



STATE BOARD OF EQUALIZATION

February 11, 1970

Dear Mr. ---:

This is with reference to your letter of February 5 regarding the conclusions and recommendations I proposed to make in the "E" petition.

First, with respect to the "customs duty" issue you contend that the "customs duty" is a United States tax, other than a "manufacturer's or importer's excise", imposed with respect to a retail sale and is, therefore, properly excluded from the taxable amount.

We disagree for several reasons. The tax imposed by California is a sales tax levied against the contractor-retailer, and is measured by the cost (to "E") of the fixtures.

Subdivision (c) of Ruling 11, a copy of which is enclosed, provides:

"Contractors are retailers of 'fixtures' which they furnish and install and tax applies to the retail selling price thereof; which, in the case of lump-sum construction contracts, is regarded as the cost price of the fixtures to the contractors." (Underlining added.)

The next question is how do you compute the sales tax of the fixtures under a lump-sum construction contract? To put it another way, can we deduct the "custom duty" paid to get the fixtures in this country when determining what the cost price of the fixtures were to "E"?

Sales price is defined under Section 6011 of the Revenue and Taxation Code and the definition contains certain exclusions. The exclusion which is in issue here reads:

"Sales price' does not include any of the following:

* * *

"(d) The amount of any tax (not including, however, any manufacturers' or importers' excise tax) imposed by the United States upon or with respect to retail sales whether imposed upon the retailer or the consumer."

Section 1483 of Title 19 of the United States Code reads in part:

“(1) All merchandise imported into the United States shall be held to be the property of the person to whom the same is consigned; and”

Importers become personally indebted to the United States for duties on goods, and the consignee is for this purpose treated as the owner and importer. (Meredith v. U.S., 38 U.S. 486 [1839].)

Where performance of purchase contract resulted in importation of merchandise, in determining whether purchaser was the importer in constitutional sense, it was immaterial whether title to merchandise imported vested in purchaser at time of shipment or only after its arrival in United States. (Hooven & Allison Co. v. Evatt, 324 U.S. 652; rehearing denied, 325 U.S. 892 [1945].)

The purpose of section 1483 is to prevent frauds on government arising from collusive transfers (LaFontan v. Elting, D.C., N.Y. [1931] 54 F.2d 664; reversed on other grounds, 58 F.2d 180).

You have not submitted any proof that “E” was the consignee of the goods in question. The fact that the selling price included the amount that would be paid to United States customs is circumstantial evidence that the seller may have been the consignee.

Be that as it may, notwithstanding the possibility that pursuant to the provisions of section 1482, “E” may have been the party the United States would deem liable for the duty on the importations, it is our opinion that the provisions of Section 6011, cited above, dictate the course that must be taken and is controlling. Further, the sales tax counsel ruling you cited from Cal. Tax Service at paragraph 1517.21 is not applicable since it relates to the issue of whether amounts paid to the United States customs as duty on imports must be included in the measure of use tax liability as in the case of materials purchased abroad and imported for consumption by construction contractors. Incidentally, if the goods in question had been materials rather than fixtures, we would have an additional amount of tax under the contract due to charges for what would be fabrication labor.

Section 6011 provides that all taxes which are imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer, are not to be included in the sales price. The section specifically provides that it does not apply to any manufacturers’ or importers’ excise tax. Thus, by excluding the manufacturers’ or importers’ excise taxes from the exclusion, they are included in the definition of what constitutes the sales price.

This brings us to the question of whether importers’ excise tax is the same thing as “customs duty”. It is your position that it is something different, but no authority has been cited to support such a position.

We say there is no difference. To support this, we go back to the very heart of the source of the words, the United States Constitution, and Article I, Section 8, Clause 1 – Taxation, which provides:

“The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the debts...but all Duties, Imposts and Excises shall be uniform throughout the United States.”

Over the years the courts have been confronted with the question of whether there was any difference between the meaning of duties, impost and excises. In Thomas v. U.S., 192 U.S. 363 (1940), Chief Justice Fuller, who delivered the opinion of the court, said these terms (duties, impost and excises) were used comprehensively to cover customs and excise duties imposed on importation, consumption and manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like.

