SYNOPSIS

DOCKET NO. 776

TAX SEGMENT: GROSS RECEIPTS TAXES

ISSUE: Whether or not the shipment of goods by a Wholesaler in interstate commerce with F. O. B. shipping point Wilmington, Delaware are subject to the Gross Receipts Tax; and, in the absence of statutory definition in 30 Del. C., Chapter 29, the applicable definition of what constitutes a sale.

TAB DECISION: The Board concluded that the goods passed from seller and buyer in Delaware and that as a result, the sale was consumated in Delaware. Therefore, the goods are taxable under the Gross Receipts Tax. Had the goods been shipped F. O. B. destination point and the destination point was outside the State of Delaware, the sale would not be taxable since the sale would not have taken place in Delaware under the UCC or the common law.

DECISION: For Respondent

DECISION DATE: March 9, 1984

TAX APPEAL BOARD OF THE STATE OF DELAWARE

FRANKLIN FIBRE-LAMITEX CORPORATION,	)	
Petitioner,	)	
v.	)	Docket No. 776
DIRECTOR OF REVENUE,	)	
Respondent.	)	

Before: Joseph S. Yucht, Esquire, Chairman; James C. Eberly, Sr., Esquire, Vice-Chairman; Nettie C. Reilly, Cyric W. Cain, Jr., and Harry B. Roberts, Jr., Members

Francis J. Trzuskowski, Esquire of Trzuskowski, Kipp, Kelleher & Pearce, P.A. for Petitioner.

John P. Fedele, Esquire, Deputy Attorney General for Respondent.

DECISION AND ORDER

Joseph S. Yucht, Esquire, Chairman: This appeal by Franklin Fibre-Lamitex Corporation (Petitioner) presents an issue of first impression: Whether the Delaware Gross Receipts Tax (30 Del. C. Chapter 29) is chargeable to and payable by a Delaware corporation, with a principal place of business in the State of Delaware, for shipments of goods which the corporation makes in interstate commerce to out of state customers and which are shipped F.O.B. (Free On Board) place of shipment - Wilmington, Delaware?

The facts in this case were stipulated by the parties and are as follows:

1. The Petitioner is a Delaware corporation with its principal place of business at 903 East 13th Street, Wilmington, DE 19899.

2. The Petitioner is a wholesaler as defined by 30 Del. C. Chapter 29 and is liable for the payment of gross receipts taxes to the State of Delaware in accordance with 30 Del. C. §2902.

3. All licensing forms designated as the monthly license form by the State of Delaware pertinent to the gross receipts tax were timely filed each month by the Petitioner for each month of the time periods now in question.

4. Forty per centum (40%) of Petitioner's Delaware shipments are to points outside of the State of Delaware, are made by United Parcel Service and the United States Mail and both parties agree that receipts from such sales are not taxable gross receipts under 30 Del. C. Chapter 29.

5. Fourteen per centum (14%) of Petitioner's Delaware shipments are to points outside the State of Delaware and are made by Petitioner's own truck deliveries and common carriers. Both parties agree that receipts from such sales are not taxable gross receipts under 30 Del. C. Chapter 29.

6. Of the various shipments made by Petitioner, 4% of the F.O.B. shipments are subject to approval sales and both parties agree that the receipts from such sales are not taxable gross receipts under 30 Del. C. Chapter 29.

7. The balance of the shipments as reflected in figures in Column 8 of Exhibits C-1, C-2 and C-3 of the Stipulation of Facts are shipments in interstate commerce and are shipments F.O.B. shipping point - Wilmington, Delaware - and are the shipments in issue.

The pertinent provisions of said Chapter 29 which the

Board must construe are:

1. 30 Del. C. §2902 (C)(1) which provides:
"In addition to the license fee required by subsection (b) of this Section, every wholesaler shall also pay a license fee at the rate of 4/10 of 1 percent of the aggregate gross receipts attributed to all goods sold by the wholesaler within the State,...." (Emphasis added)

2. 30 Del. C. §2902 (2) defines gross receipts as follows:
"(2) 'Gross Receipts' includes total consideration received by a wholesaler or retailer for all goods sold or services rendered within this State,...." (Emphasis added)

It is the Petitioner's contention that goods in interstate commerce are not subject to the Delaware Gross Receipts Tax. It contends that it makes no difference whether or not the goods are shipped F.O.B. shipping point or F.O.B. destination point, so long as the destination point is outside the State of Delaware. These goods are in interstate commerce and the State of Delaware is precluded from taxing these goods.

