. Code. The name has been changed. It is now the Universal Military Training and Service Act. This statute is in operation.

ROGER A. PUTNAM
Assistant Attorney General

November 19, 1954

To Ernest H. Johnson, State Tax Assessor
Re: Leased Equipment used in Maine by Contractors for Maine Turnpike Authority

You inquire whether the Maine sales and use tax applies to various rental arrangements involving the rental of heavy contracting machinery and, further, you inquire how the law is to be applied.

Taking the cases in the order in which they appear in the memorandum dated November 10, 1954, from Norman P. Ledew, Chief Examiner:

1. You state that Campanella & Cardi have rented 3 bulldozers for \$5,400 a month under an arrangement whereby the rental payments are to be credited against the purchase price if the lessee buys the bulldozers, provided, however, he must buy before June 15, 1955.

You do not make clear whether the rentals, if paid on time, would amount to the full purchase price by June 15, 1955.

Installment leases have been construed by the Supreme Judicial Court from a very early date. Our own Maine Sales and Use Tax Law provides:

“The term ‘retail sale’ or ‘sale at retail’ includes conditional sales, *installment lease sales*, and any other transfer of tangible personal property when the title is retained as security for the payment of the purchase price and is intended to be transferred later.” (Sec. 2.)

The law also provides:

“‘Sale’ means any transfer, exchange or barter, in any manner or by any means whatsoever, for a consideration in the regular course of business

and includes leases and contracts payable by rental or license fees for the right of possession and use, but only when such leases and contracts are deemed to be in lieu of purchase by the State Tax Assessor." (Sec. 2.)

It seems to me quite clear that, irrespective of the State Tax Assessor's deeming a lease to amount to a sale, an "installment lease sale" is a taxable sale.

A very similar arrangement was construed in 1891 by the Supreme Judicial Court of Maine in *Gross vs. Jordan*, 83 Me. 380. This was an agreement to lease a wagon for \$15 a month with agreement that if the total rentals paid should equal \$165, then the lessor should transfer title. The Court said:

"This paper, which calls itself a lease, is a conditional sale of property, the title passing when the price shall have been paid."

In 1898 the same Court stated that a similar lease of land was a sale of land in *Reynolds vs. Waterville*, 92 Me. 292. This case involved public policy respecting municipal debt limits and so may not be too much in point. The Court said about the lease:

"It would not be a misinterpretation to say that the City of Waterville, instead of leasing the property, undertakes to purchase or pay for it on the installment plan, and that what are called rentals for the hall are merely partial payments on its cost." (92 Me. at 304)

In my opinion the agreement in question is an installment lease purchase within the meaning of the statute and a sales tax or use tax is payable in the sum of 2% of \$81,868.79.

2. You next refer to the rental of a compressor by Hedge & Matheis to Campanella & Cardi. The facts are meagerly stated but would seem to lead to the same conclusion as the preceding situation.

3. In connection with Frantz Tractor Co. and Edward J. Petrillo, Inc., dealing with Yonkers Construction Co., you inquire about equipment leased to the contracting company under a written lease but with an oral option to buy. The oral option to buy would be binding as between the two parties but would not be binding as to an innocent third party who might trust the apparent estate of the title.

Since it appears that as between the parties there is a contract to sell in event the payments are all made, and since each rental payment is to be credited in full against the purchase price, it would seem to me a situation where title is retained for security only.

4. You next mention a transaction of North Carolina Equipment Company and Marian Shovel Co. with Nello Teer Contracting Co. A shovel is brought into Maine in June, 1954, and leased for \$5,000 a month. An accompanying memorandum indicated that the selling price was \$120,450. Obviously, rentals would have to be paid for two years to equal the selling price. We understand that Nello Teer has an oral option to buy and may apply the rental in full against the selling price.

Under the facts stated there seems to be installment lease contract.

As in the case just previous we would, in a contested matter, have to prove the oral agreement. If such agreement is not susceptible of proof we should consider the transaction a lease in which case a use tax would be assessable against the owner and the taxable price is the cost to the owner.

5. You next mention a deal by Alban Tractor Co. with Nello Teer Contracting Co. If I understand the statement of facts correctly, Nello Teer took over the equipment on a lease on September 23, 1953. If this lease were an installment purchase lease, something the facts do not clearly show, there would be no tax when the equipment was brought into Maine on June 22, 1954.

Caution. Other facts can be brought out which would change the above result as tentatively reached. For instance, it is very important, and the original memorandum says nothing about it, whether the lessor-vendor sends an operator or serviceman along with the machine. In the State of Rhode Island, if an operator is sent, the transaction is deemed a purchasing of a service and not a sale.

It also seems to me material whether the price charged for rental is a reasonable one as rental. If a lessee pays considerably more than fair rental value, we may well succeed in establishing that he has a purchase in mind. I would honestly recommend that instead of basing final assessment upon this memorandum we inquire of the construction companies concerned what is their side of the case.

BOYD L. BAILEY
Assistant Attorney General

November 30, 1954

To Earle R. Hayes, Secretary, Maine State Retirement System

Re: Military Leave

We have yours of November 24th relating to whether or not any employee of the State, including teachers, who may be inducted, drafted or enlisted in the Armed Forces of the United States under the provisions of the Universal Military Training and Service Act is entitled to military leave and whether the State is liable to make contributions for these individuals during their period of service.

This question we answer in the affirmative.

Under the provisions of subsection VI of Section 3 of this Act there is a provision that if anyone is enlisted, inducted or drafted into the Armed Forces of the United States, either in time of war or while the provisions of the Selective Service Act of 1948 or any amendment or extension thereof are in effect, that person shall be considered an employee and the State *shall* contribute to the System such amounts as the employee would have been required to contribute if he had been serving the State during his service in the Armed Forces.

ROGER A. PUTNAM
Assistant Attorney General

December 3, 1954

To Dr. Lillian Brush, Secretary, Board of Examiners of Psychologists

Your letter of December 1st, propounding four questions, has been received.

In answer to 1,a): Any public officer carrying on a governmental function is protected from civil suit by the immunity of the State, provided always