

M e m o r a n d u m**440.0054**

To: Inglewood – Auditing (JKI)

Date: Feb. 17, 1977

From: Tax Counsel (GJJ) - Headquarters

Subject: P--- M--- Corp.

S- -- XX XXXXXX

This is in response to your memorandum of January 19, 1977.

You have raised a question as to whether the referenced taxpayer is selling special tooling to the customers for whom it manufactures parts.

We understand that taxpayer is a manufacturer of plastic parts, primarily for use in the construction industry, who manufactures and maintains an inventory of standard catalog items for sale.

From time to time he receives orders for special custom made items. In order to produce these new articles, it is necessary for taxpayer to produce new tooling, the cost of which must be borne by his customer.

Taxpayer takes the position that it has not sold the tooling in any circumstance. For the most part you have agreed with taxpayer's concept that it is a consumer of tooling and not the seller of tooling. In certain instances, however, where taxpayer's customer's purchase order specifically calls for tooling, you have taken exception and have concluded that a sale of the tooling occurred.

You have provided us with four sets of documents related to four of taxpayer's customers which illustrate the problem.

On additional point was raised during your discussion with taxpayer. Taxpayer states that many of the custom made items will appear in the future as standard catalog items. If ordered, taxpayer states that they will be manufactured from the tooling since the tooling is invariably retained on taxpayer's premises. Unless there is some specific restriction placed on the tools used for the benefit of taxpayer's customer and if the part produced may have utility to others, the part will usually become a catalog item. Of the four situations presented for our consideration, it is your understanding that the tooling manufactured for P--- H--- Corporation is for the exclusive use of that customer.

Whether or not the tooling has been sold is a murky question of fact in each instance, depending upon the terms of the contract between taxpayer and each individual customer.

We note initially that Sales Tax General Bulletin 50-24 plays no direct part in determining whether or not the tooling is sold. That bulletin provides only that it will be presumed that the manufacturer acquired the part on behalf of the customer or for immediate resale to him, in certain circumstances described therein, if the manufacturer delivers it to the customer or holds it as bailee for the customer. In other words, the bulletin deals with time of passage of title and not with the issue as to whether there was a passage of title.

We are of the opinion that the section of the Uniform Commercial Code to be applied to the facts before use is Section 2207 concerning additional terms in acceptance or confirmation. That section provides in relevant part as follows:

“(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

“(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

“(a) the offer expressly limits acceptance to the terms of the offer;

“(b) they materially alter it; or

“(c) notification of objection to them has already been given or is given within a reasonable time after notification of them is received.”

We note that the tooling in question is produced in connection with taxpayer's sale of parts made from the tooling. We are thus of the opinion that the question as to who has title to the tooling is a question as to the terms of the contract for the sale of the parts. That is, we think these cases should be analyzed not from the point of view of whether there was an independent contract to sell the tooling but whether, under the contract to sell the parts, title to the tooling remained in the manufacturer or was passed to the customer.

Comment 6 to Section 2207 provides as follows:

“Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract.”

Preliminarily, we note that the fact that the tooling was not delivered to the customer is evidence that the tooling was not sold. In addition, there is no strong evidence that the parties formally recognized taxpayer as the bailee of the tooling.

Apparently in all instances taxpayer furnished to its customer a quotation form containing a printed statement as follows:

“All cavities, dies, their engineering and design are and shall remain the exclusive property of P--- M--- Corporation who will retain sole possession thereof notwithstanding the method or manner of quotation by seller of payment by buyer.”

The charge to be made for production of the tooling is specified on the quotation form, as well as on subsequent sales invoices and bills of lading, as an “engineering fee.”

1. T--- Inc.

Taxpayer’s quotation of August 1, 1975, states an engineering fee of “\$975 to produce the above part in a PMC production mold base.” The quantity and price quotation for the part is “\$60.00/M.” T---, Inc.’s purchase order dated August 12, 1975, recites “TOOLING...” \$975/, “[TOOLING] TO BE MAINTAINED AT P--- M--- CORPORATION.”

The purchase order provides on its back as follows:

“This purchase order constitutes Buyer’s offer to Seller, and becomes a binding contract on the terms set forth herein when it is accepted by Seller either by acknowledgment or the commencement of performance hereof. No revisions to this order shall be valid unless in writing and signed by an authorized representative of Buyer; and no conditions stated by Seller in accepting or acknowledging this order shall be binding upon Buyer if in conflict with, inconsistent with, or in addition to the terms and conditions contained herein unless expressly accepted in writing by Buyer.

