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STATE OF MAINE

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Inter-Departmental Memorandum Date August 19, 1963

To Ernest H. Johnson, State Tax Assessor Dept. Bureau of Taxation
From Jon R. Doyle, Asst. Attorney General Dept. " " "
Subject Application of Sales Tax to Contract to Construct Electric Power Line

We herewith answer your memorandum of July 26, 1963.

A review of the Contractor's Proposal submitted to us indicated the following facts:

The Contractor's Proposal indicates that the "Bidder" proposes to "construct" the named rural electric "project" for the "Owner."

This "project" is to be administered by the Rural Electrification Act.

"Project" is defined in Article VI of the proposal as follows:

"The term 'Project' shall mean the rural electric system, or portion thereof, described in the Plans and Specifications, Construction Drawings and maps attached thereto."

This "Project" includes construction of a pole line system as well as substations. (See Article I, Section 2 and Article II, Section 3). The pole line system is further broken down into distribution and transmission lines. (See Article I, Section 2).

Two types of materials and equipment are to be used in the construction of the project, to wit:

- (A) "Owner-Furnished" Materials and Equipment.
(B) Materials and Equipment furnished by Bidder.

It is assumed for the purposes of this opinion that category (a) above is not in dispute as:

- 1. There is no question raised as to the sale thereof and no question regarding the passage of title thereto.
2. It is assumed that these materials have been purchased tax paid and if not a use tax will be paid thereon by Owner. (See Article I, Section 11).

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3. It does not affirmatively appear that the Owner ever intends, in the normal course of events, to relinquish title to these units.

Article I, Section 3, provides that the Owner will furnish certain materials to the Bidder. The Bidder will:

1. Give a receipt therefor.
2. Accept goods subsequently delivered which are covered by the Proposal.

In the case of number 2 above Bidder will forward invoice to Owner who agrees to pay therefor.

Bidder's completed construction units are to be reduced by the amount of materials and equipment furnished or delivered by Owner. The value of such materials is to be fixed by the terms of the proposal. Such materials not used are to be returned to Owner upon completion of the project.

Tax is to be paid (Article I, Section 11) on these materials by Owner.

Bidder merely gives a receipt therefor and value thereof is deducted from his completed units; however, no deduction is made from the total contract price.

The contract, however, is not entirely clear on this point and in the event that there can be said to be a sale between "Owner" and Bidder it would in all probability be a "casual sale" as it does not appear that "Owner" engaged in repeated and successive transactions of this type.

Therefore, this discussion will be limited to the treatment for tax purposes of category (b) above.

Typical materials going into the construction of the project are: poles, cross arms, guy wire and various types of line hardware. Pages, e.g., page 7, which would contain a better description of the materials used are missing from the proposal.

The Proposal, however, in its entirety indicates a typical pole-line construction job.

As to title to the materials and equipment, Article I, Section 4, applicable to category (b) above, provides:

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"All such materials and equipment shall become the property of the Owner when erected in place." (Emphasis supplied).

Article I, Section 5 of the proposal provides that the proposal is on a "Unit Basis" further providing that the "Owner" may specify a certain number or combination of "units" as necessary for the construction of the "Project."

(Although the term unit is not defined in the proposal it is generally interpreted in construction contracts to mean a certain amount of material or work. See Words and Phrases, Per. Ed., Vol. 45, Unit).

Article I, Section 11 provides that:

"Bidder agrees to pay all taxes except on owner furnished materials and it is understood that, as to owner furnished materials, the values stated in the 'attached' List of Owner's Materials on Hand' and 'List of Materials Ordered by Owner, But Not Delivered' include such taxes, if applicable."

Construction is to be completed in a certain number of days (Article II, Section 1) in two sections (Article II, Section 1 (c)).

The Proposal provides for supervision in a prescribed manner at all times by "Bidder" (Article II, Section 5).

Section 6 of the above Article provides for rejection of certain materials before "final acceptance of the construction." (Emphasis supplied).

Article III entitled "Payments and Release of Liens" provides in Section 1 that payment shall be made monthly on a progress basis. The section further provides that approval by the "Engineer" (the owner's supervising engineer, see Article VI, Section 1 b) for the purposes of payment "shall not be deemed approval of the workmanship or materials."

The total contract price is also provided for in this section.

Under subsection C of this Article the "Bidder" may also elect to receive payment in full for any section of the "Project" upon "completion of construction" and other prerequisites.

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Section 2 provides "Upon the completion by the Bidder of the construction of the Project (or any section thereof if the Bidder shall elect to receive payment in full for any section when completed as provided above). Bidder shall deliver to the Owner . . . releases of all liens and of rights to claim any lien . . . from all manufacturers, material men and subcontractors"

Bidder is liable to pay material men and subcontractors. (Article III, Section 3).

