STATE OF MAINE

Inter-Departmental Memorandum Date September 4, 1963

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

From Jon R. Doyle, Asst. Atty. Gen. Dept. Bureau of Taxation

Subject Taxability of charges made by sellers of women's clothing for alterations

FACTS:

Some sellers of women's clothing make a practice of making a separate charge for alterations that may be necessary to fit certain clothing to a particular customer.

Generally two types of sales are made by these sellers, to wit:

Cash sales

Charge sales

Where clothing is charged generally there are two sales slips, one for the clothing; one for the alterations.

Where clothing is paid for on a cash basis it may be billed as above or one sales slip showing both charges may be given.

ISSUE:

Whether charges for alterations are to be considered part of the sales price whether separately stated or not.

LAW:

> " 'Sale price' means the total amount of the sale . . . price . . . of a retail sale . . . including any services that are a part of such sale, valued in money, or otherwise, including all receipts, cash, credits, and property of any kind or nature . . . ." Chapter 17, section 2.
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> ". . . nor 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." (Emphasis supplied) Chapter 17, section 2.

CONCLUSION:

In order to answer the above question it is necessary to determine the time of passage of title.

If title did not pass until after the completion of the services the charge for services would be includable in the tax base. If title passed prior to the services being performed, the charge for services would not be includable in the tax base.

There is no written instrument in existence indicating the intention of the parties; the only writing in existence is the sales slip indicating the respective charges.

Resort, therefore, must be had to the Uniform Sales Act, which act contains rules for reconstruction of the intent of the parties.

> "The question whether a sale has been completed and title to the property involved has passed depends on the intentions of the parties at the time the contract was made. Where such intent is not expressed, as in the instant case, it must be discovered from the surrounding circumstances and from the conduct and the declarations of the parties. Under the terms of the Uniform Sales Act . . . certain rules are laid down for ascertaining such intentions." Wallworth v. Cummings, 135 Me. 267 (1937)

The Uniform Sales Act is found in Chapter 185 of the Revised Statutes of 1954 and its pertinent provisions are as follows:

"Sec. 19. Rules for ascertaining intention

> Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time in which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both be postponed.

> Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done." (Emphasis supplied)

There is no question here but what the goods in question are specific and ascertained goods; the question which is of primary importance is whether the goods are in a "deliverable state", prior to the alterations being performed.

If they are in a "deliverable state" prior to the alterations being performed, Rule 1 of the above section would operate to indicate the passage of title at that time.

If they are not in a "deliverable state" until after the alterations are performed title would not pass until that time.

We must therefore consider whether the performance of the alterations is a condition precedent to the transfer of the property, that is whether something remains to be done to put the goods in a "deliverable state".

What is meant by "deliverable state" ?

The rule is generally stated that if the transaction requires the seller to put identified goods in a deliverable state, unless a different intention appears, the property interest does not pass until that is done. See 46 Am. Jur. Sales, sec. 420.

> "The basis for this rule has been said to be a natural inference; parties do not intend the property interest to pass at once if the seller has yet to expend labor on the goods before they are in the state called for by the deal." Vold, The Law of Sales, 2nd Ed. sec. 26.

The case of Kahn v. Rosenstiel, et al (N.Y. 1924) 298 F. 656 in discussing the reason for the rule of deliverable state indicates the reason for the rule "is that the parties do not presumptively mean to pass title till the seller has finished his part of the performance and the buyer has only to take the goods."

The contract then, remains executory until the seller has completed his performance.

> "A contract of sale is said to be executory when there remains something to be done the performance of which is a condition precedent to the transfer of the property. Accordingly,

> the principle is often stated that if anything remains to be done by either party to the transaction before delivery- as for example, something remaining to be done to determine the price, quantity, quality or identity of the thing sold, or something remaining to be done to make it deliverable - the contract is merely executory and the title does not vest in the buyer until such acts have been performed." 46 Am. Jur. Sales, sec. 420.

Deliverable state does not necessarily refer only to something done in the manufacture of the goods themselves but may refer to any act contemplated by the parties which is necessary to the completion of the transaction. See Kahn v. Rosenstiel supra.

> "The basis of the presumption stated in this rule, . . is the natural inference that the parties do not intend an immediate transfer of the property in the goods if the seller has yet to expend labor on them before they are in the state contemplated by the bargain." Williston on Sales, sec. 265.
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> " 'goods are in a 'deliverable state' . . . when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.'" Williston on Sales, sec. 265.
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> "Therefore it is not necessary in order to preclude the presumption of an immediate transfer of the property in the goods that the work to be done by the seller shall be such as to change the character of the goods. An obligation to pack or load them will make the presumption applicable if the seller's undertaking was to sell the goods packed or loaded." Williston on Sales, sec. 265.

The leading and apparently only case on the question involved here is the case of Gross Income Tax Division, v L. S. Ayres & Co. (Ind. 1954) 118 N.E. 2d 480.

The facts, similar to those here, were as follows:

The appellee at its store sold women's suits, coats, dresses and corsets in its ready-to-wear departments. In some of the higher

price brackets, 50% of the customers required some alterations. The sales tickets stated the price of the goods, plus the amount of work for alterations separately. Items for alteration charges varied according to the amount of work required.

The court, in determining whether the alterations should be taxed at the service rate said:

> "We believe what the customer bargained for was a suit, coat, dress, or corset that fit her . . . Something remained for the seller to do to put the goods in a deliverable state, and the property would not pass until that was done." Gross Income Tax Division v. L.S. Ayres & Co. supra (Emphasis supplied)

Of similar import is the case of J.B. Bradford Piano Co. v. Hacker (Wisc., 1916) 156 N.W. 140 involving alterations to a piano. In that case defendant agreed to take a piano provided the case would be stained a darker color and the tone be made more brilliant.

