

M e m o r a n d u m**295.0710**

To: Mr. Donald J. Hennessy

Date: Nov. 26, 1974

From: T. P. Putnam

Subject: Standby Charges

This is in response to your memorandum of November 21.

To recap the situation, it is my understanding that for a considerable time prior to 1972, our position was that an extra charge for "standby" time made in connection with the delivery of ready-mix concrete was not includable in the measure of sales tax. This position was expressed in former Annotation 205.0600

In 1972, Annotation 205.0600 was deleted, causing much concern since our personnel as well as a large number of taxpayers had long relied on the annotation. Accordingly, CLD 289 was issued, stating that the provisions of the annotation should continue to be followed pending further notice.

The question now is whether to continue to follow the annotation or change our position.

I agree with you that we should not change our position since there is no clear basis for doing do.

It appears that a charge for "standby" time is part of the charge for transportation and is includable or excludeable from taxable gross receipts in accordance with Section 6012(c)(7). Thus, where the retailer performs the transportation, separately stated charges for standing by after the sale occurs, i.e., after title passes, are excluded from the measure of tax.

If the contract requires delivery at destination, title passes on tender there (U.C.C. §2401(2)(b)). Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time, and place for tender are determined by the agreement. In particular, tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession. (U.C.C. §2503(1)(a).)

Exactly when tender occurs will depend on the particular facts. Tender can certainly occur and result in passage of title before unloading. I would think that it would not occur until after a period reasonably necessary to enable the buyer to take possession. That period, however, is far from clear. In the typical case of delivery of ready-mix concrete, a period of time is allowed for the position that the period "reasonably necessary" in such a case has passed before standby charges are incurred.

As a general proposition, it would seem appropriate to presume in the absence of evidence to the contrary that where standby charges are made with respect to any goods after they have reached their destination and are available to the buyer to take possession, tender has occurred, title has passed, and the standby charges are not includable in the measure of tax.

I suggest that pending audits and petitions be resolved on the foregoing basis.

I will make a CLD of this letter so that it will be annotated in our Business Taxes Law Guide.

TPP:lb

Cc: Mr. Robert Nunes
Mr. Glenn Rigby