

# MAINE STATE LEGISLATURE

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June 6, 1967 *yes ✓*

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Bureau of Taxation

Anheuser Busch, Inc.

FACTS:

Anheuser Busch, Inc. of St. Louis, Missouri is a brewer of beer and sells its products to distributors in Maine for resale. The company maintains a representative in the State of Maine. An assessment of use tax has been made against the brewer for the use of certain "point of sale" advertising material which it pays for and has shipped by suppliers to distributors in Maine upon their request.

The company allots a certain bookkeeping quota of point of sale of materials to each distributor, although the distributor does not pay for these materials. When a distributor requests these advertising materials, Anheuser Busch issues a purchase order to the supplier or manufacturer of the materials. The supplier ships the materials prepaid to the distributor and bills Anheuser Busch. Transportation arrangements are made by the supplier of the point of sale materials, not the distributor.

QUESTION:

Whether Anheuser Busch is liable for a use tax on point of sale advertising materials used in Maine?

ANSWER:

Yes.

OPINION:

The Law

A tax is imposed on 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. . . .  
(36 M.R.S.A. §1861)

"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

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personal property. . . .  
(36 M.R.S.A. §1752 (11))

"Sale", means any transfer, exchange or barter,  
in any manner or by any means whatsoever, for a  
consideration in a regular course of business. . . .  
(36 M.R.S.A. §1752 (13))

"Use", includes the exercise in this state of any  
right or power over tangible personal property in-  
cident to its ownership when purchased by the user  
at retail sale. . . .  
(36 M.R.S.A. §1752 (21))

Interpretation and application:

By statute, a tax is imposed upon one who purchases tangible personal property at "retail sale" for consumption in Maine. There is no question but that Anheuser Busch purchased certain point of sale advertising materials at "retail sale". The fact upon which tax imposition lies is whether the brewer is a "user" within the meaning of the statute; that is, whether Anheuser Busch exercised any right or power over these advertising materials incident to its ownership.

Upon the facts presented to this office, there is sufficient basis for an assessment and collection of a "use" tax pursuant to the statutes of the State of Maine. (The burden, incidently, is on Anheuser Busch to prove that it exercises no right or power incident to ownership within the purpose of the taxing statute, over the point of sale advertising materials.)

Several factors appear which have influenced the conclusion that the situation is taxable. Among these are the presence of an agent of the taxpayer in the State of Maine, the lack of a sale of the merchandise to the distributor, the control of the supplies by the brewer, the payment by the brewer of all costs incurred in the manufacture and shipment of the merchandise.

The extent of the role played by the brewer's agent in the State of Maine with respect to the ordering or distribution of point of sale materials is not known. No substantial reliance is placed upon this factor. It is possible that he may oversee the distribution of advertising materials, keep the distributors aware of newer advertising materials which the brewer has made available, make sure that older materials are discarded and that newer ones are ordered and to act in some other advisory capacity with regards to the advertising materials.

The situation here is similar to a recent Illinois Supreme Court case where a brewer ordered, paid for, and had shipped, certain point of sale advertising materials to independent distributors of the brewer's beer. The brewer alleged that it "did not intend to acquire title to or property in any of said point of sale advertising items"; that "none of said point of sale advertising items shipped to Illinois wholesale distributors had ever been inventoried by the plaintiff or entered upon the books of account of the plaintiff". (Miller Brewing Co. vs. Korshak, 219 N.E.2d 494, 495, Ill. 1966)

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To this argument the Court said:

We think these considerations are irrelevant. Plaintiff caused the items to be brought into being, paid for their manufacture and exercised complete power of disposition over them. Even if, in some other context or for some other purpose, someone other than the plaintiff might somehow be regarded as the owner of the items in the state in which they were manufactured, the dominion exercised over them by the plaintiff is sufficient to establish plaintiff as their owner for the realistic purpose of taxing statute.

The only conclusion that can be reached in the allegations of the complaint is that the plaintiff was the owner of the items in question when it directed that they be shipped into Illinois in order to stimulate the sale of its products. (Miller Brewing Company vs. Korahak, 219 N.E. 2d 494,496)

The key to taxability is a "use" and the key to use is the purpose behind the distribution of the materials, which naturally was the promotion and encouragement of sales of the brewer's products.

A factual distinction between that case and the one under consideration is that the Maine distributor notifies the brewer that advertising materials are needed and the distributor is allotted a certain amount of material. In Miller the distributor apparently did not request advertising materials. This factual difference does not change the major factor that control of the property was always in the brewer. Anheuser Busch ships the point of sale materials into the State of Maine with the distributor having no responsibility for making arrangements for transportation.

In this case there is neither a sale to the distributor or a gift to the distributor. Advertising materials are delivered to independent distributors by direction of the brewer for the purpose of promoting sales of the brewer's products. Coupled with the presence of a representative in Maine and the aspect of control over the materials by the brewer, there is sufficient "use" to which to attach tax liability to the brewer.

The Maine Supreme Judicial Court has yet to rule upon the facts similar to those described in this case. The only cases before the Supreme Court in the past involving the use tax have been lease cases which are quite distinguishable. The language of the cases indicate that if the court can find the exercise of any right or power incident to ownership that a use tax would attach.