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TITLE PROVISIONS OF THE UNIFORM COMMERCIAL CODE AND PRE-ACT CONTRACTS UNDER PENNSYLVANIA'S SALES AND USE TAX

BY LOUIS F. DEL DUCA,* Assisted by Joseph P. Work

IT IS the primary purpose of this article to consider the effect which the title provisions of the Uniform Commercial Code¹ have had in determining the taxability under the Pennsylvania Selective Sales and Use Tax Act² of transactions in which contracts of sale were entered into prior to March 7, 1956 (the effective date of the Act) but delivery of the goods in question occurred after said date.³

The general changes made by the title sections of the Uniform Commercial Code have been commented on extensively and frequently.⁴ It is therefore sufficient to note here that under the Uniform Sales Act numerous problems including risk of loss,⁵ buyer's right to the goods in lieu of damages,⁶ seller's right to maintain an action for price rather than damages,⁷ buyer's right to goods on

* B.A., Temple University; LL.B., Harvard University; LL.D., University of Rome; member, Pennsylvania Bar.

¹ PA. STAT. ANN., tit. 12A (1954).

² PA. STAT. ANN., tit. 72, c.2, §§ 3403-1 to 3404-802 (1958).

³ The Uniform Commercial Code as enacted by Pennsylvania was based on the 1952 Text and Comments Edition of the Code prepared by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

Largely due to studies prepared by the special study commission appointed by the New York Legislature, (Law Revision Commission, State of New York) substantial changes have been made in the 1957 Official Text and Comments Edition prepared by these two organizations. Massachusetts and Kentucky have recently adopted the Code substantially as set forth in the 1957 Text and Comments Edition. (See Mass. Laws Ann. c. 106 §§ 1-101 *et seq.*, and Ky. Rev. Stat. c. 77 — (1958). It is quite possible that the Pennsylvania Legislature in its present session will amend its earlier enactment of the Code so as to conform to the 1957 Text and Comments Edition. An attempt has been made to call the reader's attention to changes which would result from such Legislative action.

Increased revenue needs have made substantial changes in the Selective Sales and Use Tax Act mandatory. The Pennsylvania Legislature is scheduled to make changes in this Act in the near future. At the time of this writing it is not possible to accurately predict what these changes will be.

⁴ Corbin, *The Uniform Commercial Code-Sales; Should it be enacted?* 59 YALE L. J., 821, 824-7 (1950); Hawkland, *Sales and Bulk Sales*, pp. 79-108, published by the AMERICAN LAW INSTITUTE (1955); Latty, *Sales and Title and the Proposed Code*, 16 LAW AND C. P., p. 3 (1951); Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 569-71 (1950); Broeker, *Articles 2 and 6: Sales and Bulk Transfers*, 15 U. PITT. L. REV., 541, 549 (1954). The Uniform Sales Act distinction between "property to the goods" and "title to the goods," has not been retained by the Code. BRAUCHER AND SUTHERLAND, *COMMERCIAL TRANSACTIONS*, at 23; 2-401, 2-402, 2-403 Uniform Commercial Code.

⁵ PA. STAT. ANN., tit. 69, c.1, § 181 (1931), U.S.A. § 22.

⁶ PA. STAT. ANN., tit. 69, c.1, § 311 (1931), U.S.A. § 66.

⁷ PA. STAT. ANN., tit. 69, c.1, § 292 (1931), U.S.A. § 63.

the seller's insolvency,⁸ insurable interest,⁹ and real party in interest¹⁰ all turned on the determination of the status of the "title" to the property in question. The Uniform Sales Act required a finding under the specific facts of the case that the title was in the seller or the buyer and the solution to all the above mentioned problems turned on this finding. This has been called the "lump concept approach." It has been replaced by the so-called "narrow-issue thinking" of the Uniform Commercial Code.¹¹ The preamble to the title passing section¹² of the Code states that,

"Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply: . . ."

