

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION

395.0821

In the Matter of the Petition )  
for Redetermination Under the ) DECISION AND RECOMMENDATION  
Sales and Use Tax Law of: )  
)  
W---, INC., ET AL. ) No. SR -- XX XXXXXX-010  
dba U--- P--- COMPANY )  
)  
Petitioner )

The preliminary hearing on the above taxpayers' petition for redetermination was held on February 10, 1988, in Culver City, California.

Hearing Officer: John B. Adamo  
Appearing for Petitioner: L--- J. S---  
General Counsel, U--- P---  
T--- C---  
Controller, U--- P---  
Appearing for the Board: Larry Nakano  
Tax Auditor

Protested Item

The protested tax liability for the period January 1, 1983 through November 30, 1984 is measured by:

<u>Item</u>	<u>State, Local and County</u>
D. Sale of fixtures and equipment	\$2,641,131

Summary

On December 30, 1982, J--- and P--- M---, the sole shareholders of U--- P--- Corporation ("U--- Corp."), sold all of their stock to U--- P--- Company ("U--- Co."), a California limited partnership comprised of petitioners, i.e., W---, Inc., M--- C---, and E--- T. S---. Each of the three partners granted to J--- M--- an option to purchase their individual partnership interest for a price equal to fair market value.

In or about August 1983, J--- M--- approached M--- C--- and offered to purchase the latter's 26 percent partnership interest for \$150,000; Mr. C--- agreed. In October 1983, W---, Inc. and Mr. S--- learned of M---'s agreement to purchase C---'s share. These two objected to that agreement, contending that they had a right of first refusal to purchase C---'s partnership interest. They further resisted M---'s attempt to exercise his option to purchase their interests. On or about January 9, 1984, W---, Inc. and S--- filed complaints in Los Angeles Superior Court against M--- and C---, alleging various breaches and praying for injunction, damages, and declaratory relief.

In June 1984, M---, W---, Inc., and S--- entered into a settlement agreement. Among other things, this settlement agreement provided for terminating the litigation and allowed for M---'s purchase of W---, Inc.'s 48 percent partnership interest for \$2,240,000 and S---'s 26% partnership interest for \$1,260,000. The agreement provided that these transactions were to close on or before November 15, 1984. Mr. M--- concluded his purchases of W---, Inc.'s and S---'s partnership interests on November 15, 1982. He also concluded his purchase of C---'s interest on the same day on the previously agree-upon basis.

As further explained below, the issue presented by this case involves the interpretation and application of two annotations and, specifically, whether there was one transfer by U--- Co. to M--- or whether there were multiple transfers from the individual partners of their respective partnership interests to M---. The audit staff concluded that the former was the case; petitioners contend that the latter characterizes the substance of the November 15, 1984 transactions, which therefore constitute exempt occasional sales.

### Analysis and Conclusions

Gross receipts derived from the "occasional sale" of tangible personal property are exempt from the sales tax. (Revenue and Taxation Code Section 6387.) The term "occasional sale" is defined by Section 6006.5(a) as follows:

"A sale of property not held or used by a seller in the course of activities for which he or she is required to hold a seller's permit or permits if the activities were conducted in this state, provided the sale is not one of a series of sales sufficient in number, scope, and character to constitute an activity for which he or she is required to hold a seller's permit or would be required to hold a seller's permit if the activity were conducted in this state."

In relevant part, Sales and Use Tