BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
APPLE COMPUTER, INC. **No. 00-37**
ID NO. 02-006556-006, PROTEST TO
ASSESSMENT NO. 2037018

DECISION AND ORDER

This matter came on for formal hearing on June 12, 2000 before Gerald B. Richardson, Hearing Officer. Apple Computer, Inc., hereinafter, "Apple", was represented by Mary E. McDonald, Esq. of Sutin, Thayer & Browne, P.C. The Taxation and Revenue Department, hereinafter, "Department", was represented by Mónica M. Ontiveros, Special Assistant Attorney General. At the close of the hearing, the parties were requested to submit briefs and proposed findings of fact and conclusions of law in support of their respective positions in this matter. The final submission was made on August 28, 2000 and the matter was considered submitted for decision at that time. The parties have allowed this decision maker additional time, until December 8, 2000, to render his decision in this matter.

FINDINGS OF FACT

1. Apple is in the business of manufacturing and selling computers and related equipment.
2. Apple is headquartered in Cupertino, California, but its business and tax departments are located in Austin, Texas. During the audit period Apple had four employees in New Mexico.
3. Apple was audited by the Department for the period January, 1993 through July, 1995 (the "audit period"). The Department auditors, David Hecht and Janice McGee, conducted the audit at Apple's offices in Austin, Texas from October 24-27, 1995.

4. As a result of the Department's audit, on June 10, 1996 the Department mailed to Apple Notice of Assessment Number 2037018 ("the Assessment"), assessing $147,145.89 in gross receipts tax, $7,246.31 in compensating tax, $15,439.24 in penalty and $42,475.70 in interest for a total of $212,307.14 computed through June 25, 1996.

5. By letter dated June 21, 1996, Apple timely protested the gross receipts tax, interest and penalty portion of the Assessment.

6. Apple did not protest the compensating tax portion of the Assessment.

7. Apple paid the assessed compensating tax before May 25, 2000, leaving $724.65 in penalty and $6,817.16 in interest due on account of the compensating tax assessment.

8. Subsequent to the audit and issuance of the Assessment, and based upon further documentation provided by Apple, the Department made some further adjustments to the assessment. The amount of gross receipts tax principal in dispute is $140,896.61, plus related interest and penalty.

9. During the audit period, Apple sold computers, printers, keyboards and computer accessories with associated software included in the price of the hardware to customers located in New Mexico. With respect to each sale, Apple reported its receipts from the sale to the Department as gross receipts and either paid tax on its receipts or claimed a deduction for its receipts from the sale.

10. The assessment of gross receipts tax resulted from the Department's disallowance of deductions which had been claimed by Apple when it filed its monthly gross receipts tax returns.

11. The Department denied the claimed deductions based upon the failure of Apple to demonstrate that it possessed a proper form of nontaxable transaction certificate ("NTTC") to support its claim of deduction. In some cases, Apple possessed a pre-1992 form of NTTC from

its customer, but was unable to demonstrate that it had the new form of NTTC ("1992 series NTTCs") the Department required to support a claim of deduction for transactions after July 1, 1992.

12. By letter dated April 13, 1995, the Department notified Apple that it had been selected for an audit. The Department also informed Apple that its auditors would review any deductions taken when reporting gross receipts tax and that its auditors would be reviewing the NTTCs or other evidence in support of the deductions. Apple was advised that it would be to its advantage to acquire any missing documents and to have its documentation in support of its claimed deductions available for the Department's auditors at the start of the audit.

13. For 1993, Apple reported to the Department receipts of $10,718,763 and deducted $8,494,203 and the Department disallowed $306,600.29 in deductions. For 1994, Apple reported to the Department receipts of $13,149,460 and deducted $11,137,900 and the Department disallowed $731,464.58 in deductions. For the period January through July, 1995, Apple reported to the Department receipts of $10,578,049 and deducted $9,323,829 and the Department disallowed $590,052.77 in deductions.

14. Apple did not report or pay gross receipts taxes or sales taxes to any other state on any of its receipts from its sales to customers in New Mexico during the audit period.

15. During the audit period, Apple shipped all products sold to its New Mexico customers from its warehouses located in Illinois, California, and Colorado. None of the products sold to Apple's New Mexico customers originated in New Mexico.

16. All products were shipped to Apple's New Mexico customers by United Parcel Service, Federal Express or Skyway Freight Services, with the vast majority of the shipments handled by Skyway Freight Services ("Skyway").

17. During the audit period Apple had a number of contracts with Skyway (Department Exhibit 14). Some of these contracts provided contract shipping rates for shipments from Apple to its customers from Apple's warehouses in California, Illinois and Colorado. Other contracts provided for Skyway to provide various warehousing, packing and transportation services at Apple's warehouse facilities.

18. Skyway was regulated by the Interstate Commerce Commission as a common carrier and delivered freight from Apple to Apple's customers as a carrier for hire.

19. Apple assigns customer numbers to its customers and classifies its customers according to "marketing channels."

20. The Department's Exhibit 20 is a computer printout listing all Apple sales that were shipped to a New Mexico address during the audit period ("Apple's N.M. audit printout"). The list is organized by marketing channel and by customer name and number.

21. In the audit workpapers (Department's Exhibit 1), the Department lists disallowed deductions by customer name and by Apple's customer numbers.

22. The marketing channel for dealers is identified as "DEA" and the marketing channel for educational institutions is identified by "EDU" in Apple's N.M. audit printout.

23. CLI Computers and Apple entered into an Authorized Apple Dealer Sales Agreement effective December 10, 1992 and an Apple Authorized Service Provider Agreement effective July 8, 1993, each providing that title to products would pass to CLI at Apple's shipping location.

24. CLI Computers is listed as a dealer and identified by customer number 9143 in Apple's N.M. audit printout.

25. Apple assigned customer number 246158 to "DFS CLI Computers". The "DFS" prefix means that sales listed under this number were financed through DFS.

26. Sales listed under CLI Computers customer number 9143 and DFS-CLI Computers customer number 246158 were all sales to CLI Computers.

27. Apple's sales to CLI Computers during the audit period totaled $97,786.19.

28. ITT is a finance company.

29. Sales that are listed in Apple's N.M. audit printout and in the audit workpapers to a customer whose name is preceded by "ITT" or "DFS" are sales to the named company which were financed by ITT or DFS.

