STATE OF MAINE

Inter-Departmental Memorandum Date November 14, 1962

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

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

Subject Ellis C. Snodgrass Reg. #15232

Your memorandum of November 2, 1962, is answered below.

Facts:

The Mississippi Valley Equipment Company, a Missouri corporation (hereinafter called lessor), by written agreement, "leased" several sheets of steel piling to Ellis C. Snodgrass, Inc., a Maine corporation (hereinafter called lessee) for use in this State in the latter's construction work at South Arm, Maine.

The written agreement, after setting forth the names of the parties; a description of the subject matter; the rate and manner of computing rental amounts; provides that:

* * * * *

"(5) When Lessee has finished using all of the foregoing mentioned Steel Sheet Piling, Lessee is to return it in about the same quantity received and in lengths not more than two feet shorter than the original lengths in which Lessee receives all of this Steel Sheet Piling. * * *.

"(6) Lessee is to put and return all of the foregoing mentioned Steel Sheet Piling in the customary condition, i.e., all in single separate pieces * * * .

* * * * *

(10) The difference between the total footage of the foregoing mentioned Steel Sheet Piling Lessee receives from Lessor and the total footage of the foregoing mentioned Steel Sheet Piling that Lessee returns to Lessor in suitable lengths, quantities, condition, etc., is to be paid for by Lessee at seven dollars and ninety-five cents per 100 pounds for the wall pieces and fourteen dollars and forty-five cents per 100 pounds for the tees

> which replacement price, as customary, is in addition to all rentals that have been paid and that may have accrued."

* * * * *

Paragraph twelve of the agreement authorizes the Lessee to use the piling at the South Arm project; if the Lessee reuses the piling for any other project, Lessee must pay Lessor another "initial first month's minimum rental."

* * * * *

> "(13) Title to all the foregoing mentioned Steel Sheet Piling is at all times vested with the Lessor."
> * * *

The Lessor's invoice dated February 14, 1960, concerning the South Arm project, is captioned "To invoice you for shortage on steel sheet piling."

The position expressed by the Lessee is that there occurred no sale of piling between the Lessor and the Lessee. Rather, that the invoiced charges "represent an additional rental fee due to damages to the material rented." Further, that the charge is " placed upon the Lessee for misuse or abuse of the material rented."

The invoice indicates that the same number of pieces rented to the Lessee were returned to the Lessor. Of the 223,773 lbs. of piling rented to the Lessee, 209,548 lbs. was returned to the Lessor. Of the 26,792 lbs. of tees rented to the Lessee, 24,633 lbs. was returned to the Lessor.

Question:

In view of the given facts, was there a sale of tangible personal property from the Lessor to the Lessee?

Answer:

No.

Reason:

In Venice v. Frazier Davis Construction Co., 87 F. Supp. 475, (1949), the defendant contractor while engaged in erecting a culvert in the bed of the Rio Curundu River, encountered a type of soil known as "sea mud" requiring the use of metallic piling and steel support beams in order to prevent the banks of sludge from sliding into the excavation. The defendant, by written lease, acquired possession of steel beams from plaintiff. The writing provided, inter alia:

* * * * *

> "7. All steel we are unable to return we are to pay you at the price of $59.00 per ton."

In an action to recover moneys for steel not returned, the court said inter alia:

* * * * *

> "The Law governing the claim of plaintiff and the liability of defendant is prescribed by the law of bailment. The contract involved in this litigation was a bailment for hire for the mutual advantage of the parties, i.e., a hiring of personal property for a stated period of time for a sum of money for its use. The degree of care to be exercised by a bailee in a bailment for mutual benefit is placed by the law at ordinary care. 6 Am. Jur., page 333, sec. 248.
>
> "However, a bailee may enlarge his legal responsibility by contract, even to the extent of making himself absolutely liable as an insurer for the loss or destruction of goods submitted to his care, and the contract embracing such liability is controlling, and must be enforced according to its terms, irrespective

> of the fact that a less onerous liability is imposed by law on bailees of the same class generally. For such an undertaking, the bailment itself or the compensation to be paid for it is a sufficient consideration. 6 Am. Jur., page 277, sec. 181.
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> * * * * *
>
> " * * * when paragraph 7 of the contract is considered, there is expressed in clear and unmistakable terms the intent and specific agreement that defendant bailee enlarged its legal responsibility for the return of the property bailed. Under paragraph 7, the defendant agrees to pay for any steel not returned, and stipulates the price per ton for any steel not returned.
>
> "The Court therefore finds that under paragraph 7 of the contract, defendant enlarged its liability as an insurer to pay to plaintiff at the rate of $59.00 per ton for any steel which defendant was unable to return. Rainbow Petroleum Co. v. Union Drilling & Petroleum Co., 115 Cal. App. 273, 1 P. 2d 489; Kay v. M'Divani, 6 Cal. App. 2d 132, 44 P. 2d 371."

