

# MAINE STATE LEGISLATURE

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**STATE OF MAINE**

**REPORT**

**OF THE**

**ATTORNEY GENERAL**

**For The Calendar Years**

**1963 - 1964**

here for a short time with the intention of residing here. It need not be a continuous "residing in" for the six-month period.

Question:

(2) If the above-mentioned non-resident does not reside in the State of Maine at any time, does she, by virtue of marrying a Maine voting-resident serviceman, acquire voting residence in this state?

Answer:

No.

Opinion:

The doctrine that a married woman's domicil is fixed by the domicil of her husband does not necessarily apply to a "voting residence or domicil." She would still have to comply with the constitutional requirement as stated in the answer to question 1.

The answers to questions 1 and 2 sufficiently cover questions 3 and 4.

FRANK E. HANCOCK

Attorney General

November 6, 1963

To: Ernest H. Johnson, State Tax Assessor

Re: Diamond National Corporation — re dies

Facts:

Diamond National Corporation, manufactures in South Portland, Maine, dies for the production of molded pulp products by various other plants of the same corporation located in other parts of the country.

Diamond National purchases materials and parts and uses them in the manufacture of the dies. The dies, upon manufacture, are shipped by the South Portland plant out of state to the other plants.

The company, relying upon the definitions of "storage" and "'storage' or 'use'" in section 2 of the law, as well as the provisions of section 12-A of the law, maintains that these purchases are not taxable because the dies into which they are incorporated are shipped out of the state, and therefore the materials and parts should be considered as being kept within the state for subsequent use outside of the state, or being kept within the state for the purpose of subsequently transporting them outside the state.

Question:

Whether, in the circumstances indicated, the taxpayer is entitled to claim exemption on the purchase of materials and parts which are to be fabricated into dies in this state, when the completed dies are shipped outside this state to be used in the production of molded pulp products elsewhere.

Answer:

No.

Opinion:

The following law is applicable:

"A tax is imposed on the storage, use or other consumption in this State of tangible personal property, purchased at retail sale on and after July 1, 1963, at the rate of 4% of the sale price. . . ."  
*R. S. 1954, ch. 17, sec. 4.*

“‘Storage’ includes any keeping or retention in this State for any purpose, except subsequent use outside of this State, of tangible personal property purchased at retail sale.” *R. S. 1954, ch. 17, sec. 2.*

“‘Storage’ or ‘use’ does not include keeping or retention or the exercise of power over tangible personal property brought into this State for the purpose of subsequently transporting it outside the State.” *R. S. 1954, ch. 17, sec. 2.*

“When a business which operates from fixed locations within and without this State purchases supplies and equipment in this State, places them in inventory in this State, and subsequently withdraws them from inventory for use at a location of the business in another state without having made use other than storage within this State, it may request a refund of Maine sales tax paid at the time of purchase, provided it maintains inventory records by which the acquisition and disposition of such supplies and equipment purchased can be traced. No refund shall be made where the state to which the supplies and equipment are removed levies a sales or use tax. Such refunds must be requested in accordance with section 18.” *R. S. 1954, ch. 17, sec. 12-A.*  
Reported cases in this area are of little help.

“Because of the variance in the provisions in use tax laws respecting the exemption of enumerated transactions, there is very little in common among cases decided under such exemption clauses.” *153 A. L. R. 628.*

It is important to note that in the normal situation of this kind goods are brought into the state, placed in inventory, and with no physical change being made therein, transported without the state for use elsewhere. Clearly this situation comes within the statute providing either for nontaxability or a refund.

However, in the factual situation here a physical change is made in the materials and parts in that they are processed to form a die, which die is transported without the state.

I do not think there is merit in the taxpayer’s contention that the purchases in question are not taxable since the dies into which they are incorporated are shipped out of the state.

No citation of authority is needed to indicate that tax exemptions are strictly construed. A tax is imposed on the “storage, use or other consumption in this State of tangible personal property.”

“Storage” does not include “property purchased at retail sale” for “subsequent use outside of this State.”

The statute is clear; it is the original property unchanged in form, which, if kept for subsequent use outside the State is non-taxable. Had the legislature intended to exempt property purchased at retail sale, which had been processed and made use of to form other property, which was shipped outside the State, it would have so provided.

“The fundamental rule of statutory construction is to ascertain and carry out the legislative intent. The language of the statute

is 'the vehicle best calculated to express the intention' . . . . "

*Acheson et al. v. Johnson*, 147 Me. 280.

