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ATTORNEY GENERAL OPINION NO. 91-6

TO: Bruce Collier
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Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Does the vendor of a ski lift ticket which is sold from a location within the City Limits of the City of Sun Valley have a responsibility to collect, and liability for, local option sales tax from the purchaser of the ticket?
2. Does the City of Sun Valley have the power under both the tax code¹ and state law to require the collection of local option tax for building materials not purchased within the city limits of Sun Valley, but delivered in Sun Valley for use in construction of real property improvements located within Sun Valley?

¹We understand your reference to "tax code" to mean the city of Sun Valley's ordinance imposing a local sales tax under Idaho Code §§ 50-1043 through 50-1049.

CONCLUSIONS:

1. A vendor who sells a ski lift ticket from a location within the city limits of the City of Sun Valley has a responsibility to collect city sales tax from the purchaser of the ticket. The tax thus collected must be remitted to the City of Sun Valley in the manner provided in the city's municipal sales tax ordinance.

2. The City of Sun Valley may impose its sales tax on sales made in the city. For the sale of goods, a sale is in the city when title passes in the city. Under the Uniform Commercial Code, title passes either when provided by contract between the parties or, if there is no express contractual provision, when the seller completes his responsibilities regarding delivery of the product sold. In no case does title pass before identification of specific goods to the sale. When delivery of building materials occurs in the City of Sun Valley, and there is no specific provision in the sales contract to the contrary, title passes at the time of delivery. That is the time of sale. If the seller is a retailer required to have a city sales tax permit, the city may require the seller to collect city sales tax on the sale and remit the tax to the city.

ANALYSIS:

Statement of facts:

Our understanding of the facts relating to your questions is set out below. We have not undertaken an independent review of these facts. Instead, we have relied on the statements contained in the request letter and representations of facts made in telephone conversations with the city attorneys of the cities of Sun Valley and Ketchum. We understand the relevant facts to be as follows:

Lift tickets. The Sun Valley Company sells tickets that allow the purchaser to use ski lifts operated by the company. These lift tickets are sold at various locations: some in the City of Sun Valley, some in the City of Ketchum and some not in either city. The tickets may be valid for a day, a weekend, a season or another period. During the period for which the tickets are valid, the purchaser may use them to ride on any of the company's ski lifts. Lifts on Dollar Mountain and Elkhorn Mountain are located in the

City of Sun Valley. Lifts on Bald Mountain are in Blaine County and, except the base of the Warm Springs Lift which is in Ketchum, are not in either city.

Building materials. Property owners or their contractors purchase building materials from retailers (such as lumberyards) located outside the City of Sun Valley. There are no retailers of building materials known to have retail stores within the city limits of the City of Sun Valley. Some retailers are located in the City of Ketchum. Others are located elsewhere. The purchasers use the building materials to construct buildings and other real property improvements located in the City of Sun Valley.

THE "RESORT CITY SALES TAX"

The City Property Tax Alternatives Act, Idaho Code §§ 50-1043 through 50-1049, authorizes resort cities to impose certain "local option nonproperty taxes" including "a sales tax upon part or all of sales subject to taxation under Chapter 36, Title 63, Idaho Code." See Idaho Code § 50-1046. Chapter 36, title 63, Idaho Code is the "Idaho Sales Tax Act." See, Idaho Code § 63-3601. The City of Sun Valley exercised the authority granted by The City Property Tax Alternatives Act. It adopted a city ordinance imposing a sales tax. The Idaho Supreme Court has reviewed and affirmed the constitutionality of Sun Valley's tax in Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 708 P.2d 147 (1985).