30. Random Access, Inc., and Apple entered into an Authorized Apple Dealer Sales Agreement effective June 18, 1993. The Agreement provides that title to product passes to Random Access at Apple's shipping location.

31. Entex Information Services, Inc. ("Entex") and Apple entered into an Authorized Apple Dealer Sales Agreement effective February 16, 1994 and an Apple Authorized Service Provider Agreement effective July 29, 1994. Both agreements provide that title to product passes to Entex at Apple's shipping location.

32. Tandy Name Brand Retail Group and Apple entered into an Apple Retail Distribution Agreement effective October 1, 1993. The agreement provides that all purchases are F.O.B. Apple's shipping location.

33. Tandy Specialty Retail Group and Apple entered into an Authorized Apple Retailer Sales Agreement effective May 31, 1995, providing that title to product would pass to Tandy at Apple's shipping location.

34. Service Merchandise Co., Inc. and Apple entered into an Apple Retail Distribution Agreement effective June 16, 1993 and Apple Retail Distribution Agreement effective March 21, 1994. Both agreements provide that all purchases are F.O.B. Apple's shipping location.

35. Apple's standard Education Purchase Agreement provided that all purchases would be F.O.B. Apple's shipping location.

36. Apple did not produce copies of contracts with Computerworks, Connecting Point, Farmington Micro Connection or Leasing Solutions, which are listed as dealers on Apple's N.M. audit printout and are Apple customers for whom Apple's claim of deduction were denied by the Department. Nonetheless, all Apple Dealers would have signed one of Apple's standard forms of dealer or retailer agreements.

37. Apple's customers that are listed under the education channel on Apple's N.M. audit printout would have signed one of Apple's standard forms of Apple Education Purchase Agreement.

38. Apple's standard form of invoice used during the audit period provided that the terms and conditions in the invoice would govern the sale unless the customer had a current purchase agreement with Apple, in which case only the terms and conditions in the purchase agreement would apply.

39. Apple's standard invoice provided that all purchases are F.O.B. Apple's shipping location and that title to the products shall pass to the purchaser at Apple's shipping location.

40. Pursuant to either Apple's standard invoice or whichever of Apple's standard purchase agreements in effect with a customer, title to all goods shipped by Apple to a customer in New Mexico passed outside of New Mexico when Apple placed the goods for shipment with a common carrier from its warehouses.

41. All of Apple's contracts with purchasers, be they based upon Apple's standard invoice, the Authorized Apple Dealer Sales Agreement, the Apple Authorized Service Provider Agreement, the Apple Retail Distribution Agreement, the Authorized Apple Retailer Sales Agreement or the Standard Apple Corporate Direct Purchase Agreement contain language to the effect that merchandise prices include Apple's standard transportation, insurance and routing to U.S. locations.

42. None of Apple's contracts with purchasers, be they based upon Apple's standard invoice, the Authorized Apple Dealer Sales Agreement, the Apple Authorized Service Provider Agreement, the Apple Retail Distribution Agreement, the Authorized Apple Retailer Sales Agreement, or the Standard Apple corporate Direct Purchase agreement use the term "risk of loss" with respect to specifying which party bears the risk of loss for goods in shipment. They all contain, however, the following language, "When shipping pursuant to Apple's standard practices, Apple will place all tracers, file claims and replace product lost or damaged in transit."

43. Pursuant to its agreements with its customers, Apple was obligated to replace goods that were lost or damaged during shipment to its customers.

44. Apple had a division of employees who were responsible for handling claims for lost or damaged goods. If goods were lost or damaged in transit, Apple's customer notified Apple rather than the carrier. Apple filed claims with the carriers itself. With respect to claims filed by Apple which were made on a timely basis with the carriers, the carriers paid Apple only the release value of the goods. The release value was a standard amount set by the carriers in the amount of $5.00 per pound, up to $100 per package. The release value paid by the carriers never amounted to the cost of the goods or of the invoice cost regardless of who the carrier was.

45. Apple replaced goods lost or damaged in transit. At the customer's option, Apple would enter a credit against the customer's account.

46. Apple replaced lost or damaged goods or credited the customer's account without regard to whether or when Apple would recover on its claim against the carrier.

47. Apple self-insured the product while in transit to its customers.

48. During the audit period, Apple shipped $34,446,272 in products to New Mexico customers and replaced lost goods to New Mexico customers at a cost of only $17,320.

49. The replacement cost figures do not include the cost of replacements for damaged goods, but the damaged goods were returned to Apple and damaged hardware was refurbished.

50. Apple considers the $17,320 replacement cost to be a nominal cost for self-insuring over $34 million in products shipped.

51. Apple bore the risk of loss on goods shipped to its customers pursuant to its standard shipping practices.

52. Apple invoiced its customers upon placement of its merchandise with its contract carriers for shipment to customers.

53. Apple recognized the revenue from its sales at the time of shipping and invoicing in accordance with its understanding of generally accepted accounting principles.

54. Apple did not reverse the original invoice to the customer when a customer made a claim for goods lost or damaged in transit.

55. Apple did not reverse its recognition of sales revenue from sales for which a customer made a claim for goods lost or damaged in transit.

56. When Apple replaced goods lost in transit, the customer was not re-invoiced.

57. When Apple shipped replacements for goods damaged in transit, Apple generated an invoice to the customer for the replacement. When the customer returned the damaged goods, the invoice for the replacement was offset. Apple accounted for replacements on an Apple internal account.

58. Each of Apple's contracts and its standard invoice provided that the validity, construction and performance of the agreements are to be governed by and construed in accordance with the law of California.

59. During the audit period, Apple treated all sales of merchandise shipped to customers in New Mexico as New Mexico sales for purposes of reporting and paying New Mexico gross receipts tax.

60. During the audit itself, Apple never contended that its sales of merchandise shipped to customers in New Mexico were not subject to New Mexico gross receipts tax because they were not sales occurring in New Mexico.

61. As of the date of the formal hearing, Apple continues to report and pay New Mexico gross receipts tax on sales of merchandise shipped to customers located in New Mexico.

