STATE OF MAINE

Inter-Departmental Memorandum Date March 25, 1965

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

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

Subject Use Tax on Motor Vehicles Purchased at Bankruptcy Liquidation Sales

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FACTS AND QUESTION

Whether the purchaser of a motor which at a bankruptcy liquidation sale is subject to use tax thereon if the purchaser proposes to use the vehicle in this State.

ANSWER

No.

SUMMARY OF 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." Title 36 M.R.S.A. §1861.

"'Use' includes the exercise in this State of any right or power over tangible personal property incident to its ownership when purchased by the user at retail sale." Title 36 M.R.S.A. §1752.

> "The tax imposed by the provisions of this Chapter shall be levied upon all isolated transactions involving the sale of motor vehicles excepting those sold for resale, and excepting an isolated transaction involving the sale of motor vehicles to a corporation when the seller is the owner of a majority of the common stock of such corporation." Title 36 M.R.S.A. §1764.

Under normal circumstances if buyer A purchases an automobile from seller B and uses it in this state, A is liable for a use tax. This result is true even if B is not a "seller" or "retailer" (Title 36 M.R.S.A. §1752) and the transaction is "isolated" (Title 36 M.R.S.A. §1764). We note the inclusion of the words "purchased at retail sale" in both the definition of use and the imposition of the use tax. However, the Legislature has evidenced a clear intent to tax all sales of motor vehicles whether at "retail" or "isolated" so that this language is not controlling.

REASONS

Both the legal incidence and economic burden imposed by the use tax are on the purchaser. The purchaser can relieve himself of this burden by payment of the tax or by taking a receipt from the seller evidencing payment of the tax to the seller.

The specific question of taxability upon purchase at a bankruptcy liquidation must next be considered.

Congress has provided specific legislation covering this area. It is as follows:

> "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States Court who is authorized by said court to conduct any business, or who does conduct any business, shall . . . be subject to all state and local taxes applicable to such business the same as if such business were conducted by an individual or corporation . . . ." 28 U.S. C. §960.

It is therefore clear that where an officer of the federal court,

as described in the above section, conducts a business, the appropriate state and local taxes are applicable, where the business would have been subject to such taxes if conducted by an individual or corporation. See Collier on Bankruptcy, paragraph 62.14 at pages 1526, 1527; Boteler v. Ingels, Cal. 1939, 308 U.S. 57.

However, since section 960 does not apply unless the officer of the federal court is "conducting" the business it must be determined whether a liquidation sale is within the conduct of business.

> "No general rule can be extracted from the few cases dealing with the applicability of sales taxes to liquidation sales, since a great deal depends upon the wording and construction of the particular statute involved. As has been noted, section 124a (now section 960) offered no solution to the problem, since it was held, . . . that officers of federal courts selling property in liquidation of a bankrupt or insolvent estate were not "conducting a business" and were therefore not subject to the provisions of section 124a (now section 960)." 27 ALR 2d, p. 1222.

There has been a split of authority as to the proper tax treatment of liquidation sales conducted by trustees in bankruptcy.

The case of California State Board of Equalization v. Goggin, 191 F. 2d 726, cert. den. (1952) 342 U.S. 909, holds that allowing taxes on a liquidation sale would burden the authority of the Federal Government acting under the Bankruptcy Act.

The contrary view is expressed in In re Leavy, 85 F. 2d 25 (2d Cir. 1936) which reasoned that taxes levied against the buyer at a liquidation sale are irrelevant to the court process.

In a recent case, California State Board of Equalization v. Goggin, 245 F. 2d 44 (9th Cir.) cert. den. 353 U.S. 961 (1957) the trustee had conducted the bankrupt's business for seven years and had paid state sales and use taxes during that period.

The State attempted to require the trustee to collect the use tax from a purchaser at a liquidation sale. The California statute levied the tax on the purchaser and merely designated the seller as collection agent. (Maine has a similar statute).

The Court found the incident of the taxes irrelevant and enjoined the State from collecting the taxes from the trustee, in part on the burden theory.

The Court said:

> "Essentially, as applied to a liquidation sale in bankruptcy, the tax constitutes a burden on the process of liquidation. Whether the phrasing of the law imposes a liability directly upon the trustee to pay a sales tax or indirectly imposes a burden upon the trustee by naming the imposition a use tax, which the purchaser at the liquidation sale must pay, the net effect is identical." California State Board of Equalization v. Goggin, (1957) supra.