In other sections the Code contains specific provisions on risk of loss,¹³ buyer's right to the goods in lieu of damages,¹⁴ seller's right to maintain an action for price,¹⁵ buyer's right to goods on the seller's insolvency,¹⁶ insurable interest¹⁷ and real party in interest.¹⁸

The language contained in the preamble to the title passing section of the Code requires the lawyer to first ascertain whether any specific provision of the Code deals with his problem. If such a provision exists, it becomes applicable and the status of the title is irrelevant. To the extent that the Code does not contain specific provisions dealing with the problem to be solved and the status of the title is relevant the title passing rules of Section 2-401 become applicable.

The adoption by the Code of special step by step tests for resolving the above mentioned problems such as risk of loss, etc., was to a substantial degree a result of the draftsmen's desire to achieve predictability, to more adequately

⁸ Note 6 *Supra*.

⁹ PA. STAT. ANN., tit. 69, c.1, § 143 (1931), U.S.A. § 19.

¹⁰ The Uniform Sales Act did not deal specifically with the proper party to bring actions against third persons.

¹¹ Broeker, *Articles 2 and 6: Sales and Bulk Transfers*, 15 U. PITT. L. REV., 541 at 550 (1954); Hawkland, *Sales and Bulk Sales*, pp. 79-108, at 90, published by the AMERICAN LAW INSTITUTE (1955).

¹² PA. STAT. ANN., art. 2, § 2-401 (1954).

¹³ PA. STAT. ANN., art. 2, § 2-509 (1954).

¹⁴ PA. STAT. ANN., art. 2, § 2-716 (1954).

¹⁵ PA. STAT. ANN., art. 2, § 2-709 (1954).

¹⁶ PA. STAT. ANN., art. 2, § 2-502 (1954).

¹⁷ PA. STAT. ANN., art. 2, § 2-501 (1954).

¹⁸ PA. STAT. ANN., art. 2, § 2-722 (1954).

meet the reasonable expectations and practices of parties involved in commercial transactions, and also to make it possible for courts to reach equitable results without torturing facts and the law. If parties to a contract of sale do not expressly provide for risk of loss, buyer's right to the goods in lieu of damages, etc., is it reasonable to presume that they intend to have all these diversified matters resolved on the basis of the status of the title to the chattel in question? Let us consider one of many illustrations. In *Glass v. Blazer Bros.*,¹⁹ the sales contract provided that "Blazer Brothers has this day sold to Alex Glass their entire crop of growing flax . . . to be delivered at his elevator in Freeman, not later than September 15, at one dollar per bushel. . . ." When the market price went up to \$1.40 per bushel the seller refused to deliver the flax to the buyer's elevator. Buyer brought a suit in replevin on the theory that title had passed, the court ruled in favor of the buyer. Under the title passing rules of the common law, or Section 19 (1) of the Uniform Sales Act relating to contracts to sell specific goods in a deliverable state²⁰ and Section 19 (5) of the Uniform Sales Act relating to contracts requiring a seller to deliver at a particular place, title had not passed from the seller to the buyer. The court relied on the words "has this day sold" as evidencing an intention to have title pass at the time the contract of sale was entered into despite the fact that at the time the parties entered into the contract the flax was standing uncut in the seller's field and despite the fact that seller had not performed the delivery requirements of the contract. Under these facts would the court have reached the same result if the flax while still growing in seller's field had been totally destroyed by fire and the issue was risk of loss rather than buyer's right to specific goods? By providing special step by step tests which resolve problems such as risk of loss, buyer's right to the specific goods in lieu of damages, etc., the Code attempts to achieve predictability and avoid and reduce the necessity for torturing facts and the law in order to reach equitable results.

