

M e m o r a n d u m**330.2792**

To: Headquarters – Petitions Unit

Date: April 15, 1963

From: Tax Counsel (CCK) - Headquarters

Subject: P--- Corporation
--- and --- Streets
--- XX, ---

SO- --- -X-XXXXX

This is in reply to your request of September 4, 1962, for an opinion concerning the applicability of tax to the second of the two transactions in question. Please refer to our letter of October 23, 1962, with respect to the taxability of the first transaction.

Our understanding of the facts is as follows:

1. April 5, 1960. Taxpayer contracted to lease equipment to lessee.
2. November 17, 1960. Taxpayer installed the equipment in the lessee's office.
3. November 28, 1960. Taxpayer contracted to, and did[,] transfer to P--- Lessor (P/L) title to the equipment which was the subject matter of the lease agreement between taxpayer and lessee.
4. This lease agreement contained the following terms:
 - (a) Taxpayer sold to P/L the equipment subject to the lessee's rights under its lease contract of April 5, 1960.
 - (b) Taxpayer's rights under that lease contract were assigned to P/L.
 - (c) P/L's rights, however, were subject to lessee's purchase option right.
 - (d) If lessee defaults on the lease contract, taxpayer will repurchase the equipment from P/L or it will make the required rental payments to P/L in the amounts owed by lessee.

Taxpayer makes the following allegations in its behalf:

- 1.) We stated in our letter of November 20, 1960, that sales tax will not apply to the transaction.
- 2.) The transaction did not constitute a sale because P/L had none of the rights of ownership, such as possession, right to sell or lease the equipment, and risks of ownership.
- 3.) The transaction was made to resemble a sale in form only in order to obtain financing; and we ruled that the tax will not apply in a similar situation (pp. 3411 – 3412 of annotations, “Lease of Part of Aircraft”).

Upon reviewing the facts completely, we are of the opinion tax will apply to the transfer of title to the equipment by taxpayer to (--). In this case, taxpayer expressly recited that it was selling to (--) the equipment described in the rental contract of April 5, 1960, with immediate passage of title to the equipment. The fact that (--) never had possession of the equipment would not in itself prevent a taxable sale since section 6006 defines a sale to include “any transfer of title or possession, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.” Although (--) did not have the right to sell or lease the equipment to anyone other than the lessee since it had agreed to purchase the equipment subject to such obligations, it did have the power to sell or lease the equipment to any other third parties. Of course, if (--) did sell or lease the equipment to third parties, it would have been liable for damages to both taxpayer and the lessee.

Although taxpayer may have worded the agreement in the form of a sale to obtain financing, It would be inconsistent to hold that an agreement will constitute a sale contract for the purpose of obtaining financing but something less than a sale for sales tax purposes. If a seller volitionally enters into an agreement and decides to term it a sale contract in order to derive the benefits obtainable in calling it a sale, he must accept the tax consequences which arise as a result of his voluntary action.

With respect to our letter of November 22, 1960, we replied, “Where title passes to property which is situated in California, the transaction is a sale subject to the California sales tax. If title to the property passes (to Philco Lessor) before the equipment is moved to California, then it is Philco Lessor which is making a taxable use....” This statement is clearly consistent with the board’s action in determining the sales tax for the sale of equipment by taxpayer to P/L.

Finally, our ruling of May 14, 1958, to which taxpayer makes reference, is inapplicable here. In that situation, the question was whether or not the aircraft exemption of section 6366 would be affected by transferring title to part of the aircraft to a third party.

CCK:o;b

cc: Out-of-State District Administrator
New York – (SS)