62. Apple's sales of merchandise shipped from California, Illinois or Colorado were not taxed in those states.

63. Apple does not report or pay sales or gross receipts taxes to any other state on sales of merchandise it ships to customers located in New Mexico.

64. The first time the Department was notified that Apple considered its sales of merchandise during the audit period which were shipped to New Mexico customers from Apple's out-of-state warehouses to be out-of-state sales which are not subject to New Mexico gross receipts tax was when Apple filed its first Amended Protest on December 21, 1998.

65. On October 24, 1995, the Department's auditors attempted to serve a "60-day letter" on the Apple employee, Sherry Watkins, who they dealt with when they arrived to conduct their audit. Ms. Watkins declined to sign for the 60-day letter, informing the Department's auditors that it should be presented to her supervisor, Susan Desgrousillier, who would be there the following day.

66. On October 25, 1995, during the course of the Department's audit of Apple, Apple's representative, Susan Desgrousillier signed for and acknowledged receipt of the Department's 60-day letter. The 60-day letter was dated October 24, 1995. The 60-day letter informed Apple that the letter constituted notice, as provided in Section 7-9-43 NMSA 1978, that it be in possession of New Mexico Nontaxable Transaction Certificates ("NTTC's") to support its claimed deductions. With respect to transactions on or after July 1, 1992, the letter informed Apple that it must demonstrate the possession of such NTTC's "today", or it must demonstrate to the auditors within 60 days that the required NTTC's were in Apple's possession at the time each transaction for which deduction was claimed was required to be reported.

67. Apple did produce for the Department's auditors a copy of its NTTC from CLI Computers which covered transactions prior to July 1, 1992.

68. On October 25, 1995, CLI Computers issued Apple a fully completed and signed 1992 series NTTC for transactions on or after July 1, 1992.

69. Apple received the 1992 series NTTC from CLI Computers on October 25, 1995 by facsimile transmission from CLI Computers dated October 25, 1995 at 3:38 P.M.

70. Apple's customary practice is to present its tax certificates to the auditor during the course of a sales tax or gross receipts tax audit.

71. If the auditor finds exceptions and informs Apple of exceptions, Apple's customary practice is to go back to the customer to get the certificate, during the course of the audit, and to obtain the certificate by fax from the customer.

72. If a certificate is received by fax, Apple customarily gives the certificate to the auditor.

73. During the audit, the auditors were given an Apple ledger listing all sales within the audit period, by customer.

74. As the auditors reviewed NTTC's presented to them by Apple, the auditors marked "ok" on the ledger beside the entries for each customer from whom Apple produced a certificate that was accepted by the auditors.

75. When Apple did not have a certificate acceptable to the auditors, the auditors made no mark on the ledger to indicate whether a certificate had been produced.

76. The auditors made no mark indicating that they had accepted an NTTC from CLI Computer.

77. The auditors made copies of some but not all of the certificates they saw but did not accept.

78. Ms. McGee might have made a list of the NTTC's presented to the auditors but has no such list now and does not remember if such a list was made at the time of the audit.

79. Ms. McGee could not remember when Apple presented NTTC's to her or Mr. Hecht.

80. The Department's protest officer reviewed all of the certificates that had been presented by Apple to the Department and determined whether to accept any additional certificates.

81. If the protest officer had known that the 60-day letter was signed by Apple on October 25, 1995, the protest officer would have accepted Apple's 1992 series NTTC from CLI Computers, based on the fact that the NTTC was dated as issued on October 25, 1995.

82. Apple presented the CLI Computer 1992 NTTC to the Department's auditors on October 25, 1995.

DISCUSSION

Introduction

In 1995, the Department audited Apple and assessed gross receipts tax on Apple's receipts from certain of its New Mexico customers based upon Apple's failure to possess proper nontaxable transaction certificates ("NTTC's") or other documentation to support the deductions Apple had claimed when reporting its gross receipts taxes to the Department. Long after the audit was completed and its protest was filed, Apple amended its protest to dispute that the sales for which deductions had been claimed were subject to gross receipts tax whatsoever. Thus, at this juncture, the primary issue to be determined is whether Apple was subject to New Mexico gross receipts tax upon its receipts from the sale of tangible personal property to customers located in New Mexico. Gross receipts tax is imposed upon the gross receipts of any person engaging in business in New Mexico. Section 7-9-4 NMSA 1978. "Gross receipts" is defined in pertinent part as, "the total amount of money…received from selling property in New Mexico,…." Section 7-9-3(F) NMSA 1978. Apple argues that under the facts of this case, it did not sell property in New Mexico because title to the goods it sold to its New Mexico customers transferred to its customers when it placed the goods with a common carrier at its warehouses in California, Illinois or Colorado for shipment to its customers, and thus the sale took place outside of New Mexico and was not subject to tax. In making these arguments, Apple relies upon the

provisions of the Uniform Commercial Code ("UCC") to determine where the sale occurred.[1] The Department argues that both the conduct of the parties and the contract terms themselves demonstrate that regardless of Apple's shipping practices and the wording of its contracts, Apple bears the risk of loss with respect to the goods in transit to Apple's New Mexico customers and because of this, the legal obligations of the parties are not fixed until the goods are delivered to Apple's customers in New Mexico, thus establishing New Mexico as the place where the sale occurs and rendering it subject to tax. In making its arguments, the Department argues that while the UCC may apply to determine the rights between the parties, the common law governs to determine whether a sale has occurred in New Mexico for tax purposes. The issue, as framed, thus presents highly interesting issues concerning where a sale occurs when the passage of title and passage of risk of loss occur in different places, as well as issues concerning the interplay of the UCC and the common law in determining where a sale occurs for taxation purposes.

A description of the transactions between Apple and its customers will be helpful prior to determining the tax consequences of those transactions. Apple is headquartered in California. During the audit period it had four employees in New Mexico. Apple sold computers, printers, keyboards, computer accessories and associated software which was included in the price of the hardware to customers located in New Mexico. With respect to the majority of the sales at issue[2], Apple had entered into one of its standard forms of agreement with a dealer, retailer or

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[1] Apple's agreements with its customers, whether one of its form agreements or its standard invoice, all provide that California law governs the agreement between the parties. Under California law, contracts for the sale of goods are governed by the UCC. Both California and New Mexico have adopted Article 2 of the UCC, which deals with sales of goods, without modification. The UCC is codified in New Mexico in Chapter 55 of the New Mexico Statutes Annotated, 1978 compilation. Since both state's enactments of the UCC are substantially identical for purposes of the issues discussed herein, citations to the UCC will simply refer to the UCC section number without specific citation to either California's or New Mexico's statute.

