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19-3
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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

January 11, 1979

Edwin Plissey
Executive Director
Maine Potato Commission
Agricultural Center
Box 71
Presque Isle, Maine 04769

Re: Liability for the Maine Potato Tax

Dear Ed:

The purpose of this letter is to review the position of the Attorney General's Office in regard to the applicability of the Maine potato tax established pursuant to Title 36 M.R.S.A. § 4561, et seq. to potatoes which are part of the so-called "Federal Diversion Program." As you know, on November 6, 1978, this office issued an opinion at the request of Representative Luman Mahaney which indicated that potatoes which were part of this program were subject to the State's potato tax.

Subsequent to the issuance of the Mahaney opinion, the Maine Potato Commission inquired as to who would be liable for the payment of the potato tax. In addition, Mr. Arthur Carroll of the Federal Agricultural Stabilization and Conservation Service (ASCS) provided us with a copy of certain rules and regulations adopted by the Food Safety and Quality Service of the Federal Department of Agriculture in regard to the Diversion Program in the State of Maine, 7 C.F.R. Part 2880. (These rules and regulations were published in the Federal Register on Friday, November 24, 1978, and a copy thereof is attached hereto for your information.)

Having reviewed the prior opinions as well as the applicable federal statutory authority and regulatory provisions, it remains the conclusion of this office that potatoes which are part of the current federal diversion program are subject to the potato tax for the reasons stated in the opinion to Mr. Mahaney on November 6, 1978.

Analysis of the various sections of Title 36 which establish the method of taxation indicates that liability for payment of the tax rests with the grower of the potatoes.* Basically, the Maine statute provides that every "shipper" of potatoes must obtain a certificate from the State Tax Assessor in order to sell or ship potatoes; see Title 36 M.R.S.A. § 4567. After having obtained the appropriate certification, a shipper must keep records of all purchases, sales and shipments of potatoes, showing the quantity of potatoes received, sold or shipped during the preceding calendar month; see Title 36 M.R.S.A. § 4569. A shipper must then file reports with the State indicating the amount of potatoes purchased, sold or shipped; see Title 36 M.R.S.A. § 4569 and § 4566.

In the present case, the term "shipper" means the grower of potatoes. The term "shipper" is defined as:

"Shipper" for the purposes of this chapter, shall mean any person, partnership, association, firm or corporation engaged in the business of any of the following:

"A. Agent or broker, by selling or distributing potatoes in commerce for or on behalf of growers or others, or by negotiating sales of potatoes in commerce for or on behalf of the seller or the purchaser, respectively;

"B. Dealer, by purchasing potatoes in commerce for resale to other than directly to consumers;

"C. Processor, as defined in subsection 5;

"D. Grower, only when selling potatoes to anyone other than the parties set forth in paragraphs A, B or C," Title 36 M.R.S.A. § 4562.7. (emphasis supplied)

The information provided by you and by the federal ASCS, does not indicate that either sub-§§ A, B or C is applicable. The federal government, which pays for the potatoes, does not sell, distribute, or negotiate the sale or resale of potatoes in commerce. See 7 U.S.C.A. § 612c and 7 C.F.R. §§ 2880.4, 2880.5 as to payment by the federal government, and 7 C.F.R. § 2880.10, 2880.15 as to the mandated use of potatoes. Nor does the federal government "process" the potatoes;

* It is not clear from information provided to us whether any of the diversion potatoes are being sold for processing into starch. To the extent this may be the case, these potatoes are subject to the State potato tax by the express terms of Title 36 M.R.S.A. § 4562.4; see also 7 C.F.R. § 2880.11, § 2880.12 as to "grade" requisites. Tax liability would attach as in the case of other processors.

see 7 M.R.S.A. § 4562.5; compare 7 C.F.R. §§ 2880.10 and 2880.13. Accordingly, the grower who sells potatoes as part of the federal diversion program is the "shipper" as defined by statute and is liable for the payment of the State tax.

