

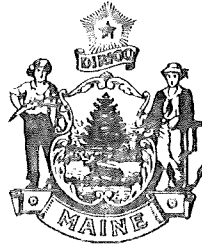
MAINE STATE LEGISLATURE

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JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

May 14, 1981

The Honorable Thomas M. Teague
Maine Senate
State House
Augusta, Maine 04333

The Honorable Bonnie Post
House of Representatives
State House
Augusta, Maine 04330

Re: May 6, 1981 Opinion Request
Donation of Merchandise Returned for Replacement.

Dear Senator Teague and Representative Post:

You have requested an opinion as to whether there is use tax liability on defective merchandise which a retailer donates to charity. The factual situation presented concerns defective merchandise which a customer returns to the retailer for a full refund or for replacement and which the retailer subsequently donates to a charitable organization.

The question of use tax liability was informally considered by this Department on May 29, 1980 in an inter-departmental memorandum to the Director of the State Tax Division, Bureau of Taxation, a copy of which is attached. We have re-examined this memorandum and have concluded that the reasoning and answer contained therein were correct and that there is a use tax liability on the defective merchandise imposed at the statutory rate of 5% of the sale price paid by the retailer to the supplier.

The definition of "use" found in the Sales and Use Tax Law reads as follows:

"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. . . .
36 M.R.S.A. § 1752, sub-§ 21.

It is apparent that the definition of a use is a broad definition encompassing any ownership right or power over tangible personal property purchased at retail sale. Furthermore, 36 M.R.S.A. § 1861 expressly provides that "[w]hen tangible personal property purchased for resale is withdrawn from inventory by the retailer for his own use, use tax liability accrues at the date of withdrawal." (Emphasis added.) Since, as noted above, use is generally defined as the exercise of any right or power over tangible personal property, it is our opinion that donating the property to a charitable organization falls within the scope of this provision.

In light of the apparent concern over this matter, some observations about the amount of the tax might prove helpful. As indicated previously, the tax is levied at the rate of 5% of the price which the retailer pays to the supplier. Thus, if the supplier gives the retailer a full refund or credit for defective merchandise, the tax, like the sale price, will be zero. Similarly, if the supplier gives a partial refund or credit, the use tax will be reduced proportionately.

Sincerely,

Stephen L. Diamond
STEPHEN L. DIAMOND
Deputy Attorney General

SLD/ec

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