[2] Apple was not able to produce copies of contracts with all of its customers for whom a deduction was taken. Apple provided convincing testimony, however, that the customers would have signed one of its standard purchase agreements, or, at the very least, Apple's standard invoice would have been used which set out the shipping and title passing terms.

educational institution which provided that all purchases would be F.O.B. Apple's shipping location or that title to the product would pass at Apple's shipping location, or would contain both statements. Apple's standard invoice for all sales provided that all purchases are F.O.B. Apple's shipping location and that title to the products passed to the purchaser at Apple's shipping location.

During the audit period, Apple shipped all of its product from warehouses in Illinois, California or Colorado, using common carriers. The vast majority of its shipping was handled by Skyway Freight Systems, with whom Apple had contracted to handle deliveries.

None of Apple's contracts use the term "risk of loss" with respect to which party bore the risk of loss for goods in transit. All of Apple's contracts with purchasers contain language to the effect that merchandise prices include Apple's standard transportation, insurance and routing to U.S. locations. They also contain language to the effect that when shipping pursuant to Apple's standard practices, Apple will place all tracers, file claims and replace goods lost or damaged in transit. In spite of the language about insurance, Apple never purchased any insurance for the goods in transit. Instead, it chose to self-insure itself against the cost of fulfilling its obligation under the contract to replace lost or damaged goods. Apple had a division of employees who handled claims for lost or damaged goods. When goods were lost or damaged in transit, Apple's customer would notify Apple and it would immediately replace the lost or damaged goods. Apple placed tracers and filed claims with the carrier on its own behalf and received the release value of the merchandise from the carriers. The release value was a nominal amount, always less than the cost of replacing the goods, paid by the carrier to Apple pursuant to the terms of its contracts with the carrier. Apple replaced the lost or damaged goods for its customers regardless of whether Apple recovered anything on its claim against the carrier.

The Uniform Commercial Code

Apple's sales transactions will first be examined under the UCC. Before doing so, however, an examination of the manner in which the adoption of the UCC changed the prior law of sales and the intention of the drafters of the UCC with respect to how the Code was intended to be used must be considered to ensure its proper application in the context of this case. Article 2 of the UCC concerns sales of goods. The official commentary to UCC § 2-101 explains the approach taken by the drafters of the Code with respect to sales of goods and how it departs from the prior law of sales. It provides:

> The arrangement of the present article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it *without resort to the idea of when property or title passed or was to pass as being the determining factor.* The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character. (emphasis added).

This comment is further explained as follows:

> Under the Uniform Sales Act and pre-Code case law, such problems as when risk of loss passes from the seller to the buyer, liability of the buyer to the seller for the price of the goods, and the buyer's remedies were generally all answered by the concept of the passing of title. Article 2 of the Uniform Commercial Code, on the other hand, attempts to take care of such situations by specific provisions defining the rights of the parties in each instance.

67 Am Jur 2d Sales § 5, fn. 13. Thus, Article 2 is divided into subparts, each addressing different aspects of the rights of the buyer and seller with respect to each aspect of the performance of a sales contract. For instance, Part 4, concerns the passage of title. Part 5 concerns aspects of performance such as delivery, risk of loss, payment, etc. Part 6 concerns breach, acceptance, repudiation, etc. Part 7 concerns the remedies available. In analyzing the

rights of parties to the sales agreement and other affected third parties, such as creditors, each component of the transaction must be analyzed in accordance with the specific provisions of the Code intended to address that particular situation.

With this background, we can now discuss how the UCC applies with respect to the passage of title to the goods Apple shipped to its customers in New Mexico. Part 4 of Article 2 of the UCC addresses the passage of title. In pertinent part, it provides:

> 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:*
>
> (1) title to goods cannot pass under a contract for sale prior to their identification to the contract, 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 article on secured transactions, *title to the 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;

UCC § 2-401 (emphasis added).

Applying this provision, with respect to Apple's sales which were governed by agreements with a specific title passing clause or which were governed by Apple's standard invoice which has a title passing clause, title passed under Subsection 1 at Apple's shipping point (its out of state warehouse) pursuant to the terms of the express agreement of the parties providing such. With respect to Apple's sales which were governed by agreements that lacked the express language regarding passage of title, each of those agreements contained language that all purchases are F.O.B. Apple's shipping location. An F.O.B. term is a delivery term. Specifically, UCC § 2-319 provides in pertinent part:

> (1) Unless otherwise agreed *the term F.O.B.* (which means "free on board") *at a named place,* even though used only in connection with the stated price, *is a delivery term under which:*
>
> (a) *when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this article and bear the expense and risk of putting them into the possession of the carrier;*

(emphasis added). Thus, under UCC § 2-401 (2) (a), title, once again passed to Apple's customers at Apple's shipping point, where Apple completed its performance with respect to the physical delivery of the goods.

Having established that title passed at Apple's shipping point, its out-of-state warehouses, with respect to all Apple sales to New Mexico customers with which we are concerned, another cautionary advisement is necessary with respect to the significance of the application of UCC § 2-401. Not only is the passage of title only part of the sales transaction addressed by Article 2 of

the Code, it must also be noted that the drafters of the UCC only intended that the UCC address the rights of the "private" parties involved in the sales transaction, such as the buyer and the seller, and such third parties as their creditors or others with an interest in the goods involved and they did not intend to override governmental or "public" determinations of what amounted to a "sale". This is made clear in the official commentary to UCC § 2-401, which provides:

> This article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not "title" to the goods has passed. *That the rules of this section in no way alter the rights of either the buyer, seller or third parties declared elsewhere in the article is made clear by the preamble of this section.* This section, however, *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.*

Comment 1, UCC § 2-401 (emphasis added.) Because of this, the fact that UCC § 2-106 defines a "sale" as consisting of "the passing of title from the seller to the buyer for a price", it does not mean that a sale between a buyer and a seller based solely upon the passage of title can also be considered to be a sale for purposes of locating the transaction to establish which public taxing agency has jurisdiction to tax such sale. Indeed, even as between the parties themselves, under the UCC the passage of title is but one aspect to be considered in defining the relative rights of the parties. ***See, Morton Booth Co. v. Tiara Furniture***, 564, P.2d 210 (Okla. 1977) (title to goods, for purposes of defining the rights of the parties is of little relative consequence under the UCC).

Location of a sale of goods under New Mexico tax law

We are thus called to examine how New Mexico's courts have treated the location of a sale for tax purposes. The parties have brought to my attention four cases involving the sale of goods where the location of the sale was mentioned by the court in its determination of the application of the New Mexico gross receipts tax or compensating tax. Of the four, only one case, ***Field Enterprises Educational Corporation v. Commissioner of Revenue,*** 82 N.M. 24, 474 P.2d 510 (Ct. App. 1970), even makes reference to the UCC in determining the place of sale and that portion of the decision was dicta. The issue in that case was whether a 1% per month "service fee" on a customer's unpaid balance for educational books bought from an out-of-state educational book publisher should be considered to be part of the sales price of the merchandise for purposes of determining the amount of compensating tax due. It was stipulated that the books were shipped by the publisher F.O.B. from its out-of-state binderies. The Commissioner of Revenue had conceded that the sale of the property was consummated out-of-state. The Court merely cited to UCC §§ 2-319 and 2-401 as being in accord with the Commissioner's concession.

Western Electric Co. v. New Mexico Bureau of Revenue, 90 N.M. 164, 561 P.2d 26 (Ct. App. 1976) was also a compensating tax case in which the place of sale was not an issue determined by the court. The issue in that case was whether transportation costs incurred in shipping goods from Western Electric's out-of-state facilities to Mountain Bell in New Mexico should be included in the price of the goods for purposes of calculating the amount of compensating tax to be paid. The Department had a regulation which excluded the transportation costs if they were paid by the purchaser and the court found that the purchaser was paying the transportation costs. The goods involved were shipped by the seller F.O.B. its

shipping point and were usually transported by a carrier with whom *the purchaser* had a contract. ***Id.,*** 90 N.M. 165. It was never an issue in that case that the sales took place out-of-state. Even if it had been, given the fact that the goods were transported by the purchaser's contract carrier, it would also be fair to assume that not only title, but also risk of loss passed outside of New Mexico. Given those facts, the Department's position in this case that risk of loss must be considered in determining where a sale takes place is in accord with the parties' assumption in ***Western Electric*** that the sale took place out-of-state.

The other two cases demonstrate that in addition to considering where title passes, New Mexico's courts also look to where risk of loss transfers in determining the location of a sale of goods. In ***Pittsburgh & Midway Coal Mining Co. v. Revenue Division, Taxation and Revenue Department,*** 99 N.M. 545, 660 P.2d 1027 (Ct. App. 1983), the determination of whether the sale of coal occurred in New Mexico or out-of-state was made in the context of the taxpayer's challenge to the assessment of gross receipts tax on its sales of coal under the Commerce Clause. In that case, Pittsburgh and Midway sold coal to out-of-state purchasers from its McKinley County mine in New Mexico. Pittsburgh and Midway loaded the coal into railroad cars (and on some occasions, trucks) at the mine. The conveyances were not owned by Pittsburgh and Midway. Rather, the purchasers made the arrangements for the conveyances to transport the coal and the purchasers paid for the transportation of the coal themselves. The contracts for the sale of the coal all provided that title to the coal passed to the purchasers at the mine. The Court of Appeals found that under these circumstances, the coal was sold in New Mexico, stating:

> In each of the contracts with out-of-state buyers, *title to the coal and risk of loss* passed from Taxpayer to its customers after the coal was loaded onto the appropriate train, at the mine. The cars in which the coal was loaded were owned by the buyer. After the coal was loaded the transporter was in custody and control of the

> coal until it reached the buyer' site of use. The official weight of the coal was determined at the McKinley mine when it was loaded into the railroad hopper cars. There is substantial evidence, and there are sufficient findings, that title of the coal did pass to Taxpayer's customers when it was loaded into cars or trucks in New Mexico. Therefore, the question is whether, under the facts and circumstances of this case, passage of title in New Mexico is a matter to be considered as a factor justifying the imposition of the gross receipts tax.

Id., 99 N.M. at 554 (emphasis added).

In the remaining case, ***Proficient Food v. New Mexico Taxation and Revenue Department,*** 107 N.M. 392, 758 P.2d 806 (Ct. App. 1988), the taxpayer also challenged the imposition of gross receipts tax on its sales of food and supplies to restaurants in New Mexico on the basis of the Commerce Clause. The stipulated facts were that the taxpayer was a California corporation which operated a restaurant supply business with a warehouse in Texas. The taxpayer had no office or place of business in New Mexico and no employees, agents or salesmen residing in the state. It sold goods to restaurants in New Mexico. The orders for those goods were taken over the phone and the sales arrangements were negotiated and administered outside of New Mexico. The invoicing for those sales was also handled out-of-state. The Taxpayer, however, delivered the goods to the restaurants in New Mexico from its warehouse in Texas, using its own trucks.

The taxpayer had argued that it was not engaged in the business of selling in New Mexico and that its selling activities were concluded when the order was accepted and the goods identified and placed in transit from its locations in Texas. As part of the court's decision upholding the imposition of the gross receipts tax the court affirmed the hearing officer's determination that the goods were sold in New Mexico, stating:

> Although not explicitly stated in the stipulated facts, the hearing officer determined it was reasonable to infer that the products delivered to the restaurants in New Mexico were sold in New Mexico, despite the fact that the invoices were handled by the corporate offices outside the state. *See Pittsburgh & Midway Coal Mining Co. v. Revenue Div., Taxation & Revenue Dep't.,* 99 N.M. 545, 660 P.2d 1027 (Ct. App. 1983) (sale occurred in New Mexico when title and risk of loss pass to purchaser in New Mexico and tax may be imposed on those sales). We Agree.