Article IV, Section 3, Subsection A providing for "Delivery of Possession and Control to Owner" provides that upon written request of the Owner, Bidder shall deliver full possession and control of any portion of the Project provided the Bidder shall have been paid at least 90% of the cost of construction of said portion. Thereafter, according to the terms of Section 3, Bidder is to be relieved of its obligations set forth in Article IV.

Subsection 6 providing for the means of "Bidders" requesting acceptance by Owner of delivery and possession.

Article V entitled "Remedies" provides for "Completion on Bidder's Default" and for "Liquidated Damages."

The project is to be constructed upon lands of another than the Owner over what are called in the proposal (Article VI, Section 6) "rights-of-way." It is entirely possible also that the pole-line will not only cross "rights-of-way" over private lands but may cross State, County or Municipal lands. In this connection see also Article IV, section J which provides:

"The Bidder shall not proceed with the cutting of trees or clearing of right-of-way without written notification from the Engineer that proper authorization has been received from the owner of the property, and the Bidder shall promptly notify the Engineer whenever any landowner objects to the trimming or felling of any trees on its land in connection with the Project and shall obtain the consent in writing of the Engineer before proceeding in any such case."
(Emphasis supplied).

Note that the word owner appears in the lower case here as denoting one other than the "Owner" referred to in the proposal).

Article IV, page 16 also speaks of "right-of-way" in several instances and refers to lands in such a manner as to indicate that they are lands of another.

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QUESTIONS:

1. Whether the contractor in such a case is to be considered as the consumer of materials installed in the line, presumably on the theory that it is making affixations to real estate. Tax to be based on cost of materials.

2. Whether the contractor in such a case is to be considered as purchasing such materials for resale in the form of tangible personal property, tax being applicable on the contractor's charge to "Owner."

3. Whether the subject of the sale is the completed line, in place, with tax on the charge therefor, or whether there is a sale of materials and an installation thereof so that if the charges for materials and installation are identified tax would apply only on the former.

ANSWERS:

1. No.

2. No.

3. The sale is the sale of a completed line in place.

LAW:

"A tax is imposed at the rate of 3% . . . on the value of all tangible personal property, sold at retail in this State" Sales and Use Tax Law, Sec. 3.

"Retail sale' or 'sale at retail' means any sale of tangible personal property, in the ordinary course of business, for consumption or use, or for any purpose other than for resale, except resale as a casual sale, in the form of tangible personal property" Sales and Use Tax Law, Sec. 2.

"'Sale price' means the total amount of the sale price . . . of a retail sale, including services that are a part of such sale, valued in money, whether received in money or otherwise . . ." " . . . NW shall 'sale price' include the price received for labor or services used in installing or applying or repairing the property sold, if separately charged or stated."

CONCLUSION:

1. General Discussion.

Generally speaking, a contractor may be considered a retailer even when engaged in carrying out a construction contract if he sells the materials and supplies and title to them passes to the purchaser before they become affixed to the real estate.

A contractor may in certain instances himself fabricate a part or all of the article which he uses in construction work. If the fabricated material is manufactured for retail sale as tangible personal property the tax should be charged to the customer on the basis of the price of the fabricated article.

2. What is the Nature of an Electrical Line, is it Real or Personal Property?

Generally speaking as to real or personal property:

"Whether an article of personalty connected with or attached to realty becomes a part of the realty, and therefore such a fixture that it cannot be removed therefrom depends upon the circumstances under which the article was placed upon the realty, the uses to which it is adapted, and the parties who are at issue as to whether such an article is realty or detachable personalty." State v. Dyeon (Ga. App. 1954) 81 S.E. 2d 217.

Generally, if property is to become realty, it must be annexed thereto.

"To constitute a fixture there must be annexation to the realty, together with unity of title and ownership of the realty and the thing affixed." State v. Dyeon, supra.

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The question of physical annexation of personal property to realty is an important one here.

"There is no universal test by which it can be determined whether a chattel has become so affixed to the realty as to become accessory to it and form a part and parcel of it. The manner and extent of physical annexation has been declared an uncertain and unsatisfactory criterion, and while it would be impossible to reconcile all the cases on this subject, yet the modern and most approved rule appears to be to give special prominence to the intention of the party making the annexation." *Keedfield Telephone and Telegraph Company v. Cyr*, 93 Me. 287.

The right or interest of the owner of the chattels is important.