In support of this contention the Petitioner argues that the provisions of 30 Del. C. Chapter 29 do not contain a definition of the word sale or sold as those words are used in 30 Del. C. §2901 (2), and since this is a taxing statute, you look for a definition within the confines of Title 30. Chapter 19 of Title 30 pertains to the corporate income taxes and the following definition is found therein:

> "Gross receipts from sales of tangible personal property physically delivered within this State to the purchaser or his agent (but not including delivery to the United States Mail or to a common or contract carrier for shipment to a place outside this State)...." 30 Del. C. §1903 (b)(6)(c).

Petitioner argues that since said §1903 (b)(6)(c) was enacted

prior to the gross receipts tax chapter, the Legislature enacted the gross receipts tax "having in mind its previous statute on the subject of gross receipts which is included in Chapter 19". But the main thrust of Petitioner's argument is that the Commerce Clause of the U.S. Constitution prohibits Delaware from taxing goods in interstate commerce.

The Respondent contends that the Delaware gross receipts tax pertains to all goods sold in Delaware and if the "sale" took place in Delaware, then the Delaware Gross Receipts Tax is applicable. He further contends that the location of the sale is the key factor and since the sales were all F.O.B. Wilmington, Delaware, the sale took place where the title passed - Wilmington, Delaware. Therefore since the sale took place in Delaware, it is taxable.

Respondent argues that since said Chapter 29 does not define the word sale or sold, a definition may be found by resorting to other statutes in pari materia or by reference to the common law. The common law definition of a sale is the passage of title for money or consideration. In addition, Respondent argues that under the Uniform Commercial Code, a sale is defined as "the passing of title from the seller to the buyer for a price" (6 Del. C. §2-106) which is virtually the same as the common law definition. In addition, the U.C.C. further provides rules governing the passage of title for F.O.B. shipments, and these rules state that the title passes to the buyer at the time and place of shipment. [6 Del. C. §2-401 (2)(a)] Therefore, since title passed in Delaware to the buyer as a result of the sale F.O.B. Wilmington, Delaware, the goods were

sold in Delaware and Petitioner was subject to the Delaware Gross Receipts Tax.

We conclude that under the Gross Receipts Tax law of the State of Delaware - 30 Del. C. Chapter 29 - the Respondent's position is correct and that a valid assessment was made by Respondent.

The situs of a sale is controlling in determining whether it is taxable. 53 C.J.S. Licenses, §26b. What constitutes a sale is dependent on the terms of the statute, including any statutory definitions thereof, and in the absence of any statutory definition, the general rules applicable to sales will apply. 53 C.J.S. Licenses, §30(c). Since the provisions of 30 Del. C. Chapter 29 are silent on the matter, resort can be made to the U.C.C. as it defines the general rules pertaining to sales. The Respondent is not restricted to only the provisions of Title 30 in finding a definition of a word or phrase contained in Title 30. Accordingly, we conclude that title of the goods passed from the seller to the buyer in Delaware and that as a result, the sale was consumated in Delaware. Therefore, the goods were taxable under the Delaware Gross Receipts Tax. Of course, if the goods had been shipped F.O.B. destination point and the destination point was outside the State of Delaware, the sale would not have been taxable since the sale would not have taken place in Delaware under the U.C.C. or the common law.

In addition to the foregoing, another issue was presented. This issue is whether or not the notice of assessment dated December 28, 1981 for deficiencies in gross receipts taxes for the year 1978 is barred by the three year statute of limitations

for all months prior to December 1978? This argument was abandoned by Petitioner in its reply brief and the Board concludes that the Notices of Assessment made by Respondent were made timely and pertain to the tax years 1978 and 1979-1980 as stated in the Notices of Assessment. Since we have ruled that the sales in question were subject to the Delaware Gross Receipts Tax, the amount of the assessments will be based upon the sales figures as stipulated in Column 8 of Exhibits C-1, C-2, and C-3 of the Stipulation of Facts. In addition, interest thereon will be applied to the assessment.

IT IS SO ORDERED

Joseph S. Yurko

Dated: March 9, 1984

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21

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FRANKLIN FIBRE-LAMITEX CORPORATION,	)	
Appellant, Respondent Below	)	
v.	)	C.A. No. 84A-MY-2
DIRECTOR OF REVENUE,	)	
Appellee, Petitioner Below	)	

Date Submitted: February 8, 1985
Date Decided: August 28, 1985

Upon appeal from the Tax Appeal Board. Affirmed.

