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Op. 59-15

TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 9, 1959

Honorable Earl W. Fase
Tax Commissioner
Territory of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in reply to your request for advice as to the application of the general excise tax to retailers who ship by common carrier or who mail merchandise to addresses outside the Territory. This merchandise is not subsequently brought into the Territory by the addressee. We understand further that the retailers involved are not themselves the manufacturers or producers of the merchandise.

The point of shipment or mailing is in the Territory. Of course if the goods are shipped or mailed from a point outside the Territory to another point outside the Territory and not subsequently brought into the Territory neither the general excise tax nor the consumption tax applies.

The sale of supplies to ships is not involved. Those sales are taxable. What is involved here is merchandise shipped from the Territory to an out-of-the-Territory destination.

In the discussion below we will designate as Case 1 the instance in which mechandise is mailed by the store as an accommodation to the buyer who has inspected and accepted the merchandise but has the store mail or ship the package for him as his agent at his own risk or perhaps he will pay for having the package insured but the store assume no responsibility in case of loss.

Case 2 is where the buyer inspects the goods but the agreement is that it will be delivered to a point outside the Territory at the seller's risk and expense. In addition to the usual price a charge is made to cover this expense, but if insufficient the seller nevertheless is reponsible for delivery to the point outside the Territory.

Case 3 is where the goods are ordered by sample, or by mail or telephone order. In this case the buyer has not inspected or accepted the merchandise, which ultimately is delivered to a point outside the Territory by common carrier or mail.

Case 4 is where the goods are shipped or mailed to a foreign country.

If the buyer should take possession of the goods within the Territory and himself arrange the transportation which is to follow, this would be a clear case of local delivery subject to the general excise tax. The following cases involve instances in which the buyer was held to have taken possession of the goods within the state: Superior Oil Co. v. Mississippi, 280 U.S. 390, 1930; Superior Coal Co. v. Department of Finance, 377 Ill. 282, 36 N.E. 2d 354, 1941.

Where shipment is by common carrier or by mail and the arrangements are handled by the seller, further facts are necessary. If the goods are inspected and accepted within the state and shipped by common carrier at the buyer's expense and risk, this is deemed a local delivery. The leading case is Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, where the goods were, by the seller's agent, presented to the buyer's agent for inspection and acceptance within the state of Indiana. This was held to be a local delivery even though at the time of inspection and coincidental therewith the goods were loaded on railroad cars for Interstate transportation. Case 1 is deemed to be covered by this decision and the general excise tax applies.

The general excise tax does not apply in Case 2 or 3. In neither case is the sale completed within the Territory in such manner as to avoid the possibility of multiple tax burdens and present a case within the principle of Department Treasury v. Wood Preserving Corp. See for example Adams mfg. Co. v. Storen, 304 U.S. 307 and Standard Oil Co. v. Johnson, 147 P.2d 577 (Calif.). Of course the retailer must be able to show, by proper records, the amount not subject to the tax.

In Case 4 where the goods are shipped or mailed to a point in a foreign country, the general excise tax does not apply for that reason. The export clause of the Constitution of the United States, Article I, section 10, clause 2, gives a broader immunity than does the interstate commerce clause and

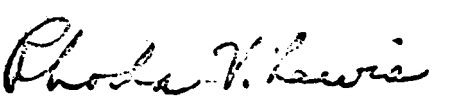
eliminates some of the fine points which apply under the Interstate Commerce clause. See Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69.

It should be emphasized that the principles above discussed are those applicable to goods outbound from the seller's state, which is the taxing state. Different principles apply when the goods are inbound to the buyer's state, which is the taxing state.

Dept. of Treasury v. Allied Mills,
42 N.E. 2d 34 (Indiana), affirmed
318 U.S. 740,

International Harvester Co. v. Dept. of Treasury, 322 U.S. 340.

Respectfully,



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