Id., 107 N.M. at 395 (italics in original). It is thus clear from the court's own characterization of its ruling in ***Pittsburgh and Midway*** that risk of loss is a factor to be considered in determining where a sale is located. It would also have been obvious to the court that when a seller is delivering the goods it sells in its own delivery trucks, that the seller is the party bearing the risk of loss. It should also be noted that although both ***Pittsburgh and Midway*** and ***Proficient Food*** involved the sale of goods, and the rights and obligations of the buyer and seller would have been governed by the UCC, the Court made no reference to the UCC in determining where the sales occurred for purposes of applying "public" law involving the imposition of New Mexico tax.

Based upon both ***Pittsburgh and Midway*** and ***Proficient Food***, it is clear that in addition to locating the passing of title, we must also consider where risk of loss passes in determining where a "sale" occurs for purposes of imposition of gross receipts taxes in New Mexico. The Department's regulation under § 7-9-55 NMSA 1978, dealing with the deduction from gross receipts tax for transactions in interstate commerce is in accordance with this approach. Regulation 3 NMAC 2.55.12.2 provides as follows:

> Receipt of New Mexico sellers from sales of property to nonresidents of New Mexico who accept delivery of the property in New Mexico *or where transfer of title or risk of loss* passes to the nonresident buyer in New Mexico are not receipts from

> transactions in interstate commerce and are not deductible under Section 7-9-55. (emphasis added).

Because Apple has argued that the location of the sale is solely governed by where title transfers under the UCC, its argument is clearly erroneous.

That Apple has misinterpreted the application of the UCC to this case is clear, even from the UCC and the cases determined under it. As noted earlier in this decision, the drafters of the UCC rejected the approach of prior law which had made the transfer of title the prime determinant of the rights of the parties, with all other issues, such as when risk of loss passes, when the buyer becomes liable for the price of the goods and the remedies of both buyer and seller upon breach, following from the passage of title. Instead, the Code provides for specific provisions dealing with each of those issues, irrespective of the passage of title.

> "No longer is the question of title of any importance in determining whether a buyer or a seller bears the risk of loss. *It is true that the person with title will also (and incidentally) often bear the risk that the goods may be destroyed or lost; but the seller may have title and the buyer the risk, or the seller may have the risk and the buyer the title. In short, title is not a relevant consideration in deciding whether the risk has shifted to the buyer."* R. Nordstrom, Handbook of the Law of Sales, 393 (1970).

Martin v. Melland's Inc., 283 N.W. 2d 76, 79 (N.Dak. 1979). Thus, § 2-509 contains provisions specifically addressing risk of loss in the absence of breach. The commentary to that section is illuminating:

> The underlying theory of these sections on risk of loss is the adoption of the contractual approach rather than an arbitrary shifting of the risk with the "property" in the goods. The scope of the present section, therefore, is limited strictly to those cases where there has been no breach by the seller. *Where for any reason his delivery or tender fails to conform to the contract, the present section does not apply and the situation is governed by the provisions on effect of breach on risk of loss.*

Comment 1, UCC § 2-509 (emphasis added). UCC § 2-613 is the section that addresses when there has been a breach due to a failure to deliver goods or failure to deliver undamaged and conforming goods. It provides:

> Where the contract requires for its performance goods identified when the contract is made and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term then:
>
> (a) if the loss is total the contract is avoided; and
>
> (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract, the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

The official commentary sheds further light on the intended operation of this section. It provides:

> Where under the agreement, including of course usage of trade, the risk has passed to the buyer before the casualty, the section has no application. Beyond this, *the essential question in determining whether the rules of this section are to be applied is whether the seller has or has not undertaken the responsibility for the continued existence of the goods in proper condition through the time of agreed or expected delivery.*

UCC § 2-613, Comment 2 (emphasis added). Thus, under this section, when the seller has undertaken the responsibility for the delivery of conforming goods, in the event that the goods are lost or damaged in transit, the buyer has the option to void the contract of sale. Obviously, if a purchaser exercised his option to void the sale, there would be no "sale" upon which any consequences, tax or otherwise, could attach, regardless of whether the parties agreed on the passage of title at some prior point in time. This situation illustrates Apple's fallacy in relying

solely upon where title passes under the UCC to determine whether a sale has occurred, because it confuses the concept of a sale defined solely by the passage of title under the UCC with an enforceable and consummated sale. ***See, also In re Charter Co.***, 49 B.R. 513 (Bkrtcy. Fla., 1985) (under UCC, passage of title to sold goods is not dependent on consummation of sale). It also confirms the wisdom of New Mexico's courts when they consider the circumstances of the entire sales transaction, including the passage of risk of loss, in determining when and where a sale has occurred. Otherwise, parties could, by private contract, alter the form of the contract to manipulate tax consequences[3], without regard to the substance or reality the sale transaction. Our courts have been careful to consider the substance of a transaction rather than to be bound by such matters of form in determining tax consequences of private agreements in New Mexico. ***See, Sonic Industries v. Taxation and Revenue Department,*** Vol. 39, No. 44, N.M.S.B.B. 38, 40 November 2, 2000 (Court refused to interpret the Gross Receipts and Compensating Tax in such a manner that the parties to a sale in New Mexico could avoid tax by simply stepping across the state line to sign the sales agreement).

The Gross Receipts and Compensating Tax Act itself makes provision to ensure that only sales which are actually consummated are taxable sales. Obviously, a cash basis taxpayer who does not receive payment for a sale, has no gross receipts which would need to be reported. However, in the instance of an accrual basis taxpayer who recognized and reported a sale prior to receiving payment, or who subsequently refunds the sale price would need a way to recover the

[3] Because the UCC gives the parties to a sale the ability to establish by contract the place where title may transfer, the parties would have the power to establish the passage of title in a jurisdiction which has no relationship whatsoever to the actual transaction between the parties, and in which neither party has a taxable presence, and successfully avoid taxation of the transaction in its entirety.

tax reported and paid on the transaction. Section 7-9-67(A) provides a deduction from gross receipts tax for accrual basis taxpayers when a subsequent refund is made.