To focus upon the issues about which you seek our opinion, we assume that the City of Sun Valley is a qualified resort city under Idaho Code § 50-1044 and that the enactment of its ordinance imposing the tax is procedurally correct.²

THE SALE OF SKI LIFT TICKETS

Idaho Code § 50-1046 states:

50-1046. City local-option nonproperty taxes permitted by sixty per cent majority vote. A sixty per cent (60%) majority of the voters of any resort city voting on the question may approve and, upon such approval,

²The fact that we express these necessary assumptions is not intended to imply that we believe there is any reason to question the accuracy of either.

any city may adopt, implement, and collect, subject to the provisions of this act, the following city local-option nonproperty taxes: (a) an occupancy tax upon hotel, motel, and other sleeping accommodations rented or leased for a period of thirty (30) days or less; (b) a tax upon liquor by-the-drink, wine and beer sold at retail for consumption on the licensed premises; and (c) a sales tax upon part or all of sales subject to taxation under chapter 36, title 63, Idaho Code.

Sun Valley's tax is the third type of tax, i.e., a tax on "part or all of sales subject to taxation under [the Idaho Sales Tax Act]." The city may only tax sales that are also subject to the state sales tax. It may choose to exempt from its tax sales that the state taxes, but it may not tax sales that the state exempts. The first issue is whether the sale of lift tickets is subject to the state sales tax.

The Idaho sales tax is imposed on retail sales. Idaho Code § 63-3619 imposes the tax. It states:

63-3619. Imposition and rate of the sales tax. An excise tax is hereby imposed upon each sale at retail at the rate of five per cent (5%) of the sales price of all property subject to taxation under this act and such amount shall be computed monthly on all sales at retail within the preceding month.

The word "sale" means:

63-3612. Sale. The term "sale" means and includes any transfer of title, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration and shall include any transfer of possession through incorporation or any other artifice found by the state tax commission to be in lieu of, or equivalent to, a transfer of title, an exchange or barter. "Sale" shall also include:

* * *

(e) Admission charges.

(f) Receipts from the use of or the privilege of using tangible personal property or other facilities for recreational purposes.

* * *

This definition does not limit "sale" to sales of tangible personal property. By its express terms, the statute defines "sale" to "also include" transactions that, but for this statutory language, would not be subject to a tax imposed only on the sale of tangible personal property. Two of these additional sales are the amounts charged for "admissions" and certain recreational charges.

There is little reason to question that the Sun Valley Company's ski facilities, including its ski lifts, are used for "recreational purposes."

A 1987 decision of the Wyoming Supreme Court holds that state's sales tax does not apply to the purchase of ski lift tickets. See, State Board of Equalization v. Jackson Hole Ski Corporation, 737 P.2d 350 (Wy, 1987), modified 745 P.2d 58 (Wy, 1987). However, that decision is based upon statutory language that differs significantly from that found in the Idaho Sales Tax Act. The Wyoming statute at issue in that case imposed Wyoming's sales tax on "the sales price paid for each admission to any place of amusement, entertainment, recreation, games or athletic event." See, § 39-6-404(a)(viii) W.S.1977, as quoted in Id 737 P.2d at 354. The facts in that case were that individuals who did not purchase ski lift tickets were not excluded from the U.S. Forest Service land on which the Jackson Hole Ski Corporation conducted its skiing operations. No entry fee to this area was charged. For this reason, a charge for using a ski lift was not within the ordinary meaning of an "admission to any place of amusement. . . ." Accordingly, a regulation purporting to tax all charges by ski resorts and all charges for transporting persons by ski lifts was beyond the authority of the statute. The regulation was held invalid.

In contrast to the Wyoming statute, the Idaho Sales Tax Act does not limit the scope of sales subject to tax to admissions. Instead, it also includes, "receipts from the use of or the privilege of using tangible personal property or other facilities for recreational purposes." Idaho Code § 63-3612(f) quoted above. Since the Wyoming decision did not address a statute such

as Idaho Code § 63-3612(f), it is inapplicable to the question you have asked.

