

M e m o r a n d u m**557.0210**

To: Mr. J. A. Najarian

October 31, 1974

From: Gary J. Jugum

Subject: A--- A--- Corporation

SS --- XX XXXXXX

This is in response to your memorandum of September 12, 1974, in which you asked our opinion on the application of Regulation 1628 to the exclusion of transportation charges from the measure of tax on sales by A--- of conductor cable to P---

The information available to us is that A--- has sold aluminum cable to P--- "F.O.B. shipping point with freight allowed to [P---'s] warehouse destination on [shipments of] 2,500 lbs. or more." Some of the shipments are made by common carrier, and some of the shipments are made by common carrier, and some of the shipments are made in A---'s own trucks.

We are of the opinion that the aluminum cable in question is sold for a "delivered price" within the meaning of that term as it is used in our Regulation 1628. Separately stated transportation charges are thus excludable from tax only if transportation occurs "after the sale of the property is made to the purchaser." Generally, the sale is regarded as having taken place at the time title to the goods passes from the seller to the purchaser.

The information which we have is that the contract of sale in the case before us does not contain a title provision. Title thus passes, in accordance with Section 2401 of the Uniform Commercial Code and paragraph (b)(3)(D) of our regulation, at the time and place at which time the retailer completes his performance with reference to the physical delivery of the property. Section 2319 of the Uniform Commercial Code provides that:

"The term F.O.B....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 in the manner provided in...[Section 2504 of the Commercial Code] and bear the expense and risk of putting them into the possession of the carrier."

In other words, the contract is a "shipment contract," when the contract contains an F.O.B. place of shipment term. Title thus passes, in accordance with the rule stated in Section 6401(2)(a) of the Commercial Code, at the time and place of shipment. We are of the opinion that, when the property is shipped by an independent carrier, title passes when the goods are placed with the carrier. Separately state transportation charges are thus excludable from the measure of tax since transportation takes place "after the sale."

Where shipment is made by facilities of the retailer, however, we are of the opinion that the contract is a "destination contract" despite use of the F.O.B. shipping point term. Section 2401(2)(b) of the Commercial Code provides that in the case of "destination contracts" title passes on tender of delivery at the destination. In other words, the sale takes place at the destination. Since transportation takes place prior to the sale and not "after the sale," the transportation charges are not excludable from the measure of tax.