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Sales-Passing of Title

SALES—PASSING OF TITLE.—Income and profits taxes were assessed against respondent by petitioner in pursuance of an Act levying taxes on income derived from sources within the United States. Respondent was a Mexican corporation selling crude oil produced in Mexico to firms in the United States. The contracts of sale were negotiated and payments were made in the United States. The oil was shipped under either f. o. b. or c. i. f. contracts which provided for inspection and gauging by representatives of both the buyer and seller at the point of destination. The c. i. f. contracts provided for ultimate delivery at points within the United States. Held, the taxes were unlawfully assessed, since the income was derived from sources without the United States.[1]

In general, when there is a contract for the sale of unascertained goods, title passes when there is an unconditional appropriation to the contract, either by the seller with the consent of the buyer, or by the buyer with the consent of the seller, and delivery to a carrier for transmission to the buyer is presumptively an unconditional appropriation.[2] The assent by the buyer to the appropriation may be given in advance.[3] In cases of contracts providing for f. o. b. shipment,[4] this prior assent is presumed,[5] and title passes to the buyer when the goods are put into the hands of the carrier at the point of shipment.[6] That title passes on shipment is also true in case of contracts calling for shipment c. i. f.[7] point of destination.[8]

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32 Hearings Before House Subcommittee of the Committee on Ways and Means, 75th Congress, 1st Session on H. R. 8479, 35.

1 Commissioner of Internal Revenue v. East Coast Oil Co. (1936), 85 F. (2d) 322.

2 Uniform Sales Act, sec. 19; Alderman Bros. v. Westinghouse (1918), 92 Conn. 419, 103 A. 267; Smith v. Edwards (1892), 156 Mass. 221, 30 N. E. 1017; Robbins v. Brazil Syndicate (1917), 63 Ind. App. 455, 114 N. E. 707.

3 Northern Grain Co. v. Northern Trading Co. (1921), 117 Wash. 422, 210 P 903; Lieb Packing Co. v. Troche (1917), 136 Minn. 345, 162 N. W 449; Smith v. Edwards (1892), 156 Mass. 221, 30 N. E. 1017.

4 F. o. b. shipment is one where the goods are put into the hands of the carrier free of expense to buyer.

5 Alderman Bros. v. Westinghouse (1918), 92 Conn. 419, 103 A. 267; Standard Casing Co. v. California Casing Co. (1922), 233 N. Y. 413, 135 N. E. 834, Hoffman v. Wisconsin Lumber Co. (1921), 207 Mo. App. 440, 229 S. W. 289; Lieb Packing Co. v. Troche (1917), 136 Minn. 345, 162 N. W. 449; Hauck Food Products Co. v. Stevenson (1922), 203 App. Div. 308, 197 N. Y. S. 34.

6 Standard Casing Co. v. California Casing Co. (1922), 233 N. Y. 413, 135 N. E. 834; Hauck Food Products v. Stevenson (1922), 203 App. Div. 308, 197 N. Y. S. 34, Disch v. National Surety Co. (1922), 203 App. Div. 723, 196 N. Y. S. 833, Rosenberg Bros. v. Buffum (1922), 234 N. Y. 338, 137 N. E. 609; United States v. Andrews (1907), 207 U. S. 229, 28 S. Ct. 100; Detroit Southern R. Co. v. Malcolmson (1907), 144 Mich. 172, 107 N. W 915.

7 C. i. f. means that the price includes cost, insurance and freight.

8 Smith v. Marano (1920), 267 Pa. 107, 110 A. 94, Northern Grain Co. v. Northern Trading Co. (1921), 117 Wash. 422, 210 P. 903, Smith v. Moscahlades (1920), 193 App. Div. 126, 183 N. Y. S. 500; Bullard v. Grace (1924), 210 App. Div. 476, 206 N. Y. S. 335.

The Sales Act provides that, unless a different intent appears, if the seller agrees to pay the freight charges to the point of destination, the presumption is that title does not pass until delivery at that point.[9] However, in c. i. f. contracts a different intent does appear, for the seller is bound to insure for the benefit of the buyer and this is held to be sufficient to show that the parties intended title to pass on shipment.[10]

The provision in the contract for inspection and gauging at the point of destination does not prevent the passage of title on shipment.[11] That is, inspection is not a condition precedent to the passage of title. If the goods were lost or damaged in transit, the risk would be on the buyer. However, if the goods were defective when shipped or did not comply with the contract requirements, then title never passed, for there was no prior consent to the appropriation of any goods except such as complied with the contract. It follows, then, that in the present case the provision in the contract allowing inspection and gauging in the United States did not prevent the title from passing in Mexico. Since in the principal case, the sales were made on an open credit basis, the above discussion shows that the court was correct in holding that the sales were made in Mexico and that the income, therefore, was derived from sources without, and not within the United States.

