

ST 2418 - SALES TAX : RETENTION OF TITLE CLAUSES IN SALE OF GOODS CONTRACTS

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TAXATION RULING NO. ST 2418

SALES TAX : RETENTION OF TITLE CLAUSES IN SALE OF
GOODS CONTRACTS

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I 1183692 RESERVATION OF TITLE
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RETENTION OF TITLE
CLAUSES
ROMALPA CLAUSES

PREAMBLE This Ruling considers the effect, for sales tax purposes, of retention of title clauses (also called reservation of title clauses and Romalpa clauses) included as part of a taxpayer's selling terms.

2. Retention of title clauses first came into prominence in the English legal system in 1976 as a result of Aluminium Industries Vaassen B.V. v Romalpa Aluminium Ltd (1976) 2 All E.R. 552. The purpose of the clauses is generally to provide protection for the vendor of the goods in the event of the purchaser failing to pay for the goods at the agreed time or becoming bankrupt or going into liquidation. In the latter situations, by retaining title, the vendor can protect itself against the claims of other creditors. This result is achieved by the vendor retaining title to the goods supplied to a purchaser while possession (and risk in those goods) is with the purchaser. Title in the goods is not intended to pass until either the final payment for the goods is made or the goods are sold by the purchaser to a customer.

FACTS 3. Decisions handed down in the English courts in recent years have confirmed the validity of retention of title clauses. This position has also been followed in Australia. In 1983 the Supreme Court of Victoria in the unreported case of Ralph McKay Ltd. v International Harvester Australia Ltd & Ors. upheld the validity of a retention of title clause.

4. A vendor can sell therefore under terms where title in the goods is retained subject to certain conditions being met. However, a retention of title clause may not always operate to keep title in the goods with the vendor. In certain situations the courts have held that title will pass notwithstanding that the goods may not have been paid for or the conditions of sale have not been fully met.

5. For example, it would seem that the goods must be able to be clearly identified if a retention of title clause is to be effective in retaining title in the goods. If the goods are mixed with others of a like character and cannot be identified then title will probably pass to the purchaser. An example

would be a supermarket where the purchaser removes the goods from the cartons and mixes them with like goods on his display shelves. A further example is where the goods involved undergo a process or treatment whereby their identity is lost. Title would probably also pass to a manufacturer where raw materials subject to a retention of title clause are consumed by the manufacturer in the manufacture of goods (see for example the case of *Re Peachdart Ltd* (1983) 3 All E.R. 204). The identity of the goods is lost and they cannot be recovered by the vendor even though they have not been paid for. In such a case the retention of title clause may convert to a charge over the manufactured goods, subject to the legal requirements for registration of such a charge.

RULING

6. There are no specific provisions in the sales tax law governing goods sold subject to a retention of title clause. Nor are there any specific provisions regarding the sale of goods. The most common taxing point is when goods are sold by wholesale - and when a sale takes place depends upon the ordinary legal meaning of the term 'sale'. In some particular instances the sales tax law deems a sale to take place. However, for the purposes of this Ruling those provisions are not relevant.

7. A sale in its ordinary legal meaning is the transfer of the ownership of property from one person to another for a money consideration (called the price). Where the transfer of ownership is dependent on the fulfilment of particular conditions, the sale does not take place until those conditions have been fulfilled and ownership of the property is transferred from the seller to the buyer. The general proposition concerning the transfer of property in goods is that the property passes to the buyer at such time as the parties intend, and this intention should be ascertained by reference to the terms of the contract, the conduct of the parties and the circumstances of the case. That is, the intention of the parties is to be judged objectively.

8. The retention of title does not necessarily mean that a sale of goods cannot take place. Although a person can legally sell goods with the title withheld, it is considered that for the purposes of the application of the sales tax law it is appropriate to consider the intention of the parties to the contract.

9. As indicated in paragraph 2 above, the purpose of selling goods subject to passing of title on certain conditions is to provide protection for the vendor in the event of the purchaser getting into financial difficulties. There is no intention on the part of the vendor and purchaser that a sale of goods will not take place. The clear intention of the vendor is to sell the goods to the purchaser and the purchaser at all times holds himself out to be the owner of the goods. On an objective view, a sale of goods takes place between the vendor and purchaser. The purchaser does not act as agent for the vendor, nor does he hold himself out to be agent. Nor are the goods sold on a consignment or sale or return basis.

10. Because it is the intention of the vendor to make a sale of goods to the purchaser, it is considered that, for sales tax purposes, a sale takes place when the goods are either delivered

or invoiced to the purchaser. The fact that title in the goods is retained by the vendor does not necessarily prevent a sale from taking place and a liability to pay sales tax arising at that time.

11. Apart from this general position there are practical reasons associated with the operation of the sales tax law why this view should be adopted.

12. In the first instance - as pointed out above - not all retention of titles clauses included in sale of goods contracts are effective. In many instances, title will pass to the purchaser because of the way the goods are dealt with e.g., where the goods change form or their identity is lost because of being incorporated into other goods or mixed with other goods.

13. Secondly, in attempting to meet a sales tax liability, a person who operates on retention of title clauses can encounter problems (apart from income tax complications relating to trading stock) in lodging a true and accurate monthly return, because he would not be aware at all times when the purchaser resells the goods. This is particularly the case where title passes on sale of the goods by the purchaser or is dependent on some other act of the purchaser. The vendor could, therefore, leave himself open to sanctions under the Taxation Administration Act for making a false or misleading statement if the return lodged does not accurately reflect the sales made for the month covered by the return.

14. A further problem concerns the position of freight. If property does not pass until payment, then prima facie the goods are sold on a freight-included basis. The terms of the contract cannot provide for property to pass ex-factory as well as on payment. While arrangements may be made between the vendor and purchaser to exclude freight costs from the sale value where property passes on payment, these would need to be very clear and the onus for meeting the freight costs would need to be clearly with the purchaser. Ordinarily, if property in the goods passes when the goods are in the purchaser's premises, freight will form part of the value on which tax is paid.

15. Therefore, retention of title clauses should not be treated as deferring the payment of sales tax. Taxpayers using such clauses are therefore required to furnish monthly sales tax returns on the basis of goods invoiced and delivered rather than on the basis of goods paid for.

16. Where goods on which sales tax has been paid are reclaimed pursuant to retention of title clauses, it is accepted that the goods have not gone into use or consumption. A refund of tax originally paid when the goods were first invoiced to the purchaser will be allowed where the goods are reclaimed by the purchaser. A liability will arise again when the reclaimed goods are resold in taxable circumstances.

17. This Ruling on retention of title does not affect the position of firms operating on floor plan or bailment arrangements that are commonly found in the motor vehicle, motor cycle, caravan and power boat industries. Bailment and floor plan arrangements are made under different contractual terms to the retention of title clauses of the kind covered by this

Ruling. Under bailment and floor plan arrangements the goods are effectively held on a consignment basis and the clear intention is that property will not pass until the goods have been sold by the retailer.

COMMISSIONER OF TAXATION

2 June 1988