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**STATE BOARD OF EQUALIZATION**

May 26, 1953

Pacht, Tannenbaum & Ross  
Attorneys at Law  
6535 Wilshire Boulevard  
Los Angeles, California

Attention: Mr. ---

Re: ---

Gentlemen:

As indicated at the hearing, we are recommending deletion from the measure of tax items 3, 4, 5, 7, 8, and 11 as set forth in your petition for redetermination. With respect to item 17, the information which you have presented indicates that Mrs. Lucile Dayton was representing Dulien in arranging for the shipment of the barge to --- & ---, in Portland, Oregon. This item, therefore, falls within the tax exempt transactions set out in our Ruling 55, section A.l.c. For this reason, we are recommending that this item be deleted from the measure of tax.

With respect to item 19, the sale of three PC boats to the Government of Korea, it is our opinion that this sale was consummated in California and is subject to California sales tax. We have considered the argument set forth in your letter of April 27, 1953. From the facts there set forth and presented at the preliminary hearing, it appears that these boats were delivered to the Government of Korea in California and thereafter were towed to Long Beach Harbor for refitting and implementation with arms. This would be sufficient exercise of a right or power over the property incident to its ownership by the Government of Korea to fall within the definition of taxable use under section 6009 of the Revenue and Taxation Code. However, we do not base our decision solely upon that factor. We think the primary question is whether at the time of sale these vessels were sufficiently within the stream of foreign commerce to exempt them from tax under Article 1, Section 10, Clause 2 of the United States Constitution and section 6352 of the Revenue and Taxation Code. The use made by the Government of Korea of these vessels in the State of California indicates that they were not in the stream of foreign commerce until after they were refitted and armed.

We think that the taxability of this sale is governed by --- v. County of Merced, 337 U.S. 154; 93 L.Ed. 1276. We also think that case is a complete answer to your contention that all that the --- case calls for in order to exempt merchandise from tax under the Export Import Clause of the United States Constitution is a "practical certainty of non-diversion to domestic use and of shipment abroad". While the --- case does not involve the validity of the imposition of the sales tax, the reasoning of that case applies to sales tax as well as to any other tax. The --- case was concerned with a property tax and arose as follows: A cement plant in Merced County, California, was sold to a columbia corporation for export to South America. An export license was obtained, a letter of credit in favor of the seller was deposited here and title passed to the purchaser and possession was taken for the purchaser. A company was employed to dismantle the plant and prepare it for shipment. On March 5, 1945 (the tax date) 12% of the plant had been shipped out of the county. That portion was not taxed. The portion that was taxed included 10% which had been dismantled and crated or prepared for shipment, 34% which had been dismantled but not crated or prepared for shipment, and 44% which had not been dismantled. Before the end of January 1946, all of the property had been shipped and was enroute to South America. In upholding the validity of the tax the court quoted --- 116 U. S. 517, 29 L. Ed. 715 as follows: "... goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State or have been started upon such transportation in a continuous route or journey." The court then stated that the test in the --- case was fashioned to determine the validity under the Commerce Clause of a non-discriminatory state tax, but as the court noted in the --- Oil case it is equally applicable to cases arising under the Export-Import Clause of the United States Constitution. The court then continued stating that:

"Under that test it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. (Citation) The tax immunity runs to the process of exportation and the transactions and documents embraced in it. (Citation) Delivery of packages to an exporting carrier for shipment abroad (citation) and the delivery of oil into the hold of the ship furnished by the foreign purchaser to carry the oil abroad (citation) have been held sufficient. It is the entrance of the articles into the export stream that marks the start of the process of exaporation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.

"So in this case it is not enough that on the tax date there was a purpose and plan to export this property. Nor is it sufficient that in due course that plan was fully executed. Part of the plant that is taxed was dismantled, but it had not been delivered to any carrier for export or otherwise started on its journey on the tax date. It might still have been diverted into the domestic market. The fact that any such diversion would entail a breach of contract that a part of the plant had already started on its export journey, that an export license had been obtained and a letter of credit deposited in

this country increases the expectation on the tax date that exportation of the entire plant would eventuate. But that prospect, no matter how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed." (Emphasis added.)

We think that this case clearly indicates that the sale of the three PC boats to the Government of Korea was properly subject to California sales tax since, at the time of sale, the movement to foreign shores had neither started nor been committed and, in fact, after the sale had been consummated the boats remained in California for refitting and arming. For this reason, we cannot recommend any adjustment be made with respect to this item.

At the hearing you indicated that you desired to present additional information with respect to item 20 in your protest. In view of the fact that this item is not mentioned in your letter of April 27, 1953, we assume that you do not desire to present any further information, and therefore we are not recommending any adjustment with respect to this item.

You also request that the 10% negligence penalty asserted in the determination be eliminated on the ground that Dulien Steel Products, Inc., has a good record on sales tax compliance in general, that the sales which were the subject of the determination were handled by an auctioneer, and the circumstances considered in connection with the background of the company do not warrant any inference of intentional disregard of the Sales Tax Law or regulations.

In view of the fact we have recommended adjustments with respect to seven of the twenty-two items set up as taxable and that there is reasonable doubt as to the taxability of at least one other sale, we are recommending that the 10% penalty be abated.

Will you please advise us if you still desire a hearing before the Board with respect to this matter.

JHM:tj