

Opinion No. 43-4369

August 19, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Victor Salazar, Director, School Tax Division, Bureau of Revenue, Santa Fe, New Mexico

On August 9, 1943, you requested that I assist you in conducting a hearing concerning the liability, if any, of Clary and Lay for sales taxes in connection with the processing of dried eggs.

Pursuant to your request I was present at such hearing and have examined the record of the proceedings. The sole question to be decided is whether, under the facts as disclosed by the hearing, Clary and Lay sell directly to the United States Government or to the Fort Worth Poultry and Egg Company, since Section 76-1405 of the New Mexico 1941 Compilation specifically exempts sales made to the Government of the United States from liability for sales taxes.

The arrangement is as follows: Every day that Clary and Lay produce any processed eggs they wire the Fort Worth Poultry and Egg Company concerning the quantity produced and immediately proceed to draw a draft on the Fort Worth Poultry and Egg Company for the full value of the eggs, computed at two cents a pound below the price fixed by the United States Government. To obtain the full price set by the United States Government it is necessary to sell directly to the United States Government and wait a period of approximately sixty days to receive the money. The testimony disclosed that the financial condition of this company will not enable them to wait this period of time to receive payment. The evidence further disclosed that, previous to entering into the above mentioned arrangement with the Fort Worth Poultry and Egg Company, Clary and Lay unsuccessfully attempted to obtain a loan sufficient in amount to enable them to sell directly to the government, rather, as distinguished from the present arrangement, and wait the necessary 60 days for payment.

The evidence discloses that from the time of the drawing of the draft on the Fort Worth Poultry and Egg Company, Clary and Lay have no expectancy of receiving any additional amount. Their only interest from such time is to deliver to a common carrier an equal quantity of eggs as have already been paid for, meeting the proper specifications. If this is not done Clary and Lay must reimburse the Fort Worth Poultry and Egg Company for any deficiency. Your records disclose the following:

"Mr. Salazar: On whose order do you consign the products processed?"

"Mr. Laughlin. On the order of the Fort Worth Poultry and Egg Company according to the bill of lading."

The record further discloses that the United States Government, as a result of this arrangement, pays the Fort Worth Poultry and Egg Company for the eggs shipped by Clary and Lay. No notes are executed or is there any evidence of a debtor - creditor relationship between the Fort Worth Poultry and Egg Company and Clary & Lay. The only time such a relationship would appear to be involved, as disclosed by the record, is when certain shipments do not meet specifications and Clary and Lay must re-imburse the Fort Worth Poultry and Egg Company.

The record further discloses the following:

"Mr. Bigbee: As far as you are concerned you are selling your eggs to the Fort Worth Poultry and Egg Company for 2c less than you would get from the government.

"Mr. Clary: On the other hand it is not a sale **and then again it is a sale.**" (emphasis ours).

In view of all the evidence, it is my opinion that Clary and Lay sell their processed eggs directly to the Fort Worth Poultry and Egg Company and thereafter make delivery to a common carrier of the goods previously sold to the Fort Worth Poultry and Egg Company, rather than selling direct to the United States Government, which, in this instance, is only done by the Fort Worth Poultry and Egg Company.

Therefore, in my opinion, the sale between Clary and Lay and the Fort Worth Poultry and Egg Company is taxable under our school tax law.

By HARRY L. BIGBEE,

Assistant Attorney General