The sale of lift tickets is clearly subject to the Idaho Sales Tax. It is proper for a resort city to include the sale of lift tickets in the scope of its tax. Sun Valley's ordinance imposing its sales tax expressly does so. Section 3-1-2 of the city's municipal tax ordinance defines sale to include:

"Sale" shall also include:

E. Admission charges and charges for ski lift tickets;

F. Receipts from the use or privilege of using tangible personal property or other facilities for recreational purposes and this shall specifically include, among other things, receipts from the sale of ski lift tickets;

The remaining issue for taxing the sale of lift tickets turns on which sales are, and which sales are not, subject to Sun Valley's sales tax. This is an issue because lift tickets are sold from locations both within and outside the city. The purchaser of a lift ticket may use ski lifts located both within and outside the city.

Sun Valley's tax ordinance makes no attempt to tax sales that occur outside the city. Section 3-1-3 (A) of the ordinance imposes the city tax. It states:

Tax Imposed: The City hereby imposes and shall collect a Municipal sales tax upon each sale at retail within the City³ at the rate of two percent (2%) of the sales price of all property which would be subject to taxation by the State of Idaho under the provisions of the Idaho Sales Tax Act, including its subsequent amendments thereto;

[Emphasis added.]

The Idaho sales tax is not a tax on property. The Idaho Supreme Court describes it as follows:

³The ordinance also defines the terms "in this city" and "in the city" to mean "Within the exterior limits of the City of Sun Valley, Blaine County, Idaho." See § 3-1-2.

A sales tax is not a tax on property but rather an excise tax -- a levy on certain transactions designated by statute. Leonardson et al. v. Moon et al., 92 Idaho 796, 451 P.2d 542 (1969).

Boise Bowling Center v. State, 93 Idaho 367, 461 P.2d 262 (1969).

We must interpret Sun Valley's ordinance as placing the city's tax on the same legal incident on which the state tax falls, i.e., the sale itself rather than the object of the sale. When the incident of the tax occurs in the city, the city's tax applies. The city's ordinance, by its language, limits the tax to "sale[s] at retail within the City." It is not necessary to determine a location for the object of the sale (the use or privilege of using ski lifts located both in and outside the city). A skier who purchases a ticket in the city is subject to the city's sales tax, even if the skier decides to use lifts outside the city. A skier who purchases a ticket at a location outside the city is not subject to the city's sales tax, even if the skier decides to use lifts inside the city. It is the point of sale, not the location of the ski lift the skier may use, that determines the incident of the tax.

The alternative argument, that the location of the object of the sale determines its taxability, is subject to serious legal and practical difficulties. The object of the sale is not only the use of the lifts, but also the privilege of using the lifts. If the privilege of using the lifts were the incidence of the tax, Sun Valley could claim tax on all the sales, whether made in the city or outside the city. The city of Ketchum, which is also a resort city imposing the local option sales tax, could make the same claim. These competing claims raise the possibility of taxing the same transaction more than once at the local level. This may be double taxation prohibited by art. 7, § 5, of the Idaho Constitution. A construction of statutes that avoids a constitutional conflict is preferred. Scandrett v. Shoshone County, 63 Idaho 46, 116 P.2d 225 (1941). Applying the city sales tax only to sales occurring in the city avoids the possible conflict of taxing authority between the two cities.

It is worth noting that state courts in other states have reached similar conclusions about the application of local sales taxes. The location of the taxable incident has most often controlled the application of the tax. See, City of Pomona v. State Board of Equalization et al., 53 Cal.2d 305, 1 Cal.Rptr. 489, 347 P.2d 904 (1959); Mobil-Teria Catering Co., Inc. v.

Spradling, 576 S.W.2d 282 (Mo.1978); and Bullock v. Dunigan Tool & Supply Co., Inc., 588 S.W.2d 633 (Tex.Civ.App.1979).

Based on the foregoing it is our conclusion that the vendor of a ski lift ticket sold from a location within the city limits of the City of Sun Valley has a responsibility to collect city sales tax from the purchaser of the ticket. The tax thus collected must be remitted to the City of Sun Valley in the manner provided in the city's municipal sales tax ordinance.