"It is especially important to ascertain what right or interest . . . the owner of these chattels, held in the realty to which it annexed them, in order to determine whether the intention existed thereby to make them permanently a part of the freehold. A different intention may well be inferred from annexations made by a tenant, or mere licensees when the same acts are done by the owner of the freehold." *Keedfield Telephone And Telegraph Company v. Cyr*, supra.

Note here that the "Owner" is acquiring a mere right of way which does not represent an interest in the freehold but merely constitutes a right to use.

It appears from a reading of the proposal that the power line is to be built over a right-of-way or an easement. (See proposal, Article VI, Section 6 and Article IV, page 16). There is no mention of any property being owned by the "Owner." It does not appear whether the right of way is to be acquired by grant or eminent domain, however, it does not appear that a rural electrification cooperative, such as "Owner" here, has power in Maine to take by eminent domain so no discussion of that point will be made here. (See R.S. 1954, Ch. 51, Sec. 4, VII).

Such cooperatives in Maine do have power (R.S. 1954, Ch. 51, Sec. 4, VII) to hold real property but it does not appear that in the construction here they intended to. In fact, many provisions are made for conduct of the construction on other's property. See Article IV of the Proposal.

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"A 'right of way' as applied to telegraph, telephone and electric companies is the right held by these companies in the land upon which their poles, towers, guys and other similar appliances are erected, and that to a certain extent, over which their wires are strung." Jones on Telegraph and Telephone Companies, 2nd Ed. Section 50.

"A 'right of way' is primarily a privilege to pass over another's land and does not exist as a natural grant but is created by grant or its equivalent and may be either public or private." Words and Phrases, Vol. 37-A, Permanent Ed.

The grant of a right of way does not pass title to the land.

"A conveyance of a 'right of way' is an easement only and title to the land does not pass, and grantee acquires only the right to a reasonable and usual enjoyment thereof with owner of the soil retaining all rights and benefit of ownership consistent with the easement including the right to make any 'incidental changes consistent with the easement.'" Words and Phrases, Vol. 37-A, Permanent Ed. citing *Kloik v. Van Schoyck (Wis.)* 27 N.W. 2d 490. (Emphasis supplied).

How does "easement" imply an interest in land.

"An easement is a right, distinct from ownership to use in the same way the land of another" Black's Law Dictionary, 3rd Ed. citing *Kalochinski v. Thompson (N.J. Eq.)* 138 A 269, 573. (Emphasis supplied).

A Maine case, *Davis v. Briggs*, 117 Me. 538 defines easement as follows:

"A privilege, without profit which one has for the benefit of his land in the land of another."

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"Where an easement is granted, it will be construed to give only a right to use that is suitable and convenient for the intended use." Asha, Noyes and Sewall Co. v. Woodbury, 115 Mo. 49, see also Willbond v. Knox Cty. Grain Co. 128 Mo. 71.

The easement is distinct from the fee.

"The fee in the land is to be regarded as distinct from an easement in the same." Blake v. Ham, 90 Mo. 511. See also First National Bank of Shoshogen v. Morrison, 88 Mo. 162.

It is therefore seen that a right of way or easement does not grant any interest in land.

The case of Roadfield Telephone and Telegraph Company v. Cyr supra held that, tried by the above tests, telephone posts, brackets, wires and insulators were personal property.

The Court said, at page 292:

"Tried by the test, no intention can be inferred to make the posts, wires and insulators in this case a permanent accession to the freehold. The owner of the chattels was not the owner of the soil. It had no right to the continued enjoyment of its use, simply a revocable license There is nothing from which it can be inferred that it intended to deprive itself of its property." Roadfield Telephone and Telegraph Company v. Cyr, supra.

"Pole line, transmission and distribution systems are regarded as personal property, so that the contractor is not regarded as improving real property when he constructs pole line systems." Ruling of Sales Tax Council, California, Prentice-Hall, State and Local Taxes, Sales Tax, California Para. 21,156-A. 39.

The above language is equally applicable here because:

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1. "Owner" does not own the freehold.
2. Its right exists upon a grant of right-of-way or easement.
3. The annexation was not made by the owner of the freehold.
4. There is no intention expressed in the Proposal which would indicate that annexation to realty was intended.

The above rule would apply as well to publicly owned property; the result would be the same. (See *Readfield Telephone and Telegraph Company v. Cyr supra*).

Although it does not appear that a substation is to be built by Bidder, mention of a substation only appearing under Article II, Section 3 entitled "Changes in Construction" the above conclusion would as well be applicable thereto if it was constructed in the same manner.

The answer to Question 1, therefore, is "No."

The answer to Question 2, is "No."

3. Whether the subject of the sale is the completed line in place or whether there is a sale of materials and installation thereof.

The proposal in Article I, Section 4 provides as to title:

"All such materials and equipment shall become the property of the Owner when erected in place." (Emphasis supplied).

