

**M e m o r a n d u m****557.0025**

To: San Diego – District Administrator  
(WLW)

July 20, 1972

From: Tax Counsel (GJJ) - Headquarters

Subject: S--- C--- A--- P--- Co., Inc.

SR -- XX-XXXXXX

This is in reply to your memorandum of June 27, 1972.

You raise a question as to the application of the tax to delivery charges where delivery is made by taxpayer's own trucks. The general rule is of course that transportation charges are excludable where transportation is by facilities of the retailer only "...with respect to transportation which occurs after the sale is made to the purchaser." [Rev. & Tax. Code Sec. 6012.] Generally we have said that the sale takes place at the time title to the goods passes from the seller to the purchaser.

In the case before us taxpayer sells asphaltic products and mixtures, mineral aggregates, and rip rap. Taxpayer's retail price list for licensed contractors quotes prices on asphalt concrete and other products "FOB Plant + tax." Taxpayer has quoted all prices at its scales since it began operations in 1960. Previously, taxpayer would deliver materials at its plant to its customer's trucks or would provide for outside carriers if the customer did not furnish trucks. Transportation charges in these latter instances were separately set forth in taxpayer's sales invoices. Subsequently, taxpayer acquired trucks of its own and began making deliveries in some cases itself. Taxpayer did not alter its pricing and billing practices, other than to account for the cost of, and revenues from, its transportation operations. Transportation charges continued to be separately stated to the customer.

Taxpayer has used, since at least October 16, 1969, invoices which state:

"We make deliveries inside the curb line and on the lot at customer's risk only and accept no responsibility for damages resulting upon such deliveries. Title passes to the buyer upon delivery of goods to the carrier."

It appears that taxpayer uses these same invoices regardless of whether delivery is made by its own trucks, by means of an outside carrier, or into the trucks of the buyer at taxpayer's plant. It also appears that in instances where the customer does not furnish his own truck, taxpayer will, at its discretion and to meet its own business needs, elect between using its own trucks and trucks of an outside carrier.

It is clear that title would pass at taxpayer's plant in instances where an outside carrier is employed and in instances where the buyer furnishes his own trucks.

The question which is critical here is - - when does title pass in instances when taxpayer delivers by means of its own trucks?

Under the Uniform Commercial Code:

“Unless otherwise agreed the term F.O.B. (which means “free on board”) at a named place, even though used only in connection with the stated price, is a delivery term under which ...when the term is F.O.B. the place of shipment, the seller must at that place ship the goods...and bear the expense and risk of putting them into the possession of the carrier...” [Commercial Code Sec. 2319.]

Where the contract contains an FOB place of shipment term and there is no agreement “otherwise” as to delivery obligations of the seller, then title to the goods sold will pass upon shipment (here, at the seller's plant); provided, again, that there is not an explicit agreement with respect to title passage to the contrary [Commercial Code Sec. 2401].

In the case before us however, it would appear that the obligation of the seller with respect to the physical delivery of the goods does not end at his plant, where delivery is to be by his own facilities or by outside carrier, but that the contract would in fact require the seller to deliver the goods to their destination. This obligation is evidenced by the language of the invoice which limits the seller's responsibilities beyond the curb line of the jobsite. Thus we find that the FOB term is not controlling under the facts of this case as to whether these are “shipment” or “destination” contracts and that these are in fact destination contracts.

As previously indicated, unless otherwise explicitly agreed, title passes to the buyer upon tender at the destination of the goods if the contract requires delivery there. The question then becomes - - have the parties explicitly agreed that title will pass at the seller's plant in instances where delivery is by facilities of the retailer?

The Uniform Commercial Code provides that “agreement” means “the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance ...” [Commercial Code Sec. 1201.] Within the spirit of the code, contrary agreement can also be found “...in the circumstances of the case ...” [Commercial Code Sec. 2509, Comment 5.]

In the case before us, it appears that taxpayer has been using invoice forms which indicate that title passes "...upon delivery of the goods to the carrier..." in instances where a carrier is employed and in those instances where it makes delivery of its goods itself. It appears that as between seller and buyer it is a mere fortuity as to whether taxpayer uses an outside carrier to make delivery or its own trucks. It would not appear to be within the bargain of the parties to the individual sales contracts that title would pass at the plant or at the jobsite, depending upon the unilateral action of the seller. We thus think it appropriate to find in the circumstance of individual cases or as a course of dealing between the seller and individual buyers that the seller and its individual customers have explicitly agreed that title to goods sold will pass at the seller's plant. ["A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Commercial Code Sec. 1205.] This agreement may be found in interpreting the word "carrier" as used on taxpayer's invoice to include taxpayer's own carriage facilities.

The transportation charges in question are thus excludable from the measure of tax. Taxpayer might be advised that to forestall problems of interpretation in the future, taxpayer should seek to make it clear in writings forming a part of the contract that title passes to the buyer at seller's plant in instances where delivery is by taxpayer's trucks.

Keeping in mind your admonition that we review this question from a realistic viewpoint, we note that merely because title passes upon shipment it does not follow that risk of loss passes to the buyer at the same time. In fact, it would appear that risk of loss passes to the buyer, where delivery is by the carrier, upon tender of delivery at the jobsite and, where delivery is by taxpayer's own trucks, on the buyer's receipt of the goods (since the seller is a "merchant") [Commercial Code Sec. 2509].

GJJ/ab