The court there said (in determining the passage of title):

> "It is obvious that the piano was not in a deliverable state until the coloring of the case had been altered to comply with the conditions of the sale . . ."

The following rule is also noted:

California:

> "Any charges for alterations prior to the time title to the completed garment passes to the customer are subject to tax. Putting on cuffs, shortening or lengthening sleeves and fitting the waist are considered part of the fabrication of the garment and charges for such alterations are includible in the measure of the tax." California Sales Tax Counsel. Prentice-Hall, State and Local Taxes, Sales Tax, Cal. Para 23, 653.

Circumstances (See Williston on Sales, sec. 265) having some weight to indicate immediate passage of title, e.g.

1. Delivery to buyer

2. Payment of whole price or a considerable part of it.

(This reasoning inapplicable if payment is small and apparently intended to bind bargain), are absent.

> "The question is purely one of fact in each case." Williston on Sales, sec. 265.

In the factual situation given there is no delivery to the buyer nor do monies pass before the alterations are performed.

In speaking of the problem of sales and services, Jerome R. Hellerstein, an eminent authority on state taxation, writing in 11 Tax Law Review states:

> "Essentially we regard ourselves as buying the finished article, whether the suit or the dress or the living room couch is made in the back of the shop by special order or in the factory a thousand miles away. In both instances products and services are involved. The difference between them is a matter of timing of the various steps in relation to the customer's order. And in both cases the significant economic event is the delivery of the completed article to the customer. Hence, taxing both the services and materials which go into the finished article whether acquired from one or several dealers and whether custom made or 'store boughten' seems proper."

It is clear therefore, that the parties herein discussed did not intend that title pass until after the completion of the alterations, that is until the goods are put into such a state that the buyer is bound to take them.

It is concluded that the charges for alterations are properly includible in the tax base.

It does not seem of any moment that the charges therefor are separately stated or that the transaction may be for cash or credit.

If a "different intention" is shown by the parties that intention is controlling. However, here we have no facts, circumstances or statements which would show a different intention other than to indicate what the customer desired was a finished item that fit her.

I am aware that it may be contended that charges for alterations come within the statutory provision exempting from taxation "the price received for labor or services used in installing or applying or repairing the property sold, if separately charged or stated." (See Chapter 17, section 2)

Many states, e.g. Iowa, in exempting certain services from taxation expressly provide for the exemption of alterations. This is usually done in conjunction with language exempting charges for "installing, applying or repairing" the property sold.

However, since Maine Law does not include this express language we must examine the meaning of the words used to see whether alterations is synonymous with any of them.

The following definitions will be found helpful.

Alterations

> "The word 'alter' means to make a change in, to modify, to change some of elements, ingredients or destroying identity of thing affected, to vary in some degree." Noyes v. Rothfeld, 78 N.Y.S. 2d 433, 436; Words and Phrases, V. 3, p. 397.
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> "In the ordinary acceptation of the word, an 'alteration' is a change of a thing from one form or state to another, that is, making a thing different from what it was, but without destroying its identity." Words and Phrases, V. 3, p. 377.
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> "The reroofing of a house constitutes 'repairs' and not 'alterations' within meaning of penal ordiance requiring of permit for alterations but not for repairs." Words and Phrases, V. 3, p. 398.

Alter

> "To make different without changing into something else; to vary; to modify." Webster's New Collegiate Dictionary.

Apply

> "Word 'apply' means to 'place in contact' and implies a change in special relationship, a movement of something from some other place into contact with something else." Words and Phrases, V. 3A, p. 402.

"To place in contact, to put on, adjust, or direct . . ." Webster's New Collegiate Dictionary

Repair

"The word 'repair' standing alone signifies a restoration to former condition without change of form or material." Words and Phrases V. 36A, p. 774 (Emphasis Supplied)

"To 'repair' is to mend; to restore to a sound state whatever has been partially destroyed; to make good an existing thing; restoration after decay, injury or partial destruction." Words and Phrases, V. 36A, p. 772. See also Webster's New Collegiate Dictionary.

Install

"To set up or fix, as a lighting system for use or service." Webster's New Collegiate Dictionary.

It is therefore easily seen, from a reading of the above definitions that the legislature did not intend to include, by use of the words chosen any meaning which would be attributable to alterations.

It is significant that none of the terms used is comparable in meaning to "alter" and that the word "altering" is not used in this statutory provision.

JRD/sc

STATE OF MAINE

Inter-Departmental Memorandum Date August 7, 1963

To Jon R. Doyle, Assistant Attorney General Dept. Bureau of Taxation

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

Subject Taxability of charges made by sellers of women's clothing for alternations

In the course of auditing the records of several Portland retail clothing merchants, we find that it is the practice with some sellers of women's clothing to make a separate charge for alterations that may be necessary in order to fit the clothing sold to the particular customer, or otherwise meet the needs of the particular customer. This office has raised a question as to whether such alterations charges, even though separately stated, are not properly a part of the sales tax base. The merchants in question, on the other hand, have taken the position that such charges are not properly taxable, presumably contending that title to the garments is passed before alterations are made. Attached is a memorandum from Mr. Lambert to Mr. Lader regarding this, as well as a letter received from Malcolm S. Stevenson, Esq. discussing this general question.

Will you please advise whether such alteration charges are to be considered part of the sale price of the garments sold, and hence part of the sales tax base, whether separately stated or not? If you need more factual information, please let me know and I will see that it is obtained for you.

EHJ:J