STATE OF MAINE

Inter-Departmental Memorandum Date December 28, 1965

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

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

Subject Annex Warehouse Co., Inc. 1780 Broadway, New York 19, New York

Annex Warehouse Co., Inc. conducts a business in Calais, Maine, selling liquor, perfume and cigarettes purportedly for export. Sales are made in bond and delivery is made to the customer's vehicle just before it crosses the International Bridge into Canada.

There is no evidence that the sales are to a preponderance of United States residents or nationals of other countries.

A sale is made as follows: Customer enters store, orders, pays, receives receipt, returns to his car, drives twenty-five feet to the International Bridge; store clerk goes to car, takes receipt and delivers merchandise. According to store personnel the customs officer also signs the receipt.

However, it appears that on least one occasion an inspector of the State Liquor Commission has purchased liquor and cigarettes tax-free without ever going into Canada. It also appears that because of the physical location of the store a purchaser may easily avoid going into Canada after the purchase is made. The Sales Tax Division seeks to tax such transactions under the sales and use tax law; Annex argues that the transactions are not taxable because of protection afforded by constitutional provisions.

QUESTION

Whether the transactions are exempt under either the Import-Export or Commerce Clause of the United States Constitution?

LAW

Article I, Section 10, Clause 2 of the Constitution of the United States provides that:

> "No state shall without the consent of the Congress, lay any imposts on duties on imports or exports, except what may be absolutely necessary for executing its inspection laws and the net produce of all duties and imposts, laid by any state on imports or exports,

> shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress."

A further provision is as follows:

> "The Congress shall have power x x x to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."
> United States Constitution. Article I, §8, Cl. 3.

REASONS

The following quotation succinctly explains the so-called import-export clause set out above:

> " * * * The constitutional provision that 'no tax or duty shall be laid on articles exported from any state' has been the subject of elaborate and authoritative exposition, and we need but to apply the principles of construction which have been settled by previous decisions.
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> "The prohibition relates only to exportation to foreign countries (Woodruff v. Parham, 8 Wall. 123, 19 L.Ed. 382; Dooley v. United States, 183 U.S. 151, 154, 162, 46 L.Ed. 128, 130, 133, 22 S.Ct. 62), and is designed to give immunity from taxation to property that is in the actual course of such exportation (Pace v. Burgess, 92 U.S. 372, 23 L.Ed. 657; Turpin v. Burgess, 117 U.S. 504, 29 L.Ed. 988, 6 S.Ct. 835; Cornell v. Coyne, 192 U.S. 418, 48 L.Ed. 504, 24 S.Ct. 383). This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it. It was the clear

> intent of the framers of the Constitution that 'the process of exporting the products of a state, the goods, chattels, and property of the people of the several states, should not be obstructed or hindered by any burden of taxation.' Miller, Const. p. 592. It was this view that Chief Justice Marshall, in Brown v. Maryland, 12 Wheat. 419, 6 L.Ed. 678,-- holding that a state tax on the occupation of the importer was a tax on imports, and that the mode of imposing it merely varied the form without varying the substance,-- drew the comparison between the two prohibitions: 'The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state.'" United States v. Hvoslef, 237 U.S. 1, 35 S.Ct. 459, 59 L.Ed. 813, Ann.Cas.1916A, 286 (1915). (Emphasis supplied).

Therefore, a state is prohibited from imposing a tax on property which has taken on the character of an export to a foreign country.

In analyzing the problem it must be determined whether there is an "export" and whether the tax is a prohibited impost.

> "Whether the shipment has acquired the status of an export depends on all evidential circumstances looking to what the owner has done in preparation for the journey and carrying it out." 15 C.J.S. Commerce §104 (b).

The evidentiary circumstances tending to show an "export" must be certain--not probable. See Richfield Oil Corp. v. State Board of Equalization (Cal. 1954) 329 U.S. 69.

Generally speaking, certainty that the process of exportation has started may normally be best evidenced by the fact that the goods have been delivered to a common carrier for that purpose, but the same degree of certainty may exist though no common carrier is involved.

Therefore, in order for the exemption to apply, the seller must deliver the property to the buyer under such circumstances that the delivery constitutes the first step in exportation. (See Richfield Oil Corp. v. State Board of Equalization, supra).

The Richfield case cited above, a leading case on the subject, offers an interesting analysis of the problem.

In the Richfield case, a California vendor sold oil to a foreign vendee--the Venezuelan government. The oil was delivered by the vendor into the hold of vendeds own vessel.