If a problem is not specifically covered by any section of the Code and title is relevant, the title passing section of the Code provides standards for ascertaining the status of the title. Subsection 2-401 (1) provides that title to goods cannot pass prior to their identification to a contract. Subject only to this limitation the parties may explicitly agree that title shall pass at any time at or after

¹⁹ 91 Mo. App. 564 (1902); See also *Radloff v. Bragmus*, 214 Minn. 130, 7 N.W.2d 491 (1943); Latty, *Sales and Title and the Proposed Code*, 16 LAW AND C. P., p. 8 (1951); *Hawland, Sales and Bulk Sales*, pp. 79, 80, published by the AMERICAN LAW INSTITUTE.

²⁰ The purchase of a seller's entire stock of goods has led courts to rule that the goods were specific at the time of contracting. See for example *Radloff v. Bragmus*, 214 Minn. 130, 7 N.W. 2d 491 (1943).

Section 76(4) of the Uniform Sales Act provides that, "Goods are in a deliverable state within the meaning of this act when they are in such a state that the buyer would, under the contract be bound to take delivery of them."

identification occurs.²¹ These provisions are essentially similar to Sections 17 and 18 of the Uniform Sales Act.

The basic innovation in the title-finding standards of Section 2-401 of the Code provides that in the absence of *explicit* agreement, "title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods."²² This provision is an attempt "to avoid resorting to the classical 'presumed intention of the parties' about an intangible something that the parties generally never thought about, viz. 'title'."²³

Under the provisions of Section 18 and the preamble to Section 19 of the Uniform Sales Act an intent to have title pass at some time other than that specified in the five sub-sections of Section 19 can be found not only in explicit provisions contained in the contract but can also be inferred from other "terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."²⁴

Only a rebuttable presumption that title has passed arises if the conditions for passage of title set forth in any one of the five sub-sections of Section 19 of the Uniform Sales Act are met. The presumption has been readily rebutted by courts seeking to reach equitable results. They have too often achieved these results at the price of injecting substantial uncertainty into the law.²⁵ The Code seeks to avoid this uncertainty by setting up the seller's "completion of performance with reference to the physical delivery of the goods" as the conclusive passage of title test in the absence of explicit agreement to the contrary.

Subsequent portions of Section 2-401 define in more detail the circumstances under which a seller completes his performance with reference to the physical delivery of the goods. 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.²⁶ If the contract requires delivery at destination title passes on tender there.²⁷ If the contract of

²¹ The 1957 Text and Comments Edition of the Code also provides that title to goods cannot pass prior to their identification to the contract. However, this later draft of Section 2-401(1) gives the buyer a so-called "special property" in the goods after they are identified to the contract. The special property concept is discussed in the 1956 Recommendations for the Uniform Commercial Code issued by the American Law Institute and the National Conference of Commissions on Uniform State Laws.

²² PA. STAT. ANN., art. 2, § 2-401(2) (1954).

²³ Latty, *Sales and Title and the Proposed Code*, 16 LAW AND C. P., 3, 7 (1951).

²⁴ PA. STAT. ANN., tit. 69, c.1, § 142 (1931), U.S.A. § 18.

²⁵ *Woodbine v. Van Horn*, 29 Cal. 2d 95, 173 P.2d 17 (1946); *Sanford v. Nickerson*, 91 N.H. 71, 13 A.2d 723 (1940). See also note 19 *supra*.

²⁶ PA. STAT. ANN., art. 2, § 2-401(2) (a) (1954).

²⁷ PA. STAT. ANN., art. 2, § 2-401(2) (b) (1954).

sale requires seller to make delivery at some point midway between the point of origin and ultimate destination title would pass when the goods are tendered at said point. In all cases where the contract requires a delivery of the goods to the buyer (whether this be at buyer's place of business, some intermediate point between buyer's and seller's place of business, or the seller's place of business) title passes when the "seller completes his performance with reference to the physical delivery of the goods."²⁸

