STATE OF MAINE

Inter-Departmental Memorandum Date January 5, 1965

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

From Jon A. Doyle, Asst. Attorney General Dept. " " "

Subject Your memorandum of November 17, 1964

FACTS

An electrical company and a telephone company have entered into an agreement, whereby either company may on occasion sell to the other a one-half interest in poles in place. These sales are governed by a written agreement; when poles are sold under this agreement the sale is evidenced by an invoice directed to the purchasing company. The invoices identify the poles by number and location.

QUESTION

Whether these are sales of tangible personal property and, if so, whether the sales are taxable sales or casual sales which are not taxable.

ANSWER

The sale is a taxable sale of tangible personal property.

LAW

> "'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, ... The term 'retail sale' or 'sale at retail' does not include, . . . any . . . isolated transaction in which any tangible personal property is sold, transferred, offered for sale or delivered by the owner thereof, such sale, transfer, offer for sale, or delivery not being made in the ordinary course of repeated and successive transactions of a like character by such owner, such transactions being elsewhere sometimes referred to as casual sales' . . . ." Sales and Use Tax Law, section 2.

> "'Sale' means any transfer, exchange or barter, in any manner or by any means whatsoever, for a consideration in the regular course of business . . . ."
> Sales and Use Tax Law, section 2.

REASONS

Assuming before proceeding to consider the questions that there is a sale of the poles and that the sale is not casual, the question arises as to whether the sale of the poles is of personalty or realty.

In order to determine the answer to this question we must determine the circumstances of the affixation of the poles.

It is important to ascertain what right or interest the power companies, the owners of the poles, have in the realty to which they are annexed, in order to determine whether the intention existed thereby to make them a part of the freehold.

> "A different intention may well be inferred from annexations made by a tenant or mere licensee, than when the same acts are done by the owner of the freehold." Readfield Telephone and Telegraph Company v. Cyr, 95 Me. 290.

As regards poles, lines and the appurtenances thereto constructed along or upon roads and highways the case of Readfield Telephone and Telegraph Company v. Cyr, 95 Me. 287, provides:

> ". . . 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. He had no right to the continued enjoyment of its use, simply a revocable license, a temporary privilege which might be determined at any time by the municipal officers."

The court further said that from the facts no legal inference can be drawn of an intention on the part of the (company) to annex permanently its posts and insulators which they supported to the freehold and to make them a part and parcel thereof, that they continued, as between debtor and creditor, to retain their original character as chattels. Readfield Telephone and Telegraph Company v. Cyr, supra.

It is interesting to note that the court in the Readfield case based its decision on the following factors:

1. That the company had no interest in the freehold;

2. that municipal officers had to issue a permit specifying the location of the posts and other details of their installation,

3. that municipal officers further had the power to order an alteration in location or erection of the posts, that the company paid nothing for the privilege of occupying and using the soil,

4. that the company had no interest in the soil which supported its posts and lines except the right to occupy by permission of the municipal officers which the court described as a "mere license revocable at their will,"

5. that the company acquired no legal right to the continued use and enjoyment of the privilege by prescription saying "it is a temporary privilege only which is conferred; no right is acquired as against the owner of the fee by its enjoyment, nor is any legal right acquired to the continued enjoyment of the privilege or any presumption of a grant made thereby."

The cases of Hayford v. Wentworth, 97 Me. 347 and Young v. Hatch, 99 Me. 465 both reiterated and approved of the guide lines laid down in Readfield Telephone and Telegraph case supra. These cases along with the Readfield case developed the rule that special prominence would be given to the intention of the person making the annexation and that consideration would be given to the permanency of the right. As the court said in the case of Hayford v. Wentworth, supra:

> "As to the intention, of course it is not the unrevealed secret intention that controls; it is the intention indicated

> by the proven facts and circumstances, including the relation, the conduct and language of the parties; the intention that should be inferred from all these."

Clearly then, the Maine rule is that poles and their appurtenances which are erected upon or along roads and highways, the beneficial use in which is appropriated for public purposes with the property and soil remaining in the owner of the adjoining land, are personal property.

The question next arises as to what is the nature of the poles when they are erected upon private land.

The rule for determination is stated in the case of Mayford v. Wentworth, supra, as follows:

> "Courts now very generally discard the old test of the physical character of the annexation and hold that a chattel is not merged into realty, unless, (1) it is physically annexed, at least by juxta position, to the realty or some appurtenance thereof, (2) it is adapted to and usable with that part of the realty to which it is annexed and (3) it was so annexed with the intention on the part of the person making the annexation, to make it a permanent accession to the realty."

This consideration of the nature of poles placed on private lands must be divided into two parts--one covering those poles which are placed on land by reason of a license and another those which are placed on land by reason of a grant of an easement.

In considering whether poles installed on land by virtue of a license are personalty we must keep in mind language herein before referred to from the Readfield Telephone and Telegraph case supra:

> "It is especially important to ascertain what right or interest . . . the owner of these chattels held in the realty to which it annexed, when 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 licensee than when the same acts are done by the owner of the freehold." (Emphasis supplied).