The Court found that the sale of the oil was exempt because there was a certainty that the goods would pass into foreign commerce.

> "The means of shipment are unimportant as long as the certainty of the foreign destination is plain." Richfield Oil Corp. v. State Board of Equalization, supra.

The Court further rejected the contention that delivery had to be made to a common carrier in order for the process of exportation to start.

> "But the same degree of certainty may exist though no common carrier is involved." Richfield Oil Corp. v. State Board of Equalization, supra.

Another leading case has stated the rule thus:

> "It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their destination. Nothing less will suffice." Empresa Siderurgica v. County of Merced, 337 U.S. 154. See also Dept. of Rev. v. Stitzel-Weiler Distillery Ky. Court of Appeals, 5 STC, para. 250-162.

The Supreme Court in the Richfield case has laid down the caveat that the certainty of the foreign destination must be plain and has suggested that this certainty may be supplied by delivery to a carrier or delivery to the purchaser under such unequivocal circumstances as would allow no probability of diversion to domestic use. This rule finds support also in the Empresas Siderurgica case above.

In one case (Richfield) the Supreme Court in applying the rule found the transaction to be exempt; in the other (Siderurgica) tax was due because the movement of goods had not started.

Delivery to an export packer has also been held sufficient by the Supreme Court of California in the case of Gough Industries, Inc. v. State Board of Equalization (Cal. 1959) 336 P. 2d 161.

See also Matson Nav. Co. v. State Board of Equalization, 136 Cal. App. 2d 577 and Spalding Bros. v. Edwards, 262 U.S. 66.

The case of Hostetter v. Idlewild Bon Voyage Liquor Corp., 84 S.Ct. 1293 (1964) cited by counsel by the taxpayer is a recent case on the subject.

The facts there, which deserve close scrutiny, are as follows: Idlewild was engaged in the business of selling in bond wines and liquors to departing travelers at John F. Kennedy Airport in New York. Idlewild accepts orders only from travelers whose tickets and boarding cards indicate their imminent departure. A customer gets nothing but a receipt at the time he gives his order and makes payment. The liquor which he orders is transferred directly to the departing aircraft on documents approved by the United States Customs and is not delivered to the customer until he arrives at his foreign destination. The beverages sold by Idlewild are purchased by it from bonded wholesalers who deal in tax-free liquors for export. The Bureau of Customs has approved Idlewild's method of operation. There was no proof of diversion of liquor into the State.

The question arose on an action against the New York State Liquor Authority by Idlewild for a judgment declaring the New York laws repugnant to the United States Constitution. The Liquor Authority argued that Idlewild was unlicensed and unlicensable under New York law.

The Supreme Court held that the commerce clause of the federal constitution prohibited the New York State Liquor Authority from terminating the tax free sales even though it was asserted that the business was unlicensed under New York law, where diversion of the wines and liquors to users within the New York was neither alleged nor proved.

(Reliance was placed in this case on the Export-Import Clause, (Art. I, §10, Cl. 2) but the Court found it misplaced since New York had not sought to lay any imposts or duties upon the merchandise sold by Idlewild).

Therefore, it appears from the foregoing authorities where an article is sold in one of the states for export to a foreign country, it is free from state sales tax under the import-export clause of the United States Constitution if at the time title passed the certainty of the foreign destination was plain.

Further, from an analysis of the Hostetter case the exemption afforded under the Commerce Clause may be overcome by showing a diversion of the goods into the jurisdiction.

Therefore, on the basis of the facts and law stated above I would conclude that neither the exemption afforded by the Import-Export Clause or the Commerce Clause would apply. There is not sufficient certainty of export under the former and, as to the latter, a diversion of the merchandise into this state can doubtless be proven. Too, under applicable rules of law title to the goods passed in Maine. In fact, the whole transaction takes place in Maine. Further, under the facts given, it does not follow that because the merchandise may be actually taken across the border by the purchaser and an export declaration issued, that no tax shall be imposed with respect to the sale. There is no court decision which goes that far in upholding an exemption from tax on constitutional grounds. The facts must clearly point to an export.

Facts which would tend to establish an export, as to a particular sale similar to those in Richfield Oil Corp. v. State Board of Equalization, supra and other cases cited above, such as delivery to a common carrier, or foreign vendee, cargo documents, trip tickets, boarding cards, visas or passports of purchaser, and customs declarations are absent here.

Therefore, since these comments apply as well to all tax laws you should take steps to compel compliance with both the cigarette and sales tax laws. If on the basis of individual sales Assessor makes bona fide sales for export these sales should be treated as exempt sales.

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