Subsection 2-401 (3) deals with contracts under which delivery is to be made without moving the goods. In such a situation, if the contract requires the seller to deliver a document of title (i.e. where goods in a warehouse are sold and the contract requires seller to transfer a warehouse receipt to buyer) title passes at the time when and the place where he delivers such documents, unless the parties have otherwise agreed. Where delivery is to be made without moving the goods and the contract does not require the seller to deliver any documents, and the goods are at the time of contracting already identified (i.e. specific furniture sold by a bailor to a bailee who already has possession of the goods) title passes at the time and place of contracting unless the parties have otherwise explicitly agreed.²⁹

The draftsmen of the Code have accomplished two things in the title area. First, they have minimized the consequences of title passing. In the above mentioned areas (i.e. risk of loss, etc.) which most frequently create problems between parties to sales contracts, rights and liabilities no longer depend on the status of title but on the question of whether the step by step performance of the contract has progressed to specified stages. Secondly in those limited areas where the title passing provisions of Section 2-401 become applicable the new title rules are not expressed in terms of presumed intention of the parties which

²⁸ PA. STAT. ANN., art. 2, § 2-401 (2) (1954).

²⁹ The Code draftsmen have made "the time and place at which the seller completes his performance with reference to the physical delivery of the goods" the passage of title test which is generally applicable. The opening statement in Comment 3 to Section 2-401 emphasizes this in stating: "The factual situations in subsections (2) and (3) upon which passage of title turn actually base the test *upon the time when the seller has finally committed himself in regard to specific goods.*" (Emphasis added.) Certainly seller has finally committed himself in regard to specific goods and has completed his performance with reference to physical delivery of the goods if shipment is made under a shipment contract [2-401 (2) (a)] or alternatively if tender is made at the point of destination in a destination contract [2-401 (2) (b)]. In those less frequent cases where delivery is to be made without moving the goods and a document of title is to be delivered [2-401 (3) (a)], the seller finally commits himself at the time and place where he delivers the document. In those less frequent cases where delivery is to be made without moving the goods and no document of title is to be delivered and the goods are identified at the time of contracting [2-401 (3) (b)], the seller finally commits himself in regard to specific goods at the time of contracting. Thus interpreted, the objective nature of the title passing tests of Section 2-401 are retained by Subsection 2-401 (3). The meaning of this section could be considerably clarified if it were amended to read as follows: "Unless otherwise explicitly agreed where *goods are in the possession of a bailee and are to be delivered without being moved, etc. . . .*"

may be rebutted but as positive objective tests which automatically apply in the absence of *explicit* agreement to the contrary.

The Code everywhere in dealing with "title" matters puts more emphasis on objective facts than on presumptions concerning the subjective intent of the parties regarding passage of title. To the extent that the step by step tests contained in the previously cited sections of the Code reflect the reasonable commercial expectations of parties to a contract of sale and to the extent that the title passing provisions of Section 2-401 establish objective, non-ambiguous tests for determining passage of title we have achieved predictability by focusing the attention of merchants and lawyers on the operative facts on which rights and liabilities turn. Simultaneously we have avoided the vast ocean of confusion, contradiction, and uncertainty which is a part of any fact finding inquiry into subjective states of mind.

Article I of the Uniform Commercial Code which deals with the purposes, rules of construction, and general applicability of the Code contains a provision which states that "the Comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute may be consulted in the construction and application of this Act. . . ." ⁸⁰ Comment one to Section 2-401, the basic title section of the Code, (after noting that Article 2 deals elsewhere with issues between seller and buyer on basis of step by step performance or non-performance under the contract for sale and that the title passing rules of Section 2-401 in no way alter the rights of either the buyer, seller or third parties declared elsewhere in Article 2) states that Section 2-401 ". . . in no way intends to indicate which line of interpretation should be followed in cases where the applicability of 'public' regulation depends upon a 'sale' or upon location of 'title' without further definition. The basic policy of this Article that known purpose and reason should govern interpretation cannot extend beyond the scope of its own provisions. 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."

Is the term "sale" as used in private law incorporated into the Pennsylvania Selective Sales and Use Tax Act? To the extent that it may be so incorporated, should the language of the Selective Sales and Use Tax Act and regulations issued pursuant thereto be interpreted so as to make the title-passing rules of the Code applicable?

