STATE OF MAINE

Inter-Departmental Memorandum Date ~~May 9, 1962~~

To ~~Ernest H. Johnson, State Tax Assessor~~ Dept. ~~Bureau of Taxation~~

From ~~John W. Benoit, Asst. Atty. General~~ Dept. " " "

Subject ~~Deficiency Assessments, Section 20 of the Sales and Use Tax Law~~

Your memorandum of April 17, 1962 is answered below. The answer is in two parts to correspond with the two questions posed.

PART ONE

The Facts:

A building supply house (the vendor), a registered seller who has been reporting regularly to this office under the sales and use tax law, sells prefabricated houses. These houses are sold as tangible personal property, since the vendor does not undertake to erect them. The method of selling is as follows: when a customer selects a house a contract is signed, and the customer gives the vendor a note in the amount of the purchase price, together with a mortgage to secure the note. The components of the house are then delivered to the building site. Subsequently, the purchaser of the house obtains a conventional bank mortgage in an amount sufficient to cover the purchase price of the house, and then pays the vendor the full balance due on the purchase price, at which time the note given the vendor is canceled and the mortgage given the vendor is discharged.This may take place from six months to two years from the date the contract between the vendor and purchaser was entered into, or the date on which delivery was made by the vendor.

Upon audit by your office it was found that the vendor has been reporting sales, not as of the date the contract of sale is entered into, or delivery is made, but as of the date bank financing is obtained by the purchaser and full payment is made to the vendor.

The Question:

1. A question has arisen, in connection with a routine audit of this vendor, as to the limitation imposed by section 20 of the sales and use tax law on deficiency assessments. Is your office limited, under section 20, to assessing tax:

(a) with respect to transactions occurring within 2 years of the date of assessment; or

(b) with respect to transactions required by law to be reported in returns filed within 2 years of the date of assessment; or

(c) with respect to transactions required by law to be reported in returns filed within 2 years of the date of assessment and also transactions actually reported in such returns which have not been outlawed by the two-year limitation at the time the return is filed, even though such transactions may have taken place prior to the month covered by the return?

(It should be noted that under example (c), a transaction reported might conceivably have occurred as far as 4 years from the date of assessment if the transaction was reported in the return filed for the first month covered by audit and if the transaction was at the point of being outlawed at the time of reporting.)

The Opinion:

Applicable sales and use tax provisions are:

"Sec. 20. Deficiency assessment.

After a report is filed under the provisions of this chapter, the Tax Assessor shall cause the same to be examined, and may make such further audits or investigations as he may deem necessary and if therefrom he shall determine that there is a deficiency with respect to the payment of any tax due under this chapter, he shall assess the taxes and interest due the State, give notice of such assessment to the person liable, and make demand upon him for payment but no such assessment can be made after 2 years."

"Sec. 14. Collection of tax; report to Tax Assessor.

Every retailer shall file with the Tax Assessor, on or before the 15th day of each month, a report made under the pains and penalties of perjury on such form as the Tax Assessor may prescribe, which shall disclose the total sale price of all sales made during the preceding calendar month, and such other information as the Tax Assessor shall require.

. . . ."

"Sec. 15. Payment of tax; interest.

The taxes imposed by this chapter shall be due and payable at the time of the sale . . . . Upon such terms and conditions as the Tax Assessor may prescribe, he may permit a postponement of payment to a date not later than the date when the sales so taxed are required to be reported."

"Sec. 2. Definitions.

. . . .

'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. 5. Adding tax to sale price.

Every retailer shall add the sales tax imposed by this chapter, or average equivalent of said tax, to his sale price, except as otherwise provided, and when added the tax shall constitute a part of the price . . . ."

To answer part (a) of your querie there is no question but that your office has authority, under the sales and use tax law, to assess tax with respect to transactions occurring within two years of the date of assessment. Such transactions take place within two years of the assessment date and are, therefore, reported within two years of the assessment date.

Pursuant to section 2, defining the word "sale", when the contract, note and mortgage were executed (in the factual situation presented) a sale of tangible personal property occurred. By section 5 this vendor was duty bound to add sales tax to the sale price. Section 14 provides that retailers shall report the monthly sales on or before the 15th day of the next succeeding month. The report required to be so filed shall reveal inter alia the total sales price of all such sales transacted in the preceding month. Payment of the tax so reported is, by reason of your postponement as authorized by section 15, due when the report is required to be filed. Failure to properly remit the full amount of reported liability is basis for your examination and investigation of such filed report plus other appropriate records of the retailer to determine the extent of the deficiency respecting the payment of tax due the State.

The ultimate conclusion, after reviewing the sales and use tax provisions already herein set forth, is that you are authorized by such provisions to examine the filed report and are authorized to examine other material records of the vendor to determine if liability is owed to this State. And your examination may be of those sales transacted during the period of time covered by the report, i.e., the month preceding the "filing month". Thus, a report filed in a month which is within a two-year period of the date of the deficiency assessment may be examined and both the reported and unreported sales for the previous month examined and affected by such assessment.