In Keystone Pipe and Supply Co. of Texas v. Herbert Oil Corporation, ---Texas App.---, 62 S. W. 2d 606, (1933) the court had before it facts similar to those presented by your memorandum, which facts arose pursuant to a written agreement with provisions similar to the agreement in issue here. In Keystone Pipe and Supply, the borrower mortgaged the borrowed property and the mortgagee sued the owner of the property for conversion; the owner having recovered his casing from the borrower's job-site after the borrower had made use of the property beyond that contemplated in the agreement.

The court, in holding for the owner of the casing, said inter alia:

* * * * *

"We quote the following from 3 R.C.L., p. 73, sec. 3: 'As to what is a bailment there appears to be no conflict of authorities. They all seem to agree in holding that when the identical article is to be re-delivered in the same or in altered form, the contract is one of bailment, and the title to the property is not changed. But when there is no obligation to return the specific article and the bailee is at liberty to return another of equal value the transaction becomes a sale and the title to the property is changed.'

* * * * *

"Testimony of (defendant owner's president) to the effect that, after he was unable to locate the casing, he had his bookkeeper mail to (the borrower) a demand for payment for the casing that had been furnished under the contract, is referred to (by the mortgagee) as indicating that the contract was one of conditional sale. We do not believe that such evidence would be controlling, since such a demand under such circumstances was not inconsistent with the theory that the contract was one of bailment, since, even under bailment, the bailee and any one who has acquired possession through a wrongful act of the bailee will be liable in damages to the bailor for the value of the property which has not been returned." (Parenthesis supplied).

* * * * *

In the present matter the agreement and the intention expressed therein is controlling.

* * * * *

> "The substance of the agreement, and not its form or the particular expressions employed in it, is controlling, and the intention of the parties must be ascertained from the terms of their contract." Commissioner of Internal Revenue v. San Carlos Milling Co., 63 F 2d 133, (1933).

After a review of the given facts and of the material taken from the above cases, the following are my conclusions:

1. The writing executed between the lessor and lessee was a bailment for hire (the proper designation of the parties being "bailor" and "bailee").

2. By the terms of the contract the lessee enlarged his responsibility, concerning the use of the goods, beyond that imposed by the law upon bailees of his class generally.

3. The payment to the lessor by the lessee of the charges here in issue constituted satisfaction of the obligation created by the contract.

By the terms of the agreement the lessee was to return the piling in "the customary condition." See paragraph (6) of the agreement. The invoice accompanying your memorandum indicates that the piling was returned, less the damaged portions. The identical articles were redelivered to the lessor in a form only slightly altered, i.e., shortened by trimming. Keystone Pipe & Supply Co. case, supra.

According to the letter addressed to you by the lessee dated October 30, 1962, the charges paid to the lessor did not represent the value of the portions of the casings removed because of damage. The lessee, then, did not return to the lessor "property of equal value." See Keystone Pipe & Supply Co., supra.

From a reading of the agreement and of the invoice the parties intended no sale of the casing trimmings. The damaged portions of the casings represented, at most, nothing more than scrap metal. At the construction site the trimmings were not worth moving for junk. The agreement cannot be interpreted as one containing a promise to sell or a promise to buy scrap metal.

A reading of the provisions of the agreement in question leads one to conclude that the lessee borrowed certain property for the furtherance of his business, agreeing, when the particular job was concluded, to return to the lessor the borrowed property and a certain amount of money representing that amount of property which, according to the agreement, the lessor did not want returned because of its damaged condition. The amount of remittance was in no way concerned with the value of the deficiencies but, instead, was concerned with the amount of damage sustained by the original piling pieces.

I return herewith the agreement, invoice and correspondence addressed to you by the lessee; all having been forwarded to me with your memorandum.

JWB:epd

STATE OF MAINE

Inter-Departmental Memorandum Date ~~November 8, 1962~~

To John W. Benoit, Assistant Attorney General Dept. Bureau of Taxation

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

Subject Ellis C. Snodgrass Reg. #15232

A use tax assessment was made against the above registrant on October 9, 1962, based in part upon charges invoiced to the registrant by the Mississippi Valley Equipment Company.

The transaction in question involves steel sheet piling leased by the registrant from Mississippi Valley Equipment Company in connection with construction contracts. While the transaction consists basically of a lease of such piling, the contract terms require the registrant to notify the lessor at the termination of use of the piling as to the number of feet of piling which will be returned, and provides that the lessee will be liable at the rate of $7.95 per hundred pounds for any losses in length of the piling incurred in connection with its use. Mr. King's letter of October 30, and the sheet piling rental agreement dated May 18, 1960, attached hereto, explain the situation more fully.

Will you please advise whether the charge made by the lessor for the damage done to the piling while in use, which damage results in a reduction in the length of the piling, constitutes a charge for the sale of tangible personal property (namely, the damaged ends which are cut off the piling and are not returned to the lessor) so that the transaction is taxable under the sales and use tax law; or whether, as Mr. King contends, the charge is rather a charge placed upon the lessee for misuse or abuse of the material rented, and hence not subject to tax.

EHJ:J