Francis J. Trzuskowski, Esquire, Trzuskowski, Kipp, Kelleher & Pearce, Wilmington, DE for appellant.

J. Patrick Hurley, Esquire, Department of Justice, Wilmington, DE for appellee.

Norris P. Wright, Esquire and Richard D. Kirk, Esquire, Morris, James, Hitchens and Williams, Wilmington, DE for C.E. Minerals, Inc., Amicus Curiae.

GEBELEIN, J.

PROTHONOTARY

BY M. M. pro B.R.

FILED:

TIME 2:11 pm.

DATE 8/28/85

This is an appeal by Franklin Fibre-Lamitex, petitioner below, from a decision of the Tax Appeal Board dated March 9, 1984 upholding a decision of the Director of Revenue including certain sales of appellant within those sales upon which a gross receipts tax would be imposed and assessing taxes thereon. C.E. Minerals, Inc., a subsidiary of Combustion Engineering, a corporation having its principal place of business in Stamford, Connecticut, was granted leave to appear as amicus curiae in this appeal as it has a similar case pending before the Tax Appeal Board. Appellant is a Delaware corporation with its principal place of business in Wilmington and is also a "wholesaler" as defined by 30 Del. C. Chapter 29.

According to the stipulated facts, a large percentage of appellant's sales are made by common carrier to out-of-state buyers F.O.B. (free on board) a shipping point located in Delaware.[1] This means that the buyer pays shipping costs, bears the risk of loss, and acquires title to the goods. See p. 3-4, infra.

The first issue presented by this appeal is whether the above sales were made "within this State" as that term is used in 30 Del. C. §2902(c) which states "every wholesaler shall also pay a license fee at the rate of 4/10 of one percent of the aggregate

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1 There is no substantial dispute as to the facts of this case. In essence, the parties stipulated to the essential facts and argued the case as a legal dispute to the Board.

gross receipts attributable to all goods sold by the wholesaler within this State."

"Sold within this State" is not expressly defined; it is therefore permissible to look to related statutes[2] and principles of statutory construction to determine its meaning.

The Corporation Income Tax, 30 Del. C., Chapter 19, employs the concept of "gross receipts" in its apportionment formula. That statute provides: Gross receipts from sales of tangible personal property physically delivered within this State to the purchaser or his agent (but not including delivery to the United States mail or to a common or contract carrier for shipment to a place outside this State)... . 30 Del. C. §1903 (b)(6)(c).[3]

This section does not include the language "sold within this State" nor does it seek to define such language. It does not say as appellant contends that goods delivered to common or contract carrier for delivery outside the State are not sold within

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> The rule is that all consistent statutes which can stand together, though enacted at different dates, relating to the same subject, are treated prospectively and construed together as though they constituted one act. DuPont v. Mills, Del. Supr. 196 A. 168, 177 (1937).

3

Subsequent to the decision of the Tax Appeal Board, 30 Del. C. Chapter 29 has been amended to provide the same exemption from its definition of gross receipts. Therefore, the decision of the Court is limited to the pre-amendment period.

the State. It is only saying that such goods will not be included in "gross receipts" in applying the income tax apportionment formula.

Another principle of statutory construction is "whenever the Legislature enacts a provision it is presumed to have had in mind the previous statutes relating to the same subject matter." Getty Refining and Marketing Co. v. Leavy, Del. Super., 438 A.2d 1236, 1238 (1981). The Legislature with the previous statute, 30 Del. C. §1903(b)(6)(c), in mind, enacted 30 Del. C. §2902(c) without the limiting language relating to delivery to a common carrier. This purposeful omission is a clear indication that the Legislature did not intend to limit the later statute in the same manner as it did the income tax.[4]

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Indeed, in the 1984 amendment adopting the exclusion of sales delivered to common carriers and the U.S. Mail from gross receipts tax for wholesalers, the General Assembly specifically noted that it was changing the present law:

> This act amends the definition of "gross receipts" applicable to wholesalers to provide for a "destination" test, rather than the present "passage of title" test, in determining taxable gross receipts from sales of tangible personal property within this State for license tax purposes. House Bill 686, 132nd General Assembly, Synopsis, p. 2 (signed into law July 17, 1984 as 64 Del. Laws, c. 374).

Thus, it is clear that the General Assembly in 1984 was of the opinion that its prior enactment of the Gross Receipts Tax Legislation in 1969 created a "passage of title" test as decided by the Tax Appeal Board in this case. While not dispositive of the issue, the legislative history lends support to the interpretation placed on this statute by the Tax Appeal Board.