There have been many definitions of “excise” laid down by the courts. It is an impost for a license to pursue certain callings or to deal in special commodities or to exercise particular franchises. It has been defined by some courts as any tax not falling within classification of poll or property tax, and any tax which is not directly on property or the rents and incomes from real estate. It has been called “duties” laid on manufacture, sale or consumption of commodities, or upon certain callings or occupations.

The court in Thomas v. U.S., supra, said that the terms were used comprehensively. Thus, it is our opinion that an importers’ excise tax, (as the term is used in Section 6011 of the California Revenue and Taxation Code) covers, includes and means customs and excise duties imposed on importation. In other words, “customs duty” and “importers’ excise” are the same thing.

“Duties” has been defined to include in its most usual signification to be the synonym of impost or customs; but it is sometimes used in a broader sense, as including all manner of taxes, charges, or governmental impositions. (Cooley v. Board of Wardens, 12 How. 299; 13 L.Ed. 996 [1851].)

“Custom Duties” were defined as taxes on the importation and exportation of commodities; the tariff or tax assessed upon merchandise, imported from or exported to a foreign country in U.S. v. Sisco, D.C. Wash.; 262 F. 1001, 1005 (1919).

“Imposts” are taxes, duties or impositions levied for divers reasons (Crew Levick Co. v. Commonwealth of Pennsylvania, 245 U.S. 292; 62 L.Ed. 295 [1917]).

Summarily, it is our opinion that the “customs duty”, regardless of who paid it or who, under the United States Code, Title 19, was deemed liable for payment, was an “importers’ excise tax” and pursuant to Section 6011, cannot be excluded from the “sales price” of fixtures “E” purchased and resold as a ruling 11 construction contractor-retailer.

Second, you contend that your letter of January 10, 1970 clearly establishes that charges for installation supervision were included in the lump-sum purchase price of the property in question. Reference was made to paragraph 6 (Erection Supervision) to support this point.

The erection supervision clause contains reference to who pays for such things as transportation, housing and subsistence of supervisors, and under what conditions they will be paid. These were not part of the lump-sum contract.

It appears that the vendor contemplated paying, out of his own pocket, initial transportation of supervisors to the jobsite, their housing and their subsistence.

It is our opinion that the lump-sum package included supervision services that were a built-in part of the sale. The compensation clause makes no mention of services (wages) of supervisors that the vendor agreed to furnish. On reading section 6, it is clear that the amount of services to be furnished was unknown, and those services were inextricably a part of what was sold. We construe this as "services which were a part of the sale".

Again, we cite Section 6011:

"6011... 'Sales price' means the total amount for which tangible personal property is sold or leased or rented, as the case may be, valued in money or otherwise, without any deduction on account of any of the following:

"(a) The cost of the property sold.

"(b) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses.

"(c) The cost of transportation of the property, except as excluded by other provisions of this section.

"The total amount for which the property is sold or leased or rented includes all of the following:

"(a) Any services that are a part of the sale." (Underlining added.)

The sales price stated under section 9 of the contract (Consideration) included supervision services agreed to be furnished and they were a part of the total sales price and a part of the sale, and under Section 6011 cannot be excluded from the sales price of fixtures "E" purchased and resold as a ruling 11 construction contractor. In other words, whatever the services may have cost the vendor, they were an inextricable built-in part of the cost of the fixtures to "E".

Third, we agreed that, in the case of fixtures which contractors under ruling 11 are deemed to have sold at retail, the tax liability would arise when the property loses its character as an import. In this instance, it would be when the property is uncrated for installation.

Your have not produced anything in the way of proof of dates of entry into California or of dates when you believe the tax liability actually arose.

If you have another date or dates which, when proven, will support an adjustment to the computation of interest we will certainly recommend the adjustment.

On the fourth item relating to your claim that the contractor's exemption (Section 6376) results in a tax rate of 2.25 percent state tax, and 1.0 percent local tax, our position was quite clearly stated in the letter to you dated January 30, 1970.

At this point, we see only one possible area for any adjustment and that is the interest computation which you raised as an issue last May 1, 1969 in the petition of "E". It has been nine months, and still we have not received anything to support an adjustment to the interest.

Under the circumstances, and in the interest in expediting this matter I am amending my recommendation of January 30, 1970 as follows:

No adjustments to the item under protest as to any of the issues raised.

If a Board hearing is desired, please notify use in writing by Monday, March 2, 1970.

Very truly yours,

Robert H. Anderson
Tax Counsel

RHA/vs [lb]