⁸⁰ Section 1-102 (3) (f) has been deleted in the 1957 draft of the Code. The reason given for the deletion is that the old comments were clearly out of date, and it was not known when new ones could be prepared (1956 Recommendations for the U.C.C.). The comments to the Code are often invaluable in clarifying the meaning of a particular section of the statute. Substantial changes have since been made in the comments to conform with the 1957 draft but section 1-102 (3) (f) remains deleted.

Section 201 (a) of the Selective Sales and Use Tax Act imposes a tax of three per cent of the purchase price on "each separate *sale at retail* of tangible personal property within this Commonwealth." (Italics supplied.) Section 201 (b) imposes a complementary use tax of three per cent of the purchase price "upon the use within this Commonwealth of tangible personal property *purchased at retail* on or after March 7, 1956." (Italics supplied.) The terms "sale at retail" and "purchase at retail" are technical terms defined by the Act. They encompass activities far more extensive than those included within the term sale as defined in the Uniform Sales Act³¹ and the Code.³² Said Act defines "sale at retail" as:

"Any transfer for a consideration of the ownership, custody, or possession of tangible personal property, including the transfer of a license to use or consume, whether such transfer be absolute or conditional and by whatsoever means the same shall have been effected. . . ." ³³

"Purchase at retail" is defined as:

"The acquisition for a consideration of the ownership, custody or possession of tangible personal property, when such acquisition is made for the purpose of consumption or use, whether such acquisition shall be absolute or conditional, and by whatsoever means the same shall have been effected. The term 'purchase at retail' shall include the acquisition of a license to use or consume and the rental or lease of tangible personal property, regardless of the period of time the lessee has possession or custody of the property . . ." ³⁴

The taxable incident under the Selective Sales and Use Tax Act relevant to our investigation is on the consummation of a "sale at retail" of tangible personal property or the use of tangible personal property "purchased at retail." These terms as defined by the Act require a "*transfer for a consideration of the ownership, custody, or possession* of tangible personal property. . . ." ³⁵ (Italics supplied.) or ". . . the *acquisition* for a consideration of the *ownership, custody, or possession* of tangible personal property. . . ." ³⁶ (Italics supplied.) The transfer or acquisition of ownership, custody, or possession including the license to use or consume obviously encompasses a range of transactions far broader than those in which title to a chattel is transferred in exchange for a consideration called the price from a seller to a buyer.³⁷

³¹ PA. STAT. ANN., tit. 69, § 1 (1931).

³² PA. STAT. ANN., tit. 12A, art. 2, § 2-106 (1954).

³³ PA. STAT. ANN., tit. 72, c.2, § 3403-2 (j) (1958).

³⁴ PA. STAT. ANN., tit. 72 c.2, § 3403-2 (e) (1958).

³⁵ See note 33 *supra*.

³⁶ See note 34 *supra*.

³⁷ See Regulation 211 entitled Scope of Taxable Transactions, C.C.H. PA. SALES AND USE REPORTER, ¶ 60-069.

It should be noted that the text of the Selective Sales and Use Tax Act contains no express provision regarding the applicability of private law title passing tests. If the Legislature had so desired it could have expressly made the Code title passing tests applicable to transactions falling within the Selective Sales and Use Tax Act definitions of sale or purchase at retail and also within the Code's private law definition of "sale." It did not do this. However, the incorporation of the *transfer or acquisition of ownership* language into the previously noted definitions of "sale at retail" and "purchase at retail" creates an area wherein the private law title passing provisions of the Code may be applicable if they are not contrary to any provisions of the Selective Sales and Use Tax Act.³⁸

A regulation was issued shortly after the enactment of the Selective Sales and Use Tax Act clarifying the meaning of the above language as applied to the question of the taxability of contracts entered into prior to March 7, 1956 (the effective date of the Act).³⁹

Section (a) of this regulation provides that:

"The tax need not be collected with respect to the sale of taxable property pursuant to a contract of sale, enforceable at law or in equity, entered into prior to March 7, 1956 as a result of which there has occurred, *according to the laws of the Commonwealth*, prior to March 7, 1956 a passage of title to the taxable property. . . ." (Italics supplied.)