“Title to and the right of immediate possession of all tooling, designs, patterns, drawings, materials and dies furnished by Buyer to Seller for use hereunder are/or constructed by Seller for use hereunder, shall be and remain in Buyer at all stages of construction....”

We are of the opinion that T---’s purchase order states a “different” term from taxpayer’s quotation with respect to title to the tooling and that T---’s acceptance is not expressly made conditional on assent to the different term within the meaning of Section 2207. the additional term with respect to the tooling is to be construed as a proposal for addition to the contract. In accordance with the rule stated in Comment 6 the conflicting term does not become a part of the

contract. The contract is thus silent as to ownership of the tooling, and a transfer of title cannot be inferred.

(If a copy of the quotation form was not furnished to the customer, then title to the tooling passed to the customer. We note here that pursuant to Sales Tax General Bulletin 50-24 it should be presumed that taxpayer sold the tooling to its customer upon completion of the fabrication thereof and that taxpayer made no intervening taxable use of the tooling.)

2. S--- S--- Corporation

The customer's purchase order dated June 27, 1975, lists "This order to cover cost of change to unit mold purchased on our P.O. 19599...." [Emphasis added.] The customer thus appears to regard itself as the owner of the tooling. Taxpayer's quotation dated July 10, 1975, specifies "ENGINEERING FEE: \$250 to modify the existing tooling."

The "terms and conditions" specified on the customer's purchase order were not furnished with your memorandum. If the terms and conditions were silent with respect to tooling, then we are of the opinion that the term as to tooling communicated to the customer on taxpayer's quotation form would govern and that there would have occurred no sale of the tooling despite the conception of the purchaser to the contrary.

3. P--- H--- Corp.

Taxpayer's quotation dated July 31, 1975, specifies "ENGINEERING FEE: \$2250.00 to produce the above part in a PMC production mold base." Parts are listed at \$13.20 per thousand.

The customer's purchase order dated August 19, 1975, specifies "Revision of binder Channel Closure #155-PB-6600 Revised Tooling Charge." Terms specified on the back of the purchase order include:

"8. Special Tools: (a) Unless otherwise herein agreed, special dies, tools and patterns used in the manufacture of the articles herein ordered shall be furnished by and at the expense of Seller, shall be kept in good condition and, when necessary, shall be replaced by Seller without expense to Buyer.

"(b) Upon agreement of the parties Buyer may at any time reimburse Seller for the cost of the whole or any part of said special dies, tools, patterns and replacements and thereby become the owner and entitled to the possession of same.

“(c) If the price stated on the face hereof includes separately the cost of any dies, tools, and/or patterns acquired by Seller for the purpose of filling this order, such dies, tools, and/or patterns shall become the property of Buyer and Seller shall, to the extent feasible, identify [sic] said property as Buyer directs. When this order has been completed, such dies, tools and/or patterns shall be disposed of as Buyer may direct.”

“18. The Contract created by this Purchase Order, executed by Buyer and its acceptance by Seller is a complete and exclusive statement of the contract and supersedes, and this is merged herein, all prior and contemporaneous negotiations and may only be amended or supplemented or otherwise affected by an agreement in writing executed on behalf of Buyer by an authorized Officer thereof. Buyer will not be bound by any printed matter on Seller’s quotation form, sales form or the like, which imposes conditions of variance with the terms herein....”

As with the T--- situation, we are of the opinion that the term contained in the customer’s purchase order as to title to special tools does not become a part of the contract and that there is thus no basis for concluding that the customer acquired title to the property.

4. W--- E--- Co.

Here the quotation dated July 14, 1975, is for “ENGINEERING FEE: \$650 TO PRODUCE THE ABOVE PART IN A PMC PRODUCTION MOLD BASE.” There is a similar quote for another part.

W--- E--- Corporation’s purchase order dated August 11, 1975, describes the property ordered as ‘tooling to produce parts....’ The terms and conditions include the following:

“Title to, and risk of loss of, each product or part to be delivered hereunder shall, unless otherwise provided herein, pass for Seller to Buyer upon delivery of such product at the F.O.B. point designated on the face of this order.”

In this instance there is insufficient basis for concluding in the face of the tooling provision contained in the quotation, that the tooling was sold to the customer.

J:alicetilton

cc: Evaluation & Planning
San Jose – Auditing (FPH)