Section 20 is herein interpreted to mean that the filed report is to be examined by your office and that your office is to make further investigations and audits necessary to determine if such report is in fact what it purports to be, i.e., a report of all liability for a certain period of time. Your office has allowed taxpayers to postpone the reporting and the paying of liability. The legislature could not have intended that such extension would work to your detriment. The lawmakers, in keeping with such intention, gave emphasis to the existence of a report and directed your attention to such report and accompanying payment, if any, and to the records of the taxpayer covering that period for which he reported. Pursuant to section 20, Sales and Use Tax Law, the statute of limitations begins to run from the date of the filing of the return and when such return is not barred neither is your inquiry. The answer to (b) of your question is, then, that your office is not prohibited from assessing tax with respect to transactions required by law to be reported on returns filed within two years of the date of assessment.

Your attention is directed to part (c) of the question, to wit: to those transactions reported on returns filed within two years of the date of assessment, which transactions might conceivably have occurred as far as four years from the date of the assessment if the transaction was reported in the return filed for the first month covered by audit and if the transaction was at the point of being outlawed at the time of reporting.

The return filed in the first month covered by the present audit period may be recognized as the last report filed for the two-year period prior to such filing. Thus, when such report was filed, the two-year period next prior to the filing date was still open to investigation and also subject to assessment provided, of course, that the assessment was made on or before such filing date. Had an assessment been so made, it would have reached all transactions having taken place two years prior to the filing of the hereinmentioned report. Unreported transactions occurring prior to the period could not be reached by such assessment.

Beginning with the first month covered by the present audit period and moving towards the present assessment date, each month may be recognized as the last month of a two-year period subject to examination and assessment as above mentioned. The present audit covers each one of these months. By statute each of these monthly reports is subject to review. The transactions <u>included</u> in such monthly reports are subject to inquiry provided such transactions occurred within two years next prior to the filing of such reports. My position is based upon a recognition that your present assessment is an assessment covering each month of a two-year period next prior to the date of assessment.

It is concluded that transactions actually reported within two years of the date of assessment are subject to inquiry even though such transactions may have occurred as stated in (c) of the question.

PART TWO

The Facts:

A second, and perhaps more important, question has also been raised on the basis of the foregoing facts: during the past two years the vendor has reported and paid a total tax liability of (for example) $50,000, of which the bulk reflects transactions occurring prior to the two-year period, but erroneously reported at the time of bank financing rather than at the time of sale.

In the course of the audit, sales within the two-year period, which have not in fact been reported at all because bank financing has not yet been arranged, are picked up in the amount of $2,000,000 with tax liability of $60,000.

The Question:

Is it necessary to credit against this liability of $60,000 the $50,000 reported and paid during the two-year period, even though it can be shown that the latter payments in fact relate to earlier sales?

The Opinion:

The amounts reported and paid by this vendor during the audit period in no way affect that liability determined by audit to be owing this State for the reason that the vendor submitted monies concerning transactions that occurred outside said audit period.

As stated earlier, your office may examine reports not barred by the statute of limitations expressed in section 19. Such investigation indicated late reporting and paying of liability by the vendor. I am not ready to argue that misfeasance of this vendor works to his benefit and to your detriment particularly when you may examine the reported transactions and allocate them to their proper place.

Allowable credits are those which by their own characteristics demand reference to related charges.

The answer to the question is that such credit need not be advanced.

JWB:epd

STATE OF MAINE

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1. A question has arisen, in connection with the routine audit of this vendor, as to the limitation imposed by Section 20 of the sales and use tax law on deficiency assessments. Is this office limited, under Section 20, to assessing deficiency tax with respect to sales occurring within two years of the date of assessment, or is this office permitted to assess deficiency tax with respect to transactions reported by the vendor within two years of assessment, even though the sales in fact occurred more than two years prior to assessment? (I.e., the vendor in this case might report a transaction in June 1960 - within the two-year period - where bank financing and final payment occurred at that time; although the sale thus being reported actually was made in January 1959 - well beyond the two-year period.)

2. A second, and perhaps more important, question has also been raised on the basis of the foregoing facts: during the past two years the vendor has reported and paid a total tax liability of (for example) $50,000, of which the bulk reflects transactions occurring prior to the two-year period, but erroneously reported at the time of bank financing rather than at the time of sale.

In the course of the audit, sales within the two-year period, which have not in fact been reported at all because bank financing has not yet been arranged, are picked up in the amount of $2,000,000, with tax liability of $60,000. Is it necessary to credit against this liability of $60,000 the $50,000 reported and paid during the two-year period, even though it can be shown that the latter payments in fact relate to earlier sales?

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