There are other principles of statutory construction that can be used to determine what the Legislature intended by "sold within this State." When a revenue statute, like any other statute does not define its terms, it is proper to refer to common law. Wilmington Suburban Water Corp. v. Board of Assessment, Del. Super., 291 A.2d 293 (1972). The common law definition of a sale is the passage of title for money or consideration. In Re Pennsylvania Distributing Corp., 11 N.Y.S. 2d 718, 256 App. Div. 781 (1939); Benner v. Tacony Athletic Ass'n., 328 Pa.577, 196 A.390 (1938). The Uniform Comercial Code carries on this definition by defining "sale" as "the passing of title from the seller to the buyer for a price." 6 Del. C. §2-106(1). The U.C.C. further states, "if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment...." 6 Del. C. §2-401(2)(a). This section has its basis in the Uniform Sales Act. See U.C.C. §2-401 Official Comment (1978). And the Uniform Sales Act was "to a large extent merely declaratory of common law." 67 Am. Jur.2d, Sales §2. In addition, 6 Del. C. §2-401 (2)(a), can be viewed as providing statutory guidelines for the implementation of the common law definition of sale in commercial law. Either way, these definitions and/or guidelines can be used in construing the term, "sold within this State", as used in 30 Del. C. §2902(c)(1). Used as such, they provide strong support to the

Board's conclusion that the Legislature intended to include this category of sales within those to be taxed.

Additional support for this position is found in other states where the courts have used the Uniform Commercial Code to interpret provisions of taxing statutes. See, Crown Iron Works Co. v. Commissioner of Taxation, 214 N.W.2d 462 (Minn. 1974); and City of Richmond v. Petroleum Markets, Inc., 269 S.E.2d 389 (Va. 1980).

Finally, Comment 1 to §2-401 indicates that the draftsmen of the U.C.C. anticipated that courts would use §2-401 in situations where the passage of title is important.

> It is therefore necessary to state what a "sale" is and when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the "private" law.
> U.C.C. §2-401 Official Comment (1978).

The second issue presented by this appeal is the constitutionality of imposing the Delaware Wholesaler Gross Receipts Tax on sales made to out-of-state buyers with delivery by common carrier, F.O.B. shipping point.

Appellant argues that the sales in question are in interstate commerce because the physical delivery to the out-of-state buyers occurred outside the State of Delaware. Appellee does not contest this and the Court holds these sales to be in interstate commerce.

Any tax on interstate commerce, to be constitutional, must pass the four-prong test of Complete Auto Transit v. Brady,

430 U.S. 274, 51 L. Ed.2d 326, 97 S. Ct. 1076 (1977). That test can be summarized as follows: The tax must (1) be "applied to an activity with a substantial nexus to the taxing state"; (2) be "fairly apportioned"; (3) "not discriminate against interstate commerce"; and (4) be "fairly related to the services provided by the State." Id., 430 U.S. at 279. Appellant concedes that prongs (1) and (4) of the test are met. Our inquiry, therefore, is focused on the second and third prongs.

Turning to prong (2), it is clear the tax is "'apportioned exactly to the activities taxed,' all of which are interstate." Standard Pressed Steel Co. v. Washington Revenue Dept., 419 U.S. 560, 564, 42 L. Ed.2d 719, 724, 95 S. Ct. 706 (1975). As will be discussed later, no other state can constitutionally impose the same tax on the same gross receipts. This, in itself, is strong evidence that the tax is properly apportioned. As Amicus states in its reply brief, prongs (2) and (3) are somewhat similar in that the basic evil to be avoided is the disadvantage to which multiple taxation would put sellers in interstate commerce as compared to sellers in local commerce.

In addition, the Supreme Court has consistently upheld the taxing of 100% of the local incidents of interstate commerce. American Mfg. Co. v. St. Louis, 250 U.S. 459, 63 L. Ed. 1084, 39 S. Ct. 522 (1919); Western Livestock v. Bureau of Revenue, 303 U.S. 250, 82 L. Ed.823, 58 S. Ct. 546 (1938); Department of Treasury v. Wood Preserving Corporation, 313 U.S. 62, 85 L. Ed. 488, 61 S. Ct. 885 (1941); Tax Commission of Utah v. Pacific Pipe Co.,

372 U.S. 605, 10 L. Ed.2d 8, 83 S. Ct. 925 (1963); Washington Rev. Dept. v. Stevedoring Ass'n., 435 U.S. 734, 55 L. Ed. 682, 98 S. Ct. 1388 (1978). Delaware is doing no more than that which the Supreme Court found constitutional in the above cases.