The ASCS has raised the issue as to whether or not anyone is liable for the tax inasmuch as it is their opinion that potatoes are not being "sold." As a general rule of statutory construction, words are to be given their plain meaning, consistent with their context and the subject matter and purpose of the statute, see, e.g., State v. Granville, 336 A.2d 861 (Me., 1975); Finks v. Maine State Highway Commission, 328 A.2d 791 at 798 (Me., 1974). In general, the term "sell" means to give up or make over to another for a consideration, see, e.g., The American College Dictionary.

In the present instance, the Maine potato farmer gives up his possession and/or control of certain potatoes in exchange for payment by the federal government. The statutory and regulatory provisions governing such program at the federal level do not indicate otherwise.

Title 7 U.S.C.A. § 612c provides, in pertinent part, that federal diversion programs may exist to:

" * * * (2) encourage the domestic consumption of such commodities or products by diverting them, by the payment of benefits or indemnities or by increasing the utilization through benefits, indemnities, donations or by other means, among persons in low income groups as determined by the Secretary of Agriculture; * * *."

The regulations adopted by the federal government for the present diversion program indicate, in a general statement, that the program is to

"make payment for the diversion for use as livestock feed of 1978 crop potatoes produced and stored in certain Maine townships designated in section 2880.3, subject to the terms and conditions set forth in this subpart," 7 C.F.R. § 2880.1 (emphasis supplied)

Payment is made for diversion of potatoes in a manner described by the regulations; 7 C.F.R. § 2880.5. So long as compensation is provided for control of the potatoes involved, it appears that this transaction would be within the normally understood meaning of the term "sell." As to the federal control of the potatoes, please refer to 7 C.F.R. § 2880.6, § 2880.10, § 2880.12, § 2880.14, § 2880.15, § 2880.17.

The Maine Law Court has found that the applicability of a tax is the rule and an exemption is the exception. A person claiming to be exempt has the burden of proving that the tax was not intended to apply. Bouchard v. Johnson, 151 Me. 41, at 46 (1961) (sales tax). While it is admittedly true that the diversion potatoes are not sold in the typical commercial manner or through what might be considered normal channels, this does not appear to be sufficient basis to find them exempt from the purview of the State tax. Compare 36 M.R.S.A. § 4562.7.A and § 4562.7.B which specify "commerce" with 36 M.R.S.A. § 4562.7.D which speaks to any other sale.* These sections, when read in conjunction with the statute's history as discussed in the opinion to Mr. Mahanay, make clear that the potato tax is applicable to diversion potatoes.

Consistent with the preceding, it remains the position of the Attorney General's Office that the potato tax is due for potatoes which are part of the diversion program and should be paid upon payment for those potatoes from the federal government to the grower involved. It is the intention of this office to take whatever steps may be necessary to enforce compliance with the provisions of Title 36 M.R.S.A. § 4561, et seq. To this end, we have this day written to the Food Safety and Quality Service, United States Department of Agriculture to request copies of approved applications for approval for participation in the diversion program so that we may assure that there is appropriate compliance with Statelaw regarding certification of shippers and payment of the tax.

If you have further questions, please feel free to let me know.

Sincerely,



SARAH REDFIELD
Assistant Attorney General

SR:mfe

cc: w/enc: Raymond Halperin, State Tax Assessor
Joseph Williams, Commissioner of Agriculture
Honorable Luman Mahanay
Arthur Carroll, ASCS
Maine Potato Council
Barbara L. Schlei

* The ASCS has also indicated that in some instances the diversion potatoes will remain in the possession of the farmer who grew them, preserved only for use as livestock feed, see, e.g. 7 C.F.R. § 2880110. We have no data sufficient to indicate the number of instances in which potato farmers may also be involved in the feeding of their own livestock. Regardless of the possibility, the tax would still accrue on the "sale" of potatoes. The exception of 36 M.R.S.A. § 4565 for potatoes retained for seed or home consumption does not appear to be applicable to consumption by animals.