SALE OF BUILDING MATERIALS

Because the Resort City Sales Tax is limited to transactions subject to the state sales tax, it is necessary to review how the Idaho Sales Tax Act taxes building materials. The basic rule is in Idaho Code § 63-3609(a):

63-3609. Retail sale -- Sale at retail. The terms "retail sale" or "sale at retail" mean a sale of tangible personal property for any purpose other than resale of that property in the regular course of business or lease or rental of that property in the regular course of business where such rental or lease is taxable under section 63-3612(h), Idaho Code.

(a) All persons engaged in constructing, altering, repairing or improving real estate, are consumers of the material used by them; all sales to or use by such persons of tangible personal property are taxable whether or not such persons intend resale of the improved property.

Sun Valley's Municipal Sales Tax ordinance uses identical language to define "retail sale" and "sale at retail." See, § 3-1-2.

There is an important difference between the taxes imposed by the Idaho Sales Tax Act and the tax imposed by Sun Valley. Sun Valley imposes only a sales tax. The Idaho Sales Tax Act imposes both a sales tax (Idaho Code § 63-3619) and a use tax (Idaho Code § 63-3621). Use taxes are a usual complement to sales taxes. They are imposed upon the privilege of using tangible personal property within the taxing jurisdiction. Their primary purpose is to avoid economic disadvantage to merchants within the taxing jurisdiction. Without use taxes, goods can be purchased outside the taxing jurisdiction and used in the jurisdiction

without payment of the tax that would be required if the same goods were purchased from a merchant within the jurisdiction. Justice Felix Frankfurter of the United States Supreme Court has described the difference between these two taxes:

A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase. . . . A use tax is a tax on the enjoyment of that which was purchased.

McLeod v. J. E. Dilworth Co. et al., 322 U.S. 327, 64 S.Ct. 1023, 1025-1026, 88 L.Ed. 1304 (1944).

Thus, in McLeod, the state of Arkansas could not impose its sales tax on the sale of goods purchased in Tennessee and subsequently shipped to and used in Arkansas. But, in a case decided the same day, General Trading Co. v. State Tax Commission of Iowa, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309 (1944), the Court held that the state of Iowa could require a Minnesota seller to collect from its customers Iowa use tax on goods purchased in Minnesota and subsequently shipped to and used in Iowa.

Sun Valley imposes only a sales tax. As observed earlier regarding the sale of lift tickets, the city's ordinance imposes the tax "upon each retail sale within the city." For its tax to apply to building materials, the sale of the materials must occur within the city. Although the State of Idaho can and does require an out-of-state seller to collect Idaho use tax on property sold to an Idaho customer for delivery into Idaho (see Idaho Code § 63-3621), there is no statutory basis for the City of Sun Valley to require the collection of a city use tax on property delivered in the City of Sun Valley. It can only require collection of its sales tax on sales transactions that occur in the city.

The facts as stated to us are that there is no known retail outlet of building materials in Sun Valley. That fact does not prevent taxable retail sales of building materials from occurring in the city. The Idaho Sales Tax Act and Sun Valley's sales tax ordinance use identical language to define the word "sale":

The term "sale" means and includes any transfer of title, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. . . .

Idaho Code § 63-3612 and § 3-1-2 of the Sun Valley sales tax ordinance.

Under this provision, a sale occurs when title transfers. The applicable law governing when title transfers for sales tax purposes is article 2 of the Uniform Commercial Code as adopted in Idaho. Old West Realty v. Idaho State Tax Commission, 110 Idaho 546, 548-549, 715 P.2d 1318 (1986). Idaho Code § 28-2-401 reads:

28-2-401. Passing of title -- Reservation for security
-- Limited application of this section.

Each provision of this chapter 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 chapter and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (section 28-2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the chapter on Secured Transactions (chapter 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed 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, despite any reservation

of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading . . .

(a) 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; but

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such reversioning occurs by operation of law and is not a "sale."

