

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For The Calendar Years

1963 - 1964

licensee constitutes an offer to loan a specified sum of money at a specified rate of payment. This offer is accepted by the borrower when he signs the note, completes the application and mails it to the licensee. The sending of the check is the first step on the part of the licensee in the performance of the contract. Hence, it would appear that the contract is executed at the place where the note is signed.

The second argument is concerned with the public policy on which the small loan law is based. There can be no serious quarrel with the arguments advanced on this phase as long as loans are confined to so-called "intrastate" transactions. There can be no doubt that the fundamental theory of the small loan law is of a remedial nature. Generally, remedial statutes are liberally construed. A liberal construction of the Maine Small Loan Law would authorize intrastate loans by mail.

The third argument that other states have interpreted similar laws to allow such transactions is entitled to some weight. Such interpretations may well be considered as legal precedents.

To say that loans must be made in the office of a licensee is straining the language of section 213. One cannot overlook another portion of that section. There is the wording "or transact any business," etc. To look at this realistically, we have to recognize that a small loan company must occasionally go to the home or place of employment of a borrower to collect payments. At times it may be necessary to repossess collateral. This is done where the collateral is located.

It is obvious that the law must contemplate the transaction of certain phases of business outside the confines of the company's office. This being so, it must be said that the making of a loan by mail is not prohibited. To say otherwise would strain the wording of the statute.

To the extent that this opinion states that "intrastate" loans by mail to Maine residents by Maine licensees is permissible, the previous opinion of May 27, 1964, is superseded.

GEORGE C. WEST

Deputy Attorney General

September 25, 1964

To: Ernest H. Johnson, State Tax Assessor

Re: R. S., Chapter 17, section 2, definition of "storage" and "'storage' or 'use'"

Facts:

Pioneer Plastics Corporation purchases from out-of-state printers certain advertising and promotional materials and pamphlets. These are then shipped by the printers to Pioneer Plastics Corporation in Sanford. From Sanford, these materials are shipped out to various distributors and retail dealers which handle products of Pioneer Plastics Corporation.

The corporation contends that the purchase of these materials is not subject to use tax in Maine because the materials are "brought into this State for the purpose of subsequently transporting (them) outside the state" and hence come within the exclusion in section 2 of the law.

Question:

Whether the goods come within the exclusion provision.

Answer:

No.

Law:

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

“‘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.* (Emphasis supplied).

“A tax is imposed on the storage, use or other consumption in this State of tangible personal property” *R.S. 1954, Ch. 17, sec. 4.*

“When a business which 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 Maine sales tax paid at the time of purchase” *R.S., 1954, Ch. 17, sec. 12-A.*

Reasons:

In order to arrive at the purpose and meaning of the section in question, we must view the statute in its entirety.

“The purpose of a statute is to be gathered from the whole act.” *Alexander v. Casden Pipe Co.*, 290 U. S. 484.

The particular section is properly denominated an “exclusion” section; since to exclude means to exempt it will be treated as an exemption provision and strictly construed against the taxpayer.

Section 2 applies to use tax; section 12-A of the law cited above contains a provision similar in import but applicable to sales tax. This section was enacted subsequent to section 2.

Section 12-A provides generally that if a business purchases supplies and equipment, pays a tax thereon, places them in inventory and without use other than storage, subsequently ships them to a location of the business in another state, it may request a refund of the sales tax paid.

Clearly, this provision can only be used where the taxpayer ships the goods to another location of his business; it is a provision personal to the taxpayer and can only be utilized by him.

It would not apply, for example, if he made a gift of the goods to an out-of-state customer.

The question here really is whether such legislative intent can be read into the definition of “storage” in section 2, considering this operation of section 12 and the purpose of the statute as a whole.

I consider that it can. The use tax has always been considered as a complement to the sales tax. Its purpose was that of equalization of the tax burden so that one merchant who might be liable for a sales tax would

not have to compete with another who might be able to avoid a sales tax. The use tax is designed so as to equalize the burden of tax.

