STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

June 12, 1968
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

Subject: Adams Leasing Corporation

SYLLABUS:

A MAINE LESSOR LEASES TRUCKS AND TRAILERS TO A MAINE LESSEE. BY VIRTUE OF 36 M.R.S.A. § 1861 AND § 1752 (21) THE LESSOR IS NOT EXEMPT FROM THE MAINE USE TAX.

FACTS:

Adams Leasing Corporation is a Maine Corporation located in South Sanford. Its primary business is that of leasing trucks and trailers to Paul V. Adams, Inc., another Maine corporation which also is located in South Sanford. Adams Leasing, Inc., the lessor, and Paul V. Adams, Inc., the lessee, are both located at the same address.

The lessee has its principal terminal in South Sanford and it also has terminals in Bangor, Portland and in Boston. Garage or repair facilities are located at the South Sanford Terminal and major repair work is performed there. The South Sanford Terminal is owned by Adams Leasing and is leased to Paul V. Adams, Inc.

The trucks and trailers which are leased by lessor to lessee are purchased outside the State and are first brought into Maine under load by lessee. The Maine Use Tax is assessed upon the lessor. The lessor is not engaged in interstate commerce.

The lessee is responsible for maintaining and repairing the vehicles. Major repairs are done at the Sanford terminal. Maintenance can be performed on the vehicles by other parties only with the prior approval of the lessor.

The lessor pays for the registration of each vehicle. The vehicles are registered in Maine. The lessor pays for and maintains insurance policies on the vehicles. The lessor controls who shall and who shall not operate the vehicles. The lessor, with or without cause, can cause a driver to be replaced. The lessor can terminate this lease by giving 13 days notice, subject to the lessee's right to purchase.

QUESTION:

Is a use tax due from the lessor on the trucks and trailers owned by the lessor?

ANSWER:

Yes.

LAW:

> "A tax is imposed on the storage, use or other consumption in this State of tangible personal property, purchased at retail sale at the rate of 4½% 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 . . . ." 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, *including the derivation of income, whether received in money or in the form of other benefits, by a lessor from the rental of tangible personal property located in this State.*" Title 36 M.R.S.A. § 1752 (21) (Emphasis supplied)

REASONS:

It is clear that the lessor derives income from the rental of tangible personal property. However, one must ask whether or not the trucks and trailers are "located in this State". On these facts, it seems clear that they are located in this State. The lessor, a Maine corporation, leases the trucks and trailers to another Maine corporation. Both corporations are located in South Sanford. The principal terminal is in South Sanford and two of the three sub-terminals are located in Maine. The trucks and trailers are overhauled and repaired in this State.

It must be admitted that these trucks and trailers are not permanently located in Maine, nevertheless, on these facts, it is difficult to conclude that they are located in another taxing jurisdiction.

'permanence . . . is not essential to the establishment of a taxable situs for tangible personal property. It means a more or less permanent location for the time being. The ownership and uses for which the property is designed, and the circumstances of its being in the State, are so various that the question is more often a question of fact than law." 51 Am Jur § 454.

Also Adams Leasing, the owner of these vehicles, is domiciled in Maine.

"The domicile of the owner is the taxable situs assigned to tangibles when an actual situs has not been acquired elsewhere. That state is the situs for purposes of taxation of tangible personal property temporarily in another state, but not permanently located there." 51 Am Jur § 457.

The United States Supreme Court in *Northwest Airlines, Inc. v. Minnesota,* 322 U. S. 292, had to deal with a similar problem, which involved the location of airplanes which were continually engaged in interstate commerce. It should be noted that the decision concerned a personal property tax. The Court stated at page 299:

"But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into another state for a day, a week, or six months, and then brought back. Using the language of domicile . . . the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts.

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But not to subject property that has no locality other than the state of its owner's domicile to taxation there would free such floating property from taxation everywhere."

An alternative argument which also compels the imposition of the Use Tax is that there has been an exercise in this State of a right or power over tangible personal property purchased by the user at retail sale, incident to its ownership. *Commercial Leasing, Inc. vs Johnson,* 160 Me. 32 is controlling. One should recall that the lessor, Adams Leasing Corporation, approves all major repairs which are performed on the vehicles. Major repairs are done at the Sanford terminal. The lessor pays for and registers each vehicle. The lessor pays for and maintains the insurance policies on the vehicles. The lessor controls who shall and who shall not operate the vehicles. The lessor, with or

without cause, can cause a driver to be replaced. It seems apparent that on these facts, the lessor has exercised within the territorial limits of this State a right or power incident to the ownership of property.