Section (b) of this regulation provides that:

"The tax must be collected with respect to the sale of taxable property pursuant to a contract entered into prior to March 7, 1956 where title to such property has *not* passed to the purchaser prior to March 7, 1956. . . ."

The draftsmen of this regulation have availed themselves of the option to utilize the title passing rules of Section 2-401 of the Uniform Commercial Code which is granted by Comment one of said Section. Unless contrary to some

³⁸ As previously noted, the Code Comment to Section 2-401 provides that ". . . The basic policy of this Article that known purpose and reason should govern interpretation cannot extend beyond the scope of its own provisions. . . ."

The purpose and reason behind a so-called "public regulation" may make the Code title passing provisions inapplicable. In ruling that the title passing provisions of the Code were not applicable in determining whether a building possessed the characteristics embodied in the zoning law concept of a warehouse or of a retail store the Supreme Court of Pennsylvania has stated:

"The 'passage of title' concepts in the Uniform Commercial Code are not helpful in solving the zoning problem presented in this case. The rules of the Code relied upon are designed to determine, at the various stages in a commercial transaction, the relative rights and liabilities of buyers and sellers. While the subtleties of the sales definition of the code are important to the law of commercial contracts, they have no application to the zoning regulations involved in the present case which concern the physical use to which land is put." [390 Pa. at 211, 134 A.2d at 662 (1957)]

³⁹ Temporary Regulation a204, C.C.H. PA. SALES AND USE TAX REPORTER, ¶ 60-207.

provision of the Selective Sales and Use Tax Act said title passing rules determine the taxability of pre-act contracts in which ownership as distinguished from custody, possession or license to use or consume tangible personal property was transferred from the vendor to the purchaser. It should be noted that this regulation applies to the "sale" rather than the "sale at retail" of taxable property.⁴⁰

Applying this regulation the Sales Tax Board⁴¹ has ruled where the sale of a car had progressed only to the stage of preliminary negotiations and no binding contract was entered into prior to March 7, 1956, that the transaction

⁴⁰ Pre-act contracts not involving a "private law sale" are governed by other standards set forth elsewhere.

A retention after March 7, 1956, of possession, custody or license to use or consume tangible personal property pursuant to a rental contract or other lease arrangement (other than as security) is included within the definitions of purchase and sale at retail and is therefore taxable. [Pennsylvania Selective Sales and Use Tax Act, Sections 2 (e), 2 (f)]

Tax paid on rental of tangible personal property may not be applied to the tax due on the purchase of said property when the lessee exercises an option to buy. Under these circumstances the tax is applicable both to the rental payments and also to any payment made in exercising the option to buy. (Legal Unit Ruling 66, C.C.H. PA. SALES AND USE TAX REPORTER, ¶ 60-059.60.)

Section 2 1 (13) of the Selective Sales and Use Tax Act includes gas and steam within the definition of tangible personal property. Temporary Regulation 204 (c) provides: "When a monthly bill is rendered to consumers of gas or steam after March 7, 1956, the tax will apply to bills which are based on meter readings taken on or after March 22, 1956." (C.C.H. PA. SALES AND USE TAX REPORTER, ¶ 60-207)

Section 203 (c) of the Selective Sales and Use Tax Act provides an exemption for the sale to a contractor of supplies and materials to be used by him in the fulfillment of a pre-March 7, 1956, fixed price construction contract. Temporary Regulation a 204 (d) deals with this matter in detail. (C.C.H. PA. SALES AND USE TAX REPORTER, ¶ 60-207)

