NO.

STATE OF MAINE

Inter-Departmental Memorandum Date February 4, 1964

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

From Jon R. Doyle, Asst. Atty. General Dept. " " "

Subject Haffenreffer & Company, Inc. Reg. #50437

FACTS:

An assessment of use tax has been made against Haffenreffer & Co., Inc. based upon so-called "point of sale" advertising material shipped by Haffenreffer & Company to distributors in this State. The assessment is based upon the assumption that title to these materials does not pass to the distributors until receipt by them in this State. The Company contends that title to the materials passes to the distributors upon delivery to the carriers in Boston.

The advertising material in question is not ordered by the distributor, but is shipped to the distributor by the company from time to time, as the company determines best; it is always shipped to the distributor at the same time as beer which has been ordered by the distributor is shipped. This practice has been in operation for some time.

The distributor determines the means of transportation of the beer from Massachusetts, dealing with the carrier and paying for transportation, presumably on both beer and advertising material.

Haffenreffer & Company apparently has no representatives in Maine, nor is the distributor their agent.

QUESTION:

In the light of the above factual situation does either Haffenreffer & Company, or the distributor in this State, become liable for use tax on advertising material so furnished to distributors of their products in this State?

ANSWER:

No.

REASONS:

I. The Law:

"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. Every person so storing, using or otherwise consuming is liable for the tax until he has paid the same or has taken a receipt from his seller, thereto duly authorized by the Tax Assessor, showing that the seller has collected the sales or use tax, in which case the seller shall be liable for it. Retailers registered under section 6 or 8 shall collect such tax and make remittance to the Tax Assessor. The amount of such tax payable by the purchaser shall be that provided in the case of sales taxes by section 5." R.S. 1954, Chapter 17, section 4 as amended.

"'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 . . . ." R.S. 1954, Chapter 17, section 2 as amended.

"'Sale' means any transfer, exchange or barter, in any manner or by any means whatsoever, for a consideration in the regular course of business . . . ." R.S. 1954, Chapter 17, section 2 as amended.

It follows that in order for Haffenreffer & Company to be liable for a use tax, it would have to:

(a) Purchase the property at "retail sale" and

(b) Store, use or otherwise consume the property in Maine.

There is probably no question but that requisite (a) has been satisfied; the problem here is in determining who made use of the tangible personal property in Maine; the answer to this determination is dependent upon:

1. What the nature of the transaction was, and

2. Where title to the tangible personal property passed.

The transfer of the advertising materials was made free of charge. It is a common practice for manufacturers to send advertising materials into another jurisdiction. In some instances a charge is made therefor, sometimes no charge is made. If a charge is made or the property is sent direct to the manufacturer's representatives in the state, the problem is clear cut.

Assuming that a charge had been made with title passing outside the State, the distributor would have to pay the use tax.

Since there was no written expression of the parties' intent, resort to the Uniform Sales Act, R.S. 1954, Chapter 183, sections 18 and 19, particularly Rule 4 of the latter section, would indicate an intention to transfer title to the goods in Massachusetts; the fact that the seller's activities end with delivery to the carrier who is selected by the buyer, the buyer's payment of transportation charges and other circumstances all serve to indicate an intention to pass title upon delivery to the carrier, i.e., in Massachusetts.

Therefore, if the transaction were a sale, there would be no use tax on Haffenreffer & Company, rather, it would be on the distributer since he would be the one purchasing at retail sale and using.

If no charge had been made and the property had been sent directly to the manufacturer's representative or salesmen for free distribution within the taxing state, or brought in by the manufacturer itself, a use tax would be due thereon from the manufacturer.

> "On advertising or promotional material, use tax applies on purchase price or cost if distributed instate by outstate manufacturer." Iowa, Prentice-Hall, para. 21,140.15; see also Prentice-Hall, Ala. Para. 21,140.5.

See also Prentice-Hall, Sales Tax:

Ala.	Para.	21,140.5
Ariz.	"	21,804
Ark.	"	21,184.10, 23,052
Ga.	"	21,362
Okla.	"	21,246.25
W. Va.	"	21,140.10, 23,006
Nev.	"	23,002
N.C.	"	21,603.5
Pa.	"	21,140.10

Some states, e.g., Mississippi, expressly tax such a situation.

> " . . . 'use' or 'consumption' shall include the benefit realized or to be realized by persons importing or causing to be imported into this State tangible advertising or sales promotional materials."
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> Mississippi Use Tax Law, L. 1955, Ex. Sess. Chapter 111, section 2.

However, problems arise, as here, where no charge is made and property is delivered to a common carrier employed by distributor for delivery to distributor. Is there a sale or is the transaction of another sort?

Clearly, there is no consideration for the transfer; it is spontaneously and gratuitously made. No exercise of dominion or control over the property is made; presumably the distributor can do with it what he wishes.

The manufacturer does receive an indirect benefit if the advertising material promotes more sales and thus more orders from the distributor; if there is give-away merchandise presumably good will is acquired but this is the most that can be said.

The transfer of title to the advertising materials is not marked by or dependent upon a consideration. A consideration, under Maine statute, is necessary to a sale. (See definition of "sale" supra).

Consideration is defined as:

> " . . . something of legal value moving from one person to another." 8-A Words and Phrases. Consideration, page 236.

Further, a <u>sale</u> usually imports a <u>valuable</u> consideration.