It should be pointed out that the Maine Court in *Commercial Leasing* hinged its decision on the fact that the lessor, who was responsible for maintaining the vehicles, chose to have them repaired in this jurisdiction. On the facts stated above, the lessee, not the lessor is responsible for and actually performs all major repairs on the vehicles. This writer does not believe that this fact weakens the Court's rationale in Commercial Leasing. The substance of the Adams lease should be controlling and not its form. In *Charles E. Austin, Inc. v. Kelly Secretary of State,* 32 N.W. 2d 694, the Michigan Court stated at page 697:

> "Under the involved circumstances here shown, where there are two corporations in both of which the wife of Charles E. Austin is the owner of the corporate shares as well as the president and secretary of both corporations, and who also individually owns all of the storage facilities and leases the same to said corporations, equity will look through and behind the corporate entitles to ascertain the true situation.
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> We have frequently said that equity looks to the substance rather than to the form."

The courts have held in numerous cases that the taxing authorities are not always required to respect the separate entity of a corporation if a distortion in tax liability results. See *Higgins v. Smith,* 30 U. S. 473, *Griffith v. Commissioner,* 308 U.S. 355, *National Investors Corporation v. Hoey,* 144 F. 2d 466. On these facts, whether the lessor or the lessee is responsible for maintaining the vehicles seems to substantively make no difference whatsoever.

The trucks and trailers which are the subject of the assessment are not exempt from non-discriminatory state taxation because of their use by the lessee in interstate commerce. The Use Tax is upon the lessor. The lessor is not engaged in interstate commerce. The Tennessee Supreme Court in *Central Transportation Company v. Atkins,* 305 S. W. 2d 940, said at page 942:

> "Of course the State is powerless to levy a tax upon interstate commerce and so far as this tax act is concerned in this particular instance we can find no effort of the State to be unfair in levying a tax which is a burden on interstate commerce. Just because the lessee under this lease might want to use the leased goods in interstate commerce is a matter entirely up to the lessee's choice and control. It must be remembered that this lease was executed in Tennessee between two Tennessee corporations. The tax is on the lessor and on the making of the lease and nothing is contemplated by the terms of this lease that the tax would be a burden on commerce between the States. The lessor, under the terms of this lease, reserved no power to determine when and where and how the lessee used these trucks and did business. All the appellant did was to furnish it the trucks to do business with."

The taxation of tangible personal property which is employed in interstate commerce is discussed in *Eastern Air Transport v. Tax Commissioner,* 285 U.S. 147; *Southern Pacific Co. v. Gallagher,* 306 U.S. 167; *Oxford v. Blankenship* 127 S. E. 2d 706; and *McGoldrick v. Berwind-White Coal Mine Co.,* 309 U.S. 33.

Another point, not mentioned above, is that there is no problem here of multiplicity of taxation. No other state has imposed a sales or use tax on these trucks and trailers.

Lastly, reference should be made to Assistant Attorney General Richard A. Foley's

opinion dated December 22, 1960 which deals with the same situation and which reaches the same result.

WENDELL R. DAVIDSON
Assistant Attorney General

Lieut. Kenneth Wood, Traffic Div. June 14, 1968
State Police

Classification of Church Owned Buses

SYLLABUS:

Buses owned and operated by a Church solely for the purpose of transporting children to and from Sunday School and other Church functions are not "School Buses" as defined in 29 M.R.S.A. § 2011.

FACTS:

Two buses are being operated by a Church for the purpose of transporting children to Sunday School and other Church functions.

These buses meet all the requirements of School Buses as to color, lighting and signing. They have been submitted to a School Bus approved Inspection Station for the purpose of complying with Par. 9 of Section 2011.

The Church authorities have been advised by DMV that they do not have to comply with Sect. 2012 (School Bus Operator's Requirements) as the vehicles are not school buses.

QUESTION:

Whether under the above stated facts, Church owned and operated buses used for transporting children to Sunday School and to other Church functions are to be considered "School Buses" as defined in 29 M.R.S.A § 2011?

ANSWER:

No.

OPINION:

20 M.R.S.A. § 2011 reads in part as follows:

"The term 'school bus' includes every motor vehicle with a carrying capacity of 10 or more passengers, owned by a public or governmental agency or private school and operated for the transportation of children to or from school, or to or from any school activities at a school regularly attended by such children, or privately owned and operated for compensation for the transportation of children to or from school or to or from any school activities at a school regularly attended by such children, or to and from any municipally sponsored, nonschool activity within the State for which use of a bus has been approved by the superintending school committee, community school committees or board of directors; school as used in this sentence shall mean either a private or public