The Court further said in regard to the imposition of the tax:

> "In practice, if the sales tax were levied upon the trustee, he would necessarily have passed the tax on to the purchaser. The same result is attained by taxing the purchaser and requiring the trustee to collect or collecting the impost from the purchaser. California State Board of Equalization v. Goggin, supra. (Emphasis supplied).

The Court went on to find none of these devices proper, saying:

> "Whatever the protean forms of a statute may be, or whatever subtle ingenuity of legislative tax advisers may suggest now or in the future, the tax is in fact based on the sale; the sale is for the essential purpose of liquidating; the liquidation process was burdened thereby. The paramount authority in the bankruptcy field can be limited only by Congress, But, since Congress has already designated sales in the course of operation of a business as the sale area where the state is permitted to impose a tax of any type, essential sales in liquida-

> tion are inevitably free from such imposition." California State Board of Equalization v. Goggin, supra. (Emphasis supplied).

This decision which reflects the most recent view has been criticized. See 67 Yale Law Journal 335.

The Yale Law Journal article sets forth several arguments, citing cases against the validity of the Goggin case. They are worth considering here.

It is stated among other things that:

1. A liquidation sale is within the Federal waiver (28 U.S. C.A. §960) (i.e., that liquidation is within the conduct of business).

2. That since a liquidation by a private person would be taxed--the sale by a bankruptcy trustee should trustee be taxed.

3. That the Federal waiver should be liberally construed.

These propositions are supported partly by the Leavy case, supra. Further cases cited supporting the principle that liquidation is within the scope of conduct of business are Missouri v. Gleick, 135 F. 2d 134 (1943); In re Loehr, 98-F Supp. 402 (1950) and In re Mid American Co. 31 F. Supp. 601, 606 (1939).

It is interesting to note that the Gleick and Mid America cases were decided under section 124a which preceded section 960. This section (124a) expressly included liquidating trustees. This language was stricken in 1948 when the statute was changed to reflect the present language.

It does not appear, even though there be a statement that Congress did not intend to change the law, that these cases are longer persuasive. See In re Newport Corp. 144 F. Supp. (Cal. 1956).

The Loehr case arose after the above two cases and is a Federal District Court case arising in Wisconsin. This case relied on the above two cases and further reasoned that the phrase

"conduct any business" should not receive a narrow and restricted interpretation but should be construed to include any activity or operation in connection with the handling and management of the bankrupt estate. The court said that had the bankrupts themselves liquidated the business they would be liable for the tax.

This case went no farther than the Federal District Court nor does it appear to be followed elsewhere.

Therefore, the only Circuit Court case in opposition to Goggin is the Leavey case decided almost thirty years ago. Too, there is no indication that this case has been followed by other circuits, whereas the Goggin rule is the more modern and accepted rule. See also In re Payne Corp. U.S. District Court N.D. Ohio 1933. Whatever argument may be made that the collection of use tax from a purchaser of a trustee in bankruptcy does not burden the Federal process we must face the rule in Goggin that it does.

> "A number of considerations support the distinction between liquidation sales and sales in the conduct of a business. One of these considerations is the fact that exemption from sales taxes for businesses being carried on by court-appointed officers would confer on them an unfair advantage over competing businesses, which is not likely to be true in respect to liquidation sales. Another consideration is that a particular statute may be construed, or even expressed, as a tax on the privilege of conducting or engaging in a business, and as such may not properly be applicable to liquidation sales." 27 A.L.R. 2d 1220, 1221.

There is also merit in the statement that a contrary decision would bring the state law in conflict with the Bankruptcy Act, which is to be avoided whenever possible. California State Board of Equalization v. Goggin 191 F. 2d 726.

The Missouri rule is the same as the Goggin rule. (In re Duke D.C. Mo. 1924, 15 F. 2d 92).

California then has held that the trustee in bankruptcy is <u>not subject</u> to the sales tax. State Board of Equalization v. Boteler,

131 F. 2d 383 1942 (note this was under 124a); In re California Pea Products, 37 F. Supp. 658 (1940); California State Board of Equalization v. Goggin, 183F. 2d 489, art. den. 340 U.S. 891 (1951).