The taxing statute must be read as a whole. The Legislature in section 12-A gives tax relief to a Maine vendor who pays the tax, holds the property in inventory, withdraws it for use at a location of the business in another state. It would be inconsistent to allow a resident taxpayer to buy outside the state — tax free — hold the property in inventory, withdraw it, package it, and ship it to other than a location of the business out of state without paying a tax.

The reason for the exclusion in 12-A is that the user himself who has paid the tax intends to use it, himself, outside the state. I believe that the definition of "storage" in section 2 should be read consistently with that in 12-A to provide an exclusion only where the last use does not occur in Maine, i. e., where the taxpayer ships to another location of his business. I believe the exclusion to be inherently personal.

The sales tax law has numerous provisions excluding from tax sales made to nonresidents who intend to use the property (automobiles, aircraft, boats) outside the state. Nowhere does this exclusion extend farther than the immediate purchaser. It is my interpretation that it was the intent of the legislature to provide exclusions or exemptions from tax in such situations only where the property was to be so used by the immediate purchaser. The "user" would be subject to tax if *he* "used" the property in the state — if *he* uses it outside the state there is no tax.

There does not seem to be any problem with Federal constitutional provisions. If property was being held temporarily in the State in the course of through-state shipment it would have immunity and not be taxable. This is true when there is no intrastate use of the property — when, however, "use" is made, it loses this protection.

Here Pioneer is removing the property from inventory, re-packaging it and shipping it, presumably free of charge to out-of-state customers. In actuality it is making a gift of the property. In delivering the property to the carrier the donor (Pioneer) is divesting itself of control over the property in Maine and is making no subsequent use of the property outside the State.

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

The act of re-packing the property and delivering it to the carrier (thus, completing the gift) constitutes an exercise of a right or power over the property so as to result in a taxable use of the property.

"If petitioner exercises in this State any right or power incident to its ownership . . . (of the property) 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." *Trimount Co. v. Johnson*, 152 Me. 109.

JON R. DOYLE

Assistant Attorney General

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STATE OF MAINE

Inter-Departmental Memorandum Date August 13, 1964

To Jon R. Doyle, Assistant Attorney General

Dept. Bureau of Taxation

From Ernest H. Johnson, State Tax Assessor

Dept. Bureau of Taxation

Subject R.S. Chapter 17, Section 2, definition of "storage" and "storage" or "use"

In connection with an audit of Pioneer Plastics corporation in Sanford a question has been raised as to the proper application of the above definitions in the sales and use tax law, with respect to advertising literature purchased outside Maine, shipped into Maine, and subsequently shipped by the purchaser to customers outside this State.

As we understand the situation, Pioneer Plastics Corporation purchases from out-of-state printers certain advertising and promotional circulars and pamphlets. These are then shipped by the printers to Pioneer Plastics Corporation in Sanford. From Sanford, these materials are shipped out to various distributors and retail dealers which handle products of Pioneer Plastics Corporation.

The corporation contends that the purchase of these materials is not subject to use tax in Maine because the materials are "brought into this State for the purpose of subsequently transporting (them) outside the state" and hence come within the exclusion in section 2 of the law.

This office, on the other hand, has taken the position that this exclusion applies only when such personal property is brought into this State for the purpose of subsequently transporting it outside the state for use by the purchaser. This office takes the position that the exclusion from use tax is comparable to the refund provision for sales tax found in section 12-A of the law. To put it another way, this office contends that the exclusion with respect to use tax does not apply when the last act representing exercise of ownership by the purchaser occurs in Maine, and that this is the case when the owner places in the hands of the post office department or carrier in Maine such property addressed to another.

Will you please advise whether use tax applies when tangible personal property is purchased outside the State of Maine, is delivered by the supplier to the customer in the State of Maine, and is then shipped by the purchaser to others (as distinct from its own offices or places of business) outside the State of Maine.

EHJ:j