However, a more difficult question would have arisen in case the seller had taken the bill of lading in his own name and sent it with drafts for the price to an agent for collection before the goods were to be given to the buyer. If this had been the case and both countries had similar revenue acts, the problem would arise as to which was entitled to tax the income. In such case the property interest or title would be retained by the seller until payment and the beneficial interest would pass on shipment. The Sales Act provides for this retention of legal title and for the passage of the beneficial interest.[12] It is submitted that the place where the beneficial interest and risk of loss passed to the buyer should govern.[13] In the first place, when title is retained solely for the purpose of security, the beneficial interest and risk of loss passes to the buyer on shipment.[14] Furthermore, from the time

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[9] Uniform Sales Act, sec. 19.

[10] Smith v. Marano (1920), 267 Pa. 107, 110 A. 94, Smith v. Moscahlades (1920), 193 App. Div. 126, 183 N. Y. S. 500; Vold, Law of Sales, p. 217.

[11] Pape v. Allis (1885), 115 U. S. 363, 6 S. Ct. 69; D. L. & W Ry. Co. v. United States (1913), 231 U. S. 363, 34 S. Ct. 65, Glass & Co. v. Misrock (1925), 239 N. Y. 475, 147 N. E. 71.

[12] The Uniform Sales Act, sec. 20, provides that: where goods are shipped and by the bill of lading are deliverable to the seller or order, the seller retains the property in the goods, but, if except for the form of the bill of lading, title would have passed on shipment, then the seller is deemed to have retained the property in the goods only for the purpose of securing performance by the buyer.

[13] Where the bill of lading is made out to the seller or his order, the property in the goods passes to the buyer when the latter secures the bill of lading by paying the draft, which is usually sent with the bill when the seller seeks security only. However, on shipment the beneficial interest and risk of loss has passed to the buyer. In this respect it would have seemed more desirable for the Sales Act to have used the term possession (or the *jus disponendi,* as suggested by Vold, Law of Sales, p. 326).

[14] Uniform Sales Act, sec. 22a, Alderman Bros. v. Westinghouse (1918), 92 Conn. 419, 103 A. 267, Maffei v. Ginocchio (1921), 299 Ill. 254, 132 N. E.

of shipment the buyer becomes liable for the price and the seller is not limited to an action for damages for breach of contract, for the beneficial interest, subject only to security title, has passed to the buyer.[15] These are the principal reasons why the place where beneficial interest passes should be controlling. Moreover, there are other factors which tend to show that, though legal title is in the seller, all of the incidents of ownership have passed to the buyer. It has been held that if the buyer makes and keeps good a tender of the price, he is entitled to the goods as against the seller, and, if, without default on the part of the buyer, the seller should sell or otherwise dispose of the goods, the buyer could hold the seller liable for conversion.[16] In addition, many courts speak of a divided property interest in the goods, or that title passes to the buyer and the seller retains only a right of possession, a *jus disponendi*.[17] While the problem was not presented in the present case, the trend of the decisions would tend to support the conclusion that for the purpose of taxation, the sale takes place where the beneficial interest passes to the buyer. R. E. M.

GUARANTY—SCOPE OF THE OBLIGATION.—Appellant brought an action for a declaratory judgment to determine her liability, if any, upon a purported guaranty of preferred stock certificates. Pursuant to a reorganization agreement, the name of a certain corporation was changed to the J. B. Hamilton Furniture Co., and $170,000 of preferred stock was issued by it and assigned to certain of the appellees. These certificates of preferred stock provided for an *absolute* payment of the par value thereof with cumulative dividends and possible penalties in ten years from the date of issuance. Pursuant to the original contract, the appellant and one J. B. Hamilton executed the following writing upon the back of each of the certificates of preferred stock: "We, the undersigned, guarantee the payment of this certificate of stock according to its terms." The corporation became insolvent and a receiver was appointed. Held, that even though the certificates of preferred stock created no enforceable primary obligation against the corporation, nevertheless the guarantor is liable for the failure to pay the amount thereof.[1]

This case raises a fundamental question in the law of Guaranty,[2] to wit: Is the scope of the guarantor's liability limited to situations where there is involved the debt, default, miscarriage, or other *obligation* of a principal?

518; Standard Casing Co. v. California Casing Co. (1922), 233 N. Y. 413, 135 N. E. 834, Smith v. Marano (1920), 267 Pa. 107, 110 A. 94.

[15] Maffei v. Ginocchio (1921), 299 Ill. 254, 132 N. E. 518; Rosenberg v. Buffum (1922), 234 N. Y. 338, 137 N. E. 609; Smith v. Marano (1920), 267 Pa. 107, 110 A. 94.

[16] Rudin v. King Richardson Co. (1924), 311 Ill. 513, 143 N. E. 119; Ogg v. Shuter (1875), L. R. 10 C. P 159.

[17] Standard Casing Co. v. California Casing Co. (1922), 233 N. Y. 413, 135 N. E. 834; Rosenberg v. Buffum (1922), 234 N. Y. 338, 137 N. E. 609; Rutonjee v. Frame (1923), 205 App. Div. 354, 199 N. Y. S. 523, Robinson v. Houston Ry. Co. (1912), 105 Texas 185, 146 S. W 537.

[1] Hamilton v. Meiks (Ind. 1936), 4 N. E. (2d) 536.

[2] For the purposes of this note any possible distinctions between Suretyship and Guaranty will not be considered, for it is believed that the principles discussed will apply to both concepts.