The reasoning of these cases was two-fold; the sale was a liquidation sale and not within the conduct of the business-- and the state laws were inconsistent with the Bankruptcy Act.

Note these earlier decisions were under 124a at the same time New York was taking a contrary view.

In the case of California State Board of Equalization v. Goggin 191 F. 2d cert. den. 342 U.S. 909 the Court again held a tax on the sale of tangible personal property under an order of liquidation of the Bankruptcy Court was a levy upon the process of a court of the United States and a burden upon its officers in an essential judicial function and that the trustee was not liable to collect the tax. California had, after the earlier decision added the word "trustee" in the definition of "person" and argued that the statute was thus applicable to liquidation sales.

In a later case, California State Board of Equalization v. Goggin, 245 F. 2d 44, cert. den. 353 U.S. 961, the taxing authorities urged that if the tax was on or to be paid by the purchaser there was no burden. As has been previously discussed the Court bluntly rejected this argument.

The Ninth Circuit Court has then three reasons for rejecting the imposition of taxes on liquidation sales:

1. Its interpretation of 28 U.S. C.A. §960 re conducting business.

2. The conflict of federal and state statutes.

3. The theory of burden on federal officers.

This circuit has continuously held that there is a definite cleavage between the conduct of business and liquidation of business. See the cases above cited and re West Coast Cabinet Works, Inc. 92 F. Supp. 636 (1950 Cal.).

The Court in Goggin (191 F. 2d) supra also pointed out the

distinction between the California sales tax as a tax imposed for the privilege of conducting a retail business, and the New York City sales tax construed In re Leavey, 85 F. 2d 25 as a tax imposed primarily on the consumer with the vendor acting as collection agent for the city. This distinction was emphasized by the court in relation to its discussion of the burden imposed by the tax on the trustee.

Maine case law indicates the sales tax is on the retailer--similar to California--Libby v. Johnson, 148 Me. 410.

Although an argument might be made that the use tax is not on the seller in Maine and the Leavey rule should thus be followed the original sale would still not be within the Federal waiver as within the conduct of business. (See Libbey v. Johnson, supra at page 416). We must note also that Leavey was decided under §124 (a).

Although it is difficult to see how the collection of tax from the vendee would burden the Federal Government it must be recognized that the weight of authority is that no liquidation sale be taxed.

It is interesting to note that the Maine Bankruptcy Court has followed the Goggin rule re conduct of business. See Decision of Referee in Bankruptcy re Camden Shipbuilding, No. BK-63-415-K.

We must, therefore, follow the Goggin rule and conclude that a purchaser of a motor vehicle from a trustee at a liquidation sale pursuant to court order is not liable to pay a use tax either directly to the trustee or to the State under the sales and use tax law or as a prerequisite to registration. The sale is protected.

> " . . . the tax is in fact based on the sale; the sale is for the essential process of liquidation; the liquidation process was burdened thereby. Goggin 245 F. 2d.

It is suggested that perhaps the vendee be required to document his purchase before being allowed to register the motor vehicle perhaps by evidencing appropriate orders from the Bankruptcy Court establishing the sale as a liquidation sale.

JRD:epd

STATE OF MAINE

Inter-Departmental Memorandum

Date January 26, 1965

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

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

Subject Use tax on motor vehicles purchased at bankruptcy liquidation sales

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There is some difference of opinion in the Sales Tax Division as to whether the purchaser of a motor vehicle, at a liquidation sale in bankruptcy, should be charged use tax with respect to the purchase of such vehicle.

In an opinion dated May 20, 1960 (#492) Mr. Farris ruled that liquidation sales by an auctioneer under employment by the court for a trustee in bankruptcy were exempt from taxation. He based this opinion largely on a Federal Court decision which stated that such a tax would constitute a burden on the process of liquidation, and was therefore prohibited.

John Bennit, in an opinion dated October 10, 1961 (#523) took the position that while sales to and sales by national banks were not taxable, nevertheless a use tax imposed upon the purchaser of tangible personal property sold by a national bank in the ordinary course of business would be proper.

Will you please advise whether the purchaser of a motor vehicle at a bankruptcy liquidation sale is subject to use tax with respect to the motor vehicle if the purchaser proposes to use the vehicle in this State?

EHJ:J