Many states so specifically provide that "storage" and "use" do not include property purchased for "the purpose of being processed, fabricated or manufactured into, attached to or incorporated into," other tangible personal property to be transported outside the state and thereafter used solely outside the State.

Since the Maine legislature has not expressed such intent it cannot be read into the statute.

The taxpayer's argument that section 12-A is controlling has no merit since obviously "use other than storage" was made of the property. That section provides that "when a business operates from fixed locations within and without this State, purchases supplies and equipment in this State, and subsequently withdraws them from inventory for use at a location of the business in another state without having made use other than storage within this State, it may request a refund of the Maine sales tax paid at the time of purchase . . . . "

The taxpayer here utilized the property in producing completely new property; storage only did not occur, nor are any facts presented to show prior payment of sales tax.

This section with its particular emphasis on "use other than storage" gives weight to the earlier conclusion that to take advantage of the exemption the property must remain in its original state.

The question here really is whether the processing and utilization of the property purchased to produce new property will subject the transaction to use tax.

"For taxability there must be a 'use.' The courts insist on something substantial to meet this requirement." *Prentice-Hall, State and Local Taxes, Sales Tax, Para 92,640.*

Use Defined:

"'Use' is defined as 'to employ for any purpose.'" *43 Words and Phrases, § 463.*

Use Tax Defined:

"a 'use tax' presupposing ownership, is an excise tax imposed on the enjoyment of property in a contemplated manner." *43 Words and Phrases, p. 193 supp.*

Use and Consumption Defined:

"The words 'use' and 'consumption' in statute imposing tax on sales for use or consumption and not for resale in any form are not technical words having a peculiar meaning in law, but are words in common use, and hence they must be given their plain, ordinary meaning. (Citing cases). The noun 'use' means the act of employing anything, or state of being employed, application . . . The word consumption means the act or process of consuming. . . . also the using up of anything . . . ." *9 Words and Phrases, p. 25.*

The taxpayer here has utilized the property and materials to form a new article; certainly in the light of the above definitions it can be said to have incurred a use tax because of such "use." To predicate taxability the statute requires that the property be used, stored or consumed, two of

those elements, use and consumption, are satisfied here.

The court in *Trimount Co. v. Johnson*, 152 Me. 109, in speaking of machines leased by the petitioner said:

“If petitioner exercises in this State any right or power incident to its ownership of the machine, the tax is imposed. The tax does not rest upon the sum total of rights and powers incident to ownership, but upon any right or power.”

It is therefore clear that the utilization of property to produce new property in the circumstances stated, is such an exercise of rights over the property as to subject the materials and parts to use tax.

A comment here relative to the possible interstate character of the transaction is appropriate.

“And the use tax is valid, if imposed upon local storage or use, such as withdrawal from storage, despite intended subsequent use (not immediate or direct use) in interstate commerce.”  
*Prentice-Hall, State and Local Taxes, Sales Tax, Para. 92,600.*

There appears to be no problem here with relation to interstate commerce. See *Hunnewell Trucking v. Johnson*, 157 Me. 338, see also *Ashton Power Co. v. Dept. of Revenue*, 52 N. W. 2d 174 (Mich., 1952).

I conclude therefore that a use tax should be levied on the cost of the materials and parts.

JON R. DOYLE

Assistant Attorney General

November 7, 1963

To: Honorable John H. Reed  
Governor of Maine  
State House  
Augusta, Maine

Dear Governor Reed:

Since the United States Supreme Court decision declaring Bible reading and prayers in the public schools unconstitutional in June of this year, I have received a number of letters from citizens of Maine protesting the decision and also protesting my interpretation thereof as noted in an opinion to the Commissioner of Education on June 21st. I understand that you have received similar letters of protest. I am writing this letter to you in hopes that it will clarify the decision and the position of this office with respect to the practice involved. If necessary, I think this letter should be reproduced and sent to each of those who have made protest or inquiry about the decision.

Of necessity I shall have to reiterate much of my opinion to the Commissioner, but I hope that by giving more of a background to the decision that it will clarify the position of this office and allay the fears of some of our citizens.

It may be important to note at the outset that the *Schempp and Murray* case was an 8 - 1 United States Supreme Court opinion. It is interesting to note also that just a year prior to the *Schempp and Murray* case the Court in a 6 - 1 opinion (2 judges not sitting) decided that the New York Regents