> "The word 'sale' in its broadest sense comprehends any contract for the transfer of property for a valuable consideration. It is often used in a more limiting sense as embracing only those contracts founded upon a money consideration." 38 Words and Phrases, Sales, 85.

> "A valuable consideration may be either a benefit to the promisor or a detriment to the promisee, or surrender by latter of some legal right he was not otherwise bound to surrender." 4 Words and Phrases, Val. Cons. Pages 21, 22.
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> "A pecuniary consideration is a necessary element of a 'sale' as that term is usually employed with reference to personal property." 34 Words and Phrases. Sales, 84.

Since there is no consideration here, as is required by a sale, the transaction is more analagous to a gift.

> "A gift has been judically defined as a voluntary transfer of property by one to another without any consideration or compensation therefore . . . . Hence, it is apparently well established in law that to constitute a valid gift a transfer must be voluntary, absolute and without consideration. As applied specially to personal property, a gift has been defined as the voluntary act of transferring the right to and possession of a chattel, whereby one person renounces and another immediately acquires all right and title thereto." 24 Am. Jur. Gifts. Section 4.

The courts have established many distinctions between gifts and other transactions. Owing to the absence of consideration a gift inter vivos does not come within the legal definition of a contract; to stand on the same footing, a gift and a contract must be alike in respect of being executed. See 24 Am. Jur., Gifts, section 11.

<u>The chief distinction between a sale and a gift is that in the former a valuable consideration is necessary, whereas the latter need not rest for its support on any consideration of value.</u>

It is a generally accepted rule that gifts inter vivos must be fully executed--that is, there must be an intention to transfer title to the property, a delivery by the donor, and an acceptance by the donee.

If anything remains to be done, the transaction merely constitutes an executory agreement to give, and the title to the property does not pass. Thus a mere intention to give without delivery is unavailing; the intention must be executed by a complete and unconditional delivering.

> "It is well settled that there must be a clear but unmistakable intention on the part of the donor to make a gift of his property in order to constitute a valid, effective gift inter vivos . . . . Thus, it has been held that a delivery of property, unless made with such intent, does not amount to a gift . . . of personalty . . . . The donor must intend to relinquish the right of dominion on the one hand, and to create it on the other, and this intention to make a gift must be a present intention; a mere intention to give in the future will not suffice. However, a donor's intent need not be expressed in any particular form; but may be manifested by acts or words, or both, or it may be inferred from the relation of the parties in the surrounding facts and circumstances." 24 Am. Jur., Gifts, section 21. See also 79 W. Va. 502 (92 S.E. 561 and 3 A.L.R. 1237).

It is generally held that an actual delivery is necessary for the consummation of a gift--when the subject of the gift is capable of manual delivery; otherwise, there must be such delivery as the nature and situation of the subject sought to be given reasonably permits, and this delivery must clearly manifest the donor's intention to divest himself of title and possession. It is usually considered sufficient if the donor has put it in the power of the donee to take possession or if the donee can take possession without committing a trespass.

> "Although there must be a delivery and acceptance in order to constitute a valid gift, it does not necessarily follow that delivery must be made to donee personally; it may be made to some third person for him . . . . The gift is not complete until there is an actual delivery to the donee or to someone for him, and until the gift is completed by delivery, the donor may reassert title to the property . . . . It has been held that a delivery of property to one as the agent or trustee of the donee, under such circumstances as to indicate that the donor relinquishes all control and dominion of the property constitutes a complete and irrevocable gift . . . ." 24 Am. Jur., Gifts, section 30. See also 88 Me. 146; 63 Me. 367; 106 Me. 433; 54 Me. 446; 81 Me. 231; 56 Me. 324; 110 Me. 550; 111 Me. 21, 75 Me. 33; 110 Me. 550.

Acceptance is requisite, but it may be implied.

> "An acceptance by the donee is held to be an essential element of a gift inter vivos . . . . Acceptance, however, need not be made immediately. It is sufficient that the gift is accepted without actual revocation by the donor . . . . The exercise by the donee of dominion over the subject of a gift, or an assertion of the right thereto by him, is generally held to be evidence of his acceptance; . . .. " 24 Am. Jur. Gifts, section 40.
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> "As a general rule, a gift to a donee without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed thereof; and where a donor has done all in his power to complete a gift by relinquishing the possession and control thereof to a third person as trustee for the donee, the gift will ordinarily be upheld, although the donee had no knowledge of the transaction. The act of the trustee in receiving the property amounts to an acceptance by him in behalf of the donee." 24 Am. Jur. Gifts, section 41.
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> "Acceptance by the donee may be implied or presumed, especially if it operates entirely to the benefit of the donee . . . ." 24 Am. Jur., Gifts, section 117. See also the Maine cases of 126 Me. 84; 127 Me. 482; 144 Me. 227; 133 Me. 500; 121 Me. 51; 134 Me. 188; 21 Me. 188.

All the elements of a gift are present here.

There has been a voluntary transfer without consideration; an intention to give (which at the least can be implied); there has been a constructive delivery of the property to an agent or bailee of the donee, and an acceptance by the donee (which acceptance is, at the least, presumed).

I conclude that title to the advertising material passed, by gift, outside the State and that Haffenreffer is not liable for the use tax.

Further, since the taxability of a use depends upon purchase for a consideration, use of property acquired by a gift or otherwise without consideration cannot be taxed. See Ohio, Prentice-Hall, para. 21,312; New York Prentice-Hall, para. 77-074.

JRD:epd