The passage of risk of loss for Apple's sales to New Mexico customers

It thus becomes important in this case to determine where the risk of loss passed with regard to Apple's sales to its New Mexico customers. Both the contract documents themselves as well as Apple's own course[4] of conduct make it clear that with respect to such sales, that Apple bore the risk of loss that its goods may be lost or damaged in shipment. The contracts provide that Apple will replace product lost or damaged in transit. It was undisputed that Apple did this routinely, and had an entire division of employees just to handle such claims. Goods were replaced immediately, without regard to whether the customer had yet returned damaged goods or whether Apple recovered anything from the carrier who shipped the goods. It is also clear from Apple's conduct and its own testimony, that it did not replace lost or damaged goods as an agent for the purchaser under any sort of insurance claims procedure based upon the contractual language that the price of the goods included insurance. Despite the contractual language, there was no evidence that Apple purchased any kind of insurance for the goods in transit, either in its own name or on behalf of the purchasers. Even to the extent that Apple recovered the "release value" of the merchandise from the carrier, the amount never represented the actual value of the loss, and Apple made the claim for and received the payments from the carrier in its own name and for its own account. No amounts were credited to the customer

[4] The Code is quite liberal in allowing evidence as to the parties course of dealing and course of performance in supplementing or explaining the agreement of the parties. UCC § 2-202(a), Official Comment 2

because Apple had already made good on the customer's claim based upon its own obligation to replace the goods. In fact, Apple's own witness, Terry Ryan, testified that Apple "self-insured". In other words, Apple made a business decision not to purchase insurance, but instead, to simply absorb any losses due to lost or damaged merchandise. Mr. Ryan testified that Apple considered the costs of doing so to be a nominal cost, given the large volume of its sales and the relatively small amount of costs incurred replacing lost or damaged goods. The fact that Apple chose to bear this expense is entirely consistent with its own obligation pursuant to its contracts to replace goods lost or damaged in transit.

Apple attempts to dispute that it bore the risk of loss until conforming goods were delivered to its New Mexico customers by pointing out its own internal bookkeeping procedures in handling such claims. Apple recognized its sales revenues at the time of shipping and invoicing, and it did not reverse the invoice when a customer made a claim. While these actions are consistent with its position now taken that the sales took place at the time of shipment when title passed, and no doubt were based upon Apple's understanding of generally accepted accounting principles based upon when it believed a sale occurred, they fail to establish, as a matter of law, when the sale actually occurred. They are also counterbalanced by Apple's own actions during the same period of time which consistently treated the same sales as New Mexico sales when it reported and paid New Mexico gross receipts tax on such sales.

Given the fact that Apple bore the risk of loss on its sales shipped to its New Mexico customers until Apple performed its contractual obligations to deliver conforming goods to its New Mexico customers, and given those customer's right to void the sale until Apple met that obligation under its contracts, there was no consummated sale until such time as Apple

performed its contractual obligations. Because that could not occur until conforming goods were delivered in New Mexico, the sales at issue were New Mexico sales and as such were subject to New Mexico's gross receipts tax.

The Commerce Clause

The next issue to be determined is whether, given that the sales are taxed as New Mexico sales, the imposition of the tax violates the Commerce Clause of the U.S. Constitution. The Commerce Clause requires that a state tax on a transaction in interstate commerce pass the four prong test set forth in ***Complete Auto Transit, Inc. v. Brady,*** 430 U.S. 274, 287 (1977). That test requires that: (1) a sufficient nexus exists between the activity being taxed and the taxing state; (2) the tax be fairly apportioned; (3) the tax imposed does not discriminate against interstate commerce; and (4) the tax is fairly related to services provided by the state. The requirement of fair apportionment serves to insure that "each state taxes only its fair share of interstate transactions." ***Goldberg v. Sweet,*** 488 U.S. 253, 261 (1989). The requirement that a tax may not discriminate against interstate commerce insures that "a state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the state." ***American Trucking Association v. Scheiner,*** 483 U.S. 266, 280 (1987). A state tax violates the fair apportionment requirement if it fails the "internal consistency" test first enunciated in ***Container Corporation of America v. Franchise tax Board,*** 463 U.S. 159, 169 (1995). This test looks to the structure of the tax at issue to determine whether its identical application by every other state would place interstate commerce at a disadvantage as compared to intrastate commerce. Apple argues that imposition of New Mexico's gross receipts tax on the sales at issue violates the internal consistency test because other states, such as California from which Apple's goods were shipped, could also impose a tax on the same sale.

In ***Oklahoma Tax Commission v. Jefferson Lines, Inc.***, 514 U.S. 175 (1994), the Court upheld the imposition of Oklahoma's sales tax on the full price of a ticket for bus travel from Oklahoma to another state under a Commerce Clause challenge. In finding the tax internally consistent and fairly apportioned, the Court analogized from its treatment of taxes on the sale of goods, stating:

> A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity affects the value on which a buyer is taxed. We have therefore consistently approved taxation of sales without any division of the tax base among different States, and have instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceeded the sale or might occur in the future. (citation omitted.)
>
> Such has been the rule even when the parties to a sales contract specifically contemplated interstate movement of the goods either immediately before, or after, the transfer of ownership. (citations omitted.) The sale, we held, was "an activity which… is subject to the state taxing power" so long as taxation did not "discriminate" against or "obstruct" interstate commerce, (citation omitted) *and we found a sufficient safeguard against the risk of impermissible multiple taxation of a sale in the fact that it was consummated in only one State.*

Id., *514 U.S. at 188 (emphasis added).* Similarly, in this case, because Apple's sale could only be consummated in New Mexico where Apple had completed its performance under the terms of its sales contract with its New Mexico customers, there is no other state in which the sale could have taken place. Because there is no risk of impermissible multiple taxation, New Mexico's tax meets the internal consistency requirement under the Commerce Clause.

The NTTC issue

The final issue to be determined is whether Apple is entitled to claim a deduction for its sales to CLI Computers[5] based upon the 1992 Series NTTC which CLI Computers faxed to Apple during the course of the New Mexico audit. There is no real dispute that the NTTC is a proper one and that Apple would be entitled to its claim of deduction for its sales to CLI based upon its Computers possession of the NTTC if it had been presented to the Department's auditors on the date it was faxed to Apple, October 25, 1995[6]. The only dispute is whether the NTTC was actually presented that day.