Under this provision of the Uniform Commercial Code, title passes, and thus the sale occurs, at the time the seller delivers the building materials to a building site in the City of Sun Valley "unless otherwise explicitly agreed" between the buyer and seller. When title passes at a place of delivery in Sun Valley, the sale is "within the City" under § 3-1-3 of the city's sales tax ordinance. The seller is required to collect and remit the city's sales tax on such a sale.

Courts in other states have used the passage of title to determine the application of local sales taxes. See, Shell Oil Company v. Director Of Revenue, 732 S.W.2d 178 (Mo. 1987) (Shell Oil Company required to collect St. Louis County sales tax on aviation fuel Shell sold to airlines that was delivered from Texas via a third party into the fuel tanks of aircraft at Lambert Field in St. Louis); Matter of Gunther's Sons v. McGoldrick, 255 App. Div. 139, 5 N.Y.S.2d 303 (1938), aff'd 279 N.Y. 148, 18 N.E. 2d 12 (1938) (furs sold by New York City retailer but held in "free storage" until shipped to out-of-city purchasers by common carrier were not subject to New York City's

sales tax because title did not pass until the furs were delivered to the out-of-city purchaser).

In summary, we conclude that the City of Sun Valley may impose its sales tax on sales made in the city. For the sale of goods, a sale is made in the city when title passes to the buyer in the city. Under the Uniform Commercial Code, title passes either when provided by contract between the parties or, if there is no express contractual provision, when the seller completes his responsibilities regarding delivery of the product sold. In no case does title pass before identification of specific goods to the sale. When delivery of building materials occurs in the City of Sun Valley, and there is no specific provision in the sales contract to the contrary, then title passes at the time of delivery and that is the time of sale. In that case, if the seller is a retailer required to have a city sales tax permit, the city may require the seller to collect city sales tax on the sale and remit the tax to the city.

AUTHORITIES CONSIDERED:

1. Statutes

Idaho Code § 28-2-401.
Idaho Code §§ 50-1043 through 50-1049.
Chapter 36, Title 63, Idaho Code.
Idaho Code § 63-3609.
Idaho Code § 63-3612.
Idaho Code § 63-3619.
Idaho Code § 63-3621.

2. Cases

Boise Bowling Center v. State, 93 Idaho 367, 461 P.2d 262 (1969).

Bullock v. Dunigan Tool & Supply Co., Inc., 588 S.W.2d 633 (Tex.Civ.App.1979).

City of Pomona v. State Board of Equalization et al., 1 Cal.Rptr. 489, 347 P.2d 904 (1959).

General Trading Co. v. State Tax Com'n of Iowa, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309 (U.S.Iowa, 1944).

Matter of Gunther's Sons v McGoldrick, 255 App. Div. 139, 5 N.Y.S.2d 303 (1938), aff'd 279 N.Y. 148, 18 N.E. 2d 12 (1938).

McLeod v. J. E. Dilworth Co., 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304 (U.S.Ark., 1944).

Mobil-Teria Catering Co., Inc. v. Spradling, 576 S.W.2d 282 (Mo. 1978).

Old West Realty v. Idaho State Tax Commission, 110 Idaho 546, 715 P.2d 1318 (1986).

Scandrett v. Shoshone County, 63 Idaho 46, 116 P.2d 225 (1941).

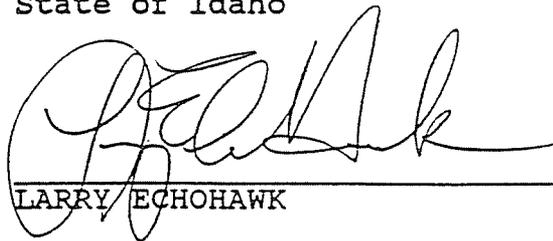
Shell Oil Company v. Director Of Revenue, 732 S.W.2d 178 (Mo. 1987).

State Board of Equalization v. Jackson Hole Ski Corporation, 737 P.2d 350 (Wy, 1987) Modified 745 P.2d 58 (Wy, 1987).

Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 708 P.2d 147 (1985).

Dated this 29th day of April, 1991.

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Analysis by:

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