The State is taxing the privilege of doing business in Delaware measured by the gross receipts from sales made in Delaware only. Although it is on 100% of those local incidents, by taxing only local incidents, the tax is apportioned by its very nature.

As already stated, prong (3) of the Complete Auto Transit test (discrimination against interstate commerce) is also satisfied. In Armco v. Hardesty, _____ U.S. _____, 81 L. Ed.2d 540, 104 S. Ct. 2620 (1984), the court discloses it is the potential of multiple taxation that violates prong (3).

This raises the question of whether another state could constitutionally impose the same tax on the same gross receipts, i.e., a tax on the privilege of doing business within that state measured in part by the gross receipts from sales made F.O.B. Wilmington. In Norton v. Department of Revenue, 340 U.S. 534, 71 S. Ct. 377 (1951), at issue was the Illinois occupation tax, which was imposed upon persons engaging in the business of selling tangible personal property at retail in Illinois. The tax was measured by gross receipts. Although the Court found the tax to be constitutional as it applied to a Massachusetts corporation for a majority of their sales, the Court had the following to say

about those sales made F.O.B. Worcester, Massachusetts directly to a customer in Illinois:

> The only items that are so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business are orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester. Income from those we think was not subject to this tax. Id. 340 U.S. at 539.

This decision would prohibit a state of destination from using sales made F.O.B. Wilmington in the measure of their gross receipts tax upon a Delaware wholesaler.

While General Motors Corp. v. Washington, 377 U.S. 436, 12 L. Ed.2d 430, 84 S. Ct. 1564 (1964) seems to lead to the opposite conclusion, it is easily distinguished. In that case the Court upheld a similar tax imposed by the state of destination, Washington, as it applied to wholesale sales made by General Motors to its retailers in Washington F.O.B. shipping point. In upholding this tax, the Court stated the burden was on General Motors to show multiple taxation and General Motors failed to make this showing. In the present case, if another state used the gross receipts of the sales F.O.B. Wilmington in the measure of a tax on appellant, multiple taxation could be clearly established. In addition, Armco makes it clear that multiple taxation no longer needs to be proved. Therefore, General Motors is not authority for the constitutionality of a gross receipts tax imposed by another state on the sales made F.O.B. Wilmington.

In an analogous situation, the United States Supreme Court found that a sales tax imposed by Arkansas on sales made by a Tennessee corporation, where title passed in Tennessee upon delivery to a carrier, violated the commerce clause, even though Arkansas was the state of destination. McLeod v. J.E. Dilworth Co., 322 U.S. 327, 88 L. Ed. 1304, 64 S. Ct. 1023 (1944).

These cases make it clear that another state could not constitutionally impose a tax on the privilege of doing business in that state measured in part by the gross receipts from the sales sent F.O.B. shipping point. Therefore, there is no danger of multiple taxation and prong (3) of the Complete Auto Transit test is met.

In addition, the constitutionality of the tax in question can be seen in cases where the Supreme Court has upheld taxes imposed by a state of shipping. In International Harvester Co. v. Department of Treasury, 322 U.S. 340, 88 L. Ed. 1313, 64 S. Ct. 1019 (1944), the Court stated,

> Here ... delivery of the goods in Indiana is an adequate taxable event....
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> * * *
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> The Wood Preserving Corp. case indicates that it is immaterial to the present issue that the goods are to be transported out of Indiana immediately on delivery. Id. 322 U.S. at 345, 64 S. Ct. at 1021.

At issue in International Harvester as in the present case, was a gross receipts tax.

In State Tax Commission of Utah v. Pacific States Cast Iron Pipe Co., 372 U.S. 605, 10 L. Ed.2d 8, 83 S. Ct. 925 (1963), at issue was a sales tax as it applied to sales made to out-of-state customers with title passing in Utah. Despite the certainty of interstate shipment, the Court upheld the tax saying,

> We reverse... on the authority of International Harvester ... which holds on facts close to those of this case that a State may levy and collect a sales tax, since the passage of title and delivery to the purchaser took place within the State. Id. 372 U.S. at 605.

For all of the above-stated reasons, the decision of the Tax Appeal Board is affirmed.

IT IS SO ORDERED.