

# MAINE STATE LEGISLATURE

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# STATE OF MAINE

Inter-Departmental Memorandum Date May 29, 1980

To Thomas S. Squiers, Director

Dept. State Tax Division

Jerome S. Matus, Asst. Atty. Gen.

Dept. Attorney General

Subject Donation of Merchandise Returned for Replacement

By memorandum dated May 27, 1980, you provided the following facts:

A retailer "receives defective merchandise which is returned to them and for which full refund is made or which is replaced without charge, apparently, pursuant to a written or implied warranty. The defective merchandise which they receive from their customer is in turn donated to a charitable organization."

You then inquired: "Is there a use tax liability on the defective merchandise which they donate?"

In my opinion, there is a use tax liability on the defective merchandise measured by the sale price to the retailer of the defective merchandise purchased from its suppliers.

The term "sale price" is defined in the Sales and Use Tax Law in 36 MRSA § 1752 sub-§ 14. There are certain exclusions contained within the statutory provision. The pertinent exclusion reads as follows:

"'Sale price' shall not include allowances in cash or by credit made upon the return of merchandise pursuant to warranty, or the price of property returned by customers when the full price thereof is refunded either in cash or by credit. . ."

A "sale" under the provisions of the Sales and Use Tax Law requires a "consideration". 36 MRSA § 1752 sub-§ 13

The defective merchandise originally transferred to the customer was not transferred for a "consideration" within the meaning of the Sales and Use Tax Law as there was no "sale price" within the express terms of the Sales and Use Tax Law. There being no "consideration", there could be no "sale" and accordingly, no "retail sale".

Since the original transaction was not a "retail sale", the defective merchandise purchased from its suppliers was not sold at "retail sale". There was, however, an exercise by the retailer of a right or power over the defective merchandise incident to its ownership when the retailer subsequently donated the merchandise to charities. Such exercise was a "use" within the definition of "use" contained in the Sales and Use Tax Law. 36 MRSA § 1752 sub-§ 21.

It follows that a use tax is imposed on such "use" by the retailer as

"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 5% of the sale price." 36 MRSA § 1861