A license is defined as follows:

> "A license is . . . ordinarily a commission merely to do something on or to the detriment of the land or the giver of the license or licensor. Insofar as an easement involves, as it ordinarily does, the privilege of doing or not doing a certain class of act on or in connection with another's land, there is a superficial resemblance between an easement and a privilege created by a license. The distinction between such an easement and a license privilege lies primarily in the fact that the licensee has a privilege and nothing more, while the holder of an easement has not only a privilege but also rights against the community in general, including the owners of the land, that they refrain from interference with the exercise or enjoyment of the privilege . . . ." Tiffany, Real Property 3d Ed. section 829.

There to arise situations wherein a license is not revocable such as where the grantor may be estopped to revoke after improvements have been made. See Tiffany on Real Property, 3d Ed., section 521 and White v. Elwell, 38 Me. 360, but these are not applicable here. Further, it is well settled that no interest in the land is granted by license, in fact the granting of a license by a private owner of land is analagous to the license granted by the officers of the municipality to a utility to erect its poles on public lands.

For the same reasons as expressed above as applicable to poles constructed upon or along public highways I would conclude that poles installed on private land by virtue of a mere license are personalty. We can not reach a conclusion that a person who has a mere license to use has any intention to affix chattels to the freehold when he has no interest in the freehold itself.

More specifically the conclusion is reached since the owner of the poles does not own the freehold, its right exists upon a license and the annexation was not made by the owner of the freehold.

Where a company actually sells a pole to a private individual and installs it on that individual's land there is no question but that that pole is realty; it is being installed into land owned by its ultimate owner who cannot be said to have an intent other than it become a permanent accession to his realty.

As to poles placed on lands under an easement the specific question is whether an easement is an interest in land; and if it is whether it is sufficient to give rise to the intention to affix as realty.

It is well settled that an easement is an interest in land.

> "While it is always distinct from the occupation and enjoyment of land itself, it does not confer title to the land . . . . . If easement is property it partakes of the nature of land. It is an incorporeal right--an incorporeal hereditament and although only an incorporeal right and appurtenant to another the dominant tenement, it is yet properly denominated an interest in land which constitutes the servient tenement." 28 C.J.S. Easements, section 1 (B).

While the grantee of an easement may not acquire "ownership of land" it does have an interest in the realty. Although strictly speaking it is not the owner of the realty it has a right which is not revocable or temporary such as a license; it is a right of a permanent nature. Noting that the company does have an interest in land, that it does annex its chattels, that the interest is of a permanent nature the conclusion must be reached that the poles were annexed with the intention on the part of the person making the annexation to make a permanent accession to the realty.

Therefore, poles placed on land by virtue of an easement should be considered realty except as hereinafter qualified.

For the same reasons if the company owns the land upon which the poles are placed they are to be considered as realty except as hereinafter qualified.

However, where poles which are on land by virtue of an easement are sold or a part interest in them is sold with no mention of the conveyance of an interest in realty and with none of the formalities thereof we must conclude that the vendor at that point had changed its original intent of affixation to realty to indicate a present intention to treat the transaction as a sale of personalty, and that the vendee's intent for the reasons previously stated herein is to the same effect since he has no interest in the realty.

Actually, under the facts given no other conclusion can be reached

since all actions of the parties are consistent with the sale of personalty.

Since we have determined that in certain instances poles may be personal property we must determine whether under the given facts there is a sale of an interest in the personal property sufficient to subject the transaction to liability under the sales and use tax law and further whether sales are casual in nature.

The transactions are governed by a written agreement. When poles are sold under this agreement the transaction is evidenced by an invoice directed to the purchasing company. The invoices identify the poles by number and location.

The agreement further sets out purchase and sale values of new poles and appurtenances as provided for in a flat rate billing schedule. The agreement provides in detail for other matters which we are not concerned with. The agreement read as a whole indicates that companies desire to jointly own certain pole line systems and provide for their maintenance with a requirement of the agreement being the sale of poles between the companies under a flat rate agreement which provides the amount of the purchase price. There seems to be no question but that the transactions are sales under the sales and use tax law within the broad language of the definition of "sale" and "retail sale."

We must now determine whether the transaction is casual in nature.

The Maine sales and use tax law, section 2 provides:

> "The term 'retail sale' or 'sale at retail' does not include . . . any . . . isolated transaction in which any tangible personal property is sold, transferred, offered for sale or delivered by the owner, thereof, such sale, transfer, offer for sale, or delivery not being made in the ordinary course of repeated and successive transactions of a like character by such owner, such transactions being elsewhere sometimes referred to as 'casual sales.'"

The statute specifies no quantum of sales during the specific time. It merely indicates that casual transactions are ones not made in the ordinary course of repeated and successive transactions of a like character.

The facts presented indicate that these sales are of a recurring and continuous nature and although the companies in question are primarily engaged in the selling of electricity to customers these transactions are an integral part of their business. Not only are pole sales made to companies with which the utility has a joint agreement governing sales but sales are also made to private individuals and other companies.

In fact, the total pole sales between two of the companies described in your memo of November 17, 1964, including purchases and sales, amount to over $116,000 during a two-year period.

I would conclude without further discussion that these sales are of such a frequent nature as not to be casual.

In summary, I find that the transactions in question are sales of tangible personal property and are not of a casual nature.

JRD:epd