Special regulations governing lay-away, credit and credit card sales have been issued. Temporary regulation a 305 Governing Lay-away Sales requires the vendor to collect the full amount of tax as measured by the full agreed purchase price at the time the first payment "is made following appropriation by the vendor of the goods to the sale or within 30 days following the appropriation whichever shall first occur." C.C.H. PA. SALES AND USE TAX REPORTER, ¶ 64-305. To insure the Commonwealth's revenue the regulation requires full payment of tax on the entire purchase price no later than 30 days following the appropriation of the goods to the sale. The basic taxable incident, however, still remains transfer of title. The regulation also states that: "In the event the purchaser fails to make the agreed payment, or otherwise forfeits his right to acquire title and possession under the terms of the agreement, he shall have a right to a refund from the vendor for the amount of the tax paid." This portion of the regulation is in accord with the transfer or acquisition of ownership language contained in the act. Under these provisions a transaction wherein a vendor made delivery after March 7, 1956, of goods purchased under a lay-away sale, would be taxable even though the vendor had identified and appropriated the goods prior to that date. The requirement that payment be made no later than 30 days after appropriation is an administrative procedural device for safeguarding the government's revenue.

Tax due on credit sales is also based on the full purchase price and must be remitted "either at the time the purchase is made or within 30 days thereafter." Temporary Regulation, 304 C.C.H. PA. SALES AND USE TAX REPORTER, ¶ 63-029. Analogous provisions governing credit-card sales are found in Temporary Regulation 261, ¶ 64-261. C.C.H. PA. SALES AND USE TAX REPORTER, ¶ 64-261. See also § 549, Selective Sales and Use Tax Act.

⁴¹ The Selective Sales and Use Tax Act requires the Department of Revenue to hold such hearings as may be necessary for the purpose of disposing of reassessment and refund petitions. (§ 542 and § 553 of the Act.) Section 580 of the Act empowers and requires the department "to prescribe, administer, promulgate and enforce rules and regulations not inconsistent with the provisions of this act relating to any matter or thing pertaining to the administration and enforcement of the provisions of the Act and the collection of taxes, penalties and interest imposed by the Act."

was taxable since the title had not passed.⁴² Of course, in this situation no title passed under the Uniform Sales Act or the Code.

Where the contract of sale of a cash register and the physical delivery of the register occurred prior to March 7, 1956, the Board has ruled that title passed from the seller to the buyer prior to said date and the transaction was not taxable even though when repairs to the register were required after March 7, 1956, the seller dated some of buyer's records from this later date in order to extend the period of duration of buyer's warranties.⁴³

Several cases have been presented to the Board in which the contract for the sale of tangible personal property was entered into, and the goods taken from general stock and set aside and identified prior to March 7, 1956, but delivery occurred subsequent to that date.⁴⁴ In ruling that such transactions are taxable the Board cited the previously noted imposition sections of the Selective Sales and Use Tax Act⁴⁵ and the pre-act contract regulation⁴⁶ as authority for utilizing the "physical delivery" title passing test of Section 2-401 (2) of the Uniform Commercial Code. In so doing the Board has noted that Section 2-401 (1) of the Uniform Commercial Code provides that title to goods cannot pass under a contract of sale prior to their identification to the contract. Section 2-501 of the Code provides that if the contract is for sales of future goods, identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement by the parties, identification occurs when the goods are shipped, marked, or otherwise designated by the seller as goods to which the contract refers. Title cannot pass under any circumstances prior to the time the goods are identified to the contract, but the parties thereto can agree to have title pass at any time subsequent to the identification of the goods to the contract. If the parties to the contract have not otherwise explicitly agreed, the title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods. Mere proof of the fact that goods were identified to the contract prior to March 7, 1956, is not sufficient to establish that title passed prior to that date.

Where prior to March 7, 1956, a seller delivered a truck to a coal dealer purchaser who built a coal body for the truck to facilitate its usage in hauling coal, the transaction was held not to be taxable even though the purchaser returned the vehicle to the seller's place of business on March 14, 1956, for the

⁴² Board Docket No. 190.