The parties therefore intended title to pass when the materials and equipment were erected.

"A contract with the architect contained the statement 'The undersigned proposes to furnish architectural services for your flat to be erected on or before 1st May, 1902' etc. Held, that the word 'erected' is synonymous with 'completed'." *Words and Phrases*, Vol. 15, Permanent Ed. citing *Hartrath v. Halsman*, 127 Ill. App. 360.

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"Erected means constructed." Words and Phrases, Vol. 15, Permanent Ed. citing Allen v. Jackson Cty. Sav. and Loan Assn. (Mo. App.) 115 S.W. 2d 7, 9 and Watson v. Greeley (Cal. App.) 232 P. 475.

Therefore, the parties to the Proposal agreed that title would pass when the materials and equipment were constructed into the "Project."

The Project was to be completed and title was then to pass.

"It is always of such importance in the interpretation of a contract upon which doubt arises to ascertain what was the attitude of the parties on the subject and to find out what was their main purpose and object in making it. If this can be done, the terms of the contract will be so interpreted as to promote the main purpose, if the language employed will fairly permit such construction." 13 Am. Jur. Contracts, Sec. 242.

Here the parties intended construction of and passage of title to a complete rural electrification "Project."

This is borne out by the following facts:

1. Bidder (Article I) agrees to "construct the rural electric project."
2. "Project is defined as "the rural electric system." (See Article XI, Section 1 d.).
3. Title is not to pass until materials and equipment are "erected." (See discussion above).
4. The proposal continually and repeatedly speaks of the construction of the Project in a manner that would indicate one complete unit.
5. The term "Completion of Construction" is frequently used and according to Article VI, Sec. 1 e means full performance by Bidder of all his obligations.

I note that the "Project" is further broken down by the parties into "Sections" and "Units."

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The Project is divided into two sections (See Article II, Section 1 c) however, this appears not to be done so as to effect passage of title but merely to indicate the sequence of construction.

The division into units (Article III, Section 1 a) appears again not to indicate intention of the parties to pass title to any completed unit but rather to furnish a rule of thumb upon which to base payment. In fact Article III expressly provides that approval for the purposes of payment does not relieve the Bidder from all responsibility.

Too, delivery of possession and contract to the owner (Article IV, Section 3) is not indicative of passage of title.

The component parts or materials themselves were of no great moment to the general contractor. Their only concern was the completed product.

In the purchase of the various materials the sole purpose of the appellant was to manufacture and fabricate completed transmission line. It resold at retail none of the individual materials purchased since all were used in the process of manufacturing and fabricating.

"That work and labor is to be done upon or in connection with the materials as an incident to or in connection with the transfer of title to the materials, does not rob the transaction of its essential characteristics of a sale if the whole or any measurable part of the consideration for the performance of the contract is compensation for materials." Fifteenth St. Inv. Co. v. People (Cal. App. 1938) 81 P. 2d 764.

"If materials have the legal status of tangible personal property when the title passes they are subject to the sale tax." State v. Smith (Mo. App. 1948) 212 S.W. 2d 580.

This is in effect fabrication of finished tangible personal property which is sold at retail and fabricator should collect tax on full price without segregating labor.

It is not the sale of a standard item of tangible personal property and the installation thereof but is rather the sale of a completed item of tangible personal property in place.

I conclude, therefore, that the parties intended to sell a complete item of tangible personal property, the Project, that the parties did not intend to sell materials and install them, that tax should be on the full contract price.

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Should it appear in the future that the cooperative in concern here or a similar one has actually taken the fee to its right of way this opinion should be reviewed.

JRD:epd

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Inter-Departmental Memorandum Date July 26, 1963

To Jon R. Doyle, Assistant Attorney General

Dept. Bureau of Taxation

From Ernest H. Johnson, State Tax Assessor

Dept. Bureau of Taxation

Subject Application of sales tax to contract to construct electric power line

Please refer to the attached proposal, directed to Eastern Maine Electric Cooperative, Inc., having to do with the construction of a proposed power line.

Will you please advise whether the contractor in such a case is to be considered as the consumer of the materials installed in the line, and thus liable for tax on the purchase of such materials; or whether the contractor is to be considered as purchasing such materials for resale in the form of tangible personal property, tax being applicable to the contractor's charge to Eastern Maine Electric Cooperative, Inc.

If this is found to constitute a sale of tangible personal property by the contractor to Eastern Maine Electric Cooperative, Inc., is the subject of the sale to be considered the completed line in place, or is it to be treated on the basis of a sale of the materials and installation of those materials, so that if the charges for materials and installation are identified tax would apply only to the former?

ENJ:J