The parties dispute is based upon § 7-9-43(A) NMSA 1978 as it was written at the time of the audit. In pertinent part, it provided as follows:

> The provisions of this subsection apply to transactions occurring on or after July 1, 1992. All nontaxable transaction certificates of the appropriate series executed by buyers or lessees shall be in the possession of the seller or lessor for nontaxable transactions at the time the return is due for receipts from the transactions. *If the seller or lessor does not demonstrate possession of required nontaxable transaction certificates to the department at the commencement of an audit* or demonstrate within sixty days from the date that the notice requiring possession of these nontaxable transaction certificates is given the seller or lessor by the department that the seller or lessor was in possession of such certificates at the time receipts from the transactions were required to be reported, *deductions claimed by the seller or lessor that require delivery of these nontaxable transaction certificates shall be disallowed.* (emphasis added.)

§ 7-9-43(A) NMSA 1978 (1992 Supp.)[7]

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[5] Apple's receipts from CLI Computers during the audit period amounted to $97,786.19.

[6] Although the Department's auditors began their audit of Apple on October 24, 1995, the audit took four days and Apple actually signed for the Department's 60 day letter on October 25, 1995. I believe that the presentment of an NTTC on the second day of an audit under these circumstances is sufficiently close to the time the audit began to qualify as being presented at the "commencement" of the audit.

[7] The prior version of this statute had provided that taxpayers *should* have the NTTC in their possession at the time the nontaxable transaction occurs but it provided taxpayers 60 days from notice from the Department to obtain a NTTC from the buyer which could be presented to the Department at any time prior to the expiration of the 60 days. § 7-9-43(A) NMSA 1978 (1991 Supp.). By Laws 1997, Ch. 72, § 1, the Legislature amended § 7-9-43(A) to again relax the standards for possession of NTTC's to that of the prior law. The Department has applied the more relaxed

Because of the time which had elapsed from the audit of Apple to the hearing in this matter, the evidence on the crucial issue of whether Apple had presented the CLI NTTC to the Department's auditors was less than conclusive for either party. Apple presented a witness who was not actually employed by Apple at the time of the audit but who is familiar with how Apple customarily responds to state tax audits based upon her experience at Apple subsequent to the audit. She testified that if an auditor finds exceptions with respect to resale certificates and informs Apple of exceptions, Apple's customary practice is to go back to the customer and request that the customer fax the certificate to them. Apple's witness also testified that if a certificate is received by fax, Apple customarily gives the certificate to the auditor.

The Department presented the testimony of Janice McGee, who was one of the two auditors present for the Apple audit. She testified that she had not seen the CLI Computers NTTC at issue. She further testified that Apple had given the auditors a ledger listing all sales within the audit period, by customer and that when the auditors reviewed NTTC's presented to them by Apple, the auditors marked "ok" on the ledger beside the entries for each customer from whom Apple had produced a certificate that was accepted by the auditors. Ms. McGee could not remember whether she or the other auditor had made a list of all of the NTTC's which Apple had presented to the auditors. She could only testify that she had no such list now. She further testified that she had made copies of only some of the NTTC's that Apple presented at the time of the audit which were not accepted by the auditors. Thus, there were no documents in the form of copies of rejected NTTC's or a list of all rejected NTTC's against which the ledger could be compared.

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standards to all audits commenced after the effective date of the 1997 amendments. Ironically, had Apple been audited for the same period after the amendments, there would be no dispute over its entitlement to the deduction at issue.

While I have no doubt that Ms. McGee testified truthfully and accurately, she could only testify to her knowledge as one of the two auditors who conducted the audit. Given the lapse of time since she conducted the audit, she could not remember all of the details of what happened during the course of the audit, which is only to be expected. It was also unclear whether all of the audit backup documentation had been maintained or whether it was complete, such as making copies of all NTTC's rejected by the auditors, even at the time of the audit.

On the other hand, Apple's witness had no first hand knowledge of the conduct of the audit at issue, but could only testify to Apple's customary procedures in responding to state audits. Nonetheless, her testimony was corroborated by the fact that Apple had obtained a NTTC from CLI Computers during the Department's audit. Given the fact that Apple demonstrated that it had received the CLI NTTC while the Department's auditors were present, I simply find it more likely than not that Apple's employees did not leave it on the fax machine (for the next few days), but instead delivered it to the auditors. Additionally, given the large volume of transactions the Department's auditors had to examine, it is certainly at least conceivable that this NTTC could have been missed. For these reasons, I find that the CLI Computer NTTC was presented to the Department in a timely manner and that Apple is entitled to the deduction for its sales to CLI Computers.

CONCLUSIONS OF LAW

1. Apple filed a timely, written protest, pursuant to § 7-1-24 NMSA 1978, to Assessment No. 2037018 and that jurisdiction lies over the parties and the subject matter of this protest.

2. Title of the goods sold by Apple to its customers located in New Mexico passed at Apple's out-of-state shipping location.

3. For purposes of determining the location of a sale of goods for purposes of the imposition of the New Mexico gross receipts tax, the place where title passes is not the sole consideration. The location of the passage of risk of loss must also be taken into consideration.

4. Because Apple was contractually obligated to replace its products which were lost or damaged in transit to its New Mexico customers, Apple bore the risk of loss on such products until they were delivered to its customers in New Mexico.

5. Where the risk of loss for goods sold transfers from an out-of-state seller to a purchaser in New Mexico, the sale of the goods occurs in New Mexico regardless of the place where title transfers.

6. A sale occurs in New Mexico when a seller completes all acts necessary to complete its performance under the sales agreement.

7. Because Apple's sales of goods to its New Mexico customers occurred in New Mexico, the imposition of New Mexico gross receipts tax on such sales meets the fair apportionment and internal consistency requirements of the Commerce Clause of the United States Constitution.

8. Apple is entitled to deduct its receipts from its sales to CLI Computers.

For the foregoing reasons, Apple's protest **IS HEREBY GRANTED IN PART AND DENIED IN PART. THE DEPARTMENT IS HEREBY ORDERED TO ABATE THAT PORTION OF ASSESSMENT NO. 2037018 RELATING TO THE GROSS RECEIPTS TAX, PENALTY AND INTEREST ASSESSED ON APPLE'S SALES TO CLI COMPUTERS.**

DONE, this 8th day of December, 2000.