⁴³ Board Docket No. 381.

⁴⁴ Board Docket Nos. 32, 72, 156, 453.

⁴⁵ Selective Sales and Use Tax Act §§ 201 (a) and (b).

⁴⁶ See note 39 *supra*.

purpose of consummating financing arrangements and application for title. The examiner's decision states:

"Title passed to the purchaser at the time that the petitioner delivered the vehicle although application for title from the Bureau of Motor Vehicles was not made until after the effective date of the Act, March 14, 1956. Title given by the Bureau of Motor Vehicles is only evidence of the title that the purchaser had at the time of delivery."⁴⁷

This result would appear to be in accord with Section 2-401 (2) of the Code which provides that in the absence of explicit agreement title passes from seller to buyer when seller completes his performance with reference to the physical delivery of the goods even though a document of title is to be delivered at a different time and place. This section also provides that in the case where a seller reserves a security interest in the goods title will pass when seller completes his performance with reference to physical delivery of the goods in the absence of an explicit agreement to the contrary.

Where a vendor of rugs contracted for the sale of rugs and cloth was cut to fill specific orders but no delivery occurred prior to March 7, 1956, the Board, overruling the hearing Examiner, held said transaction to be taxable.⁴⁸ The examiner utilized the fact that the rug was cut to fit particular specifications as a basis for presuming that the parties intended title to pass prior to delivery and that therefore title passed prior to the effective date of the act. Such a presumption was permissible under Sections 18 and 19 of the Uniform Sales Act but the Code and its comments expressly provide that "in the absence of explicit agreement" title passes when seller completes his performance with reference to delivery of the goods. The result reached by the Board was correct since the explicit agreement provision was included in Section 2-401 (2) of the Code precisely to avoid the chaos and lack of predictability resulting from inquiries into the "presumed intention" of the parties.

In summary it is fair to conclude that the objective title-finding tests set forth in Section 2-401 of the Code have provided standards which provide a greater degree of certainty and are more easily applied than the subjective rebuttable presumed intention tests previously contained in the Uniform Sales Act. Determination of passage of title where the parties have not otherwise explicitly agreed and the contract calls for delivery at seller's place of business or residence, shipment to the buyer, or delivery at a specified destination requires the trier of fact to make a finding regarding the time and place at which the seller completed his performance with reference to the physical delivery of the goods.

⁴⁷ Board Docket No. 145.

⁴⁸ Board Docket No. 424.

Determination of passage of title where the parties have not otherwise explicitly agreed and where the delivery is to be made without moving the goods and the goods are in the possession of a bailee requires the trier of fact to make a finding regarding the time and place where seller has delivered documents of title to the buyer, if the contract requires the seller to deliver such documents. Determination of passage of title where the parties have not otherwise explicitly agreed and where delivery is to be made without moving the goods and the goods are in the possession of a bailee requires the trier of fact to make a finding as to whether or not the goods were identified at the time of contracting, if the contract does not require the seller to deliver any documents. The physical delivery of the goods, delivery of documents of title, or identification of goods test which must be applied in determining passage of title under the Code clearly involves a less arduous undertaking than that required in applying the subjective rebuttable presumed intention tests of the Uniform Sales Act. Nevertheless, in certain areas the fact-finding task involved in applying Code title tests to future pre-amendment contracts might be considerably simplified by utilizing existing administrative machinery supplemented with relatively nominal additional manpower. For example an appropriate statutory or regulatory provision with respect to motor vehicles for which application for title is made on or after the fifth day (or any other reasonable time limit) following the date of enactment of an amendment, which would set up a conclusive presumption that such motor vehicle was purchased on or after the effective date of said amendment, would be fair to taxpayers, insure prompt payment of tax, and by providing indisputable documentary evidence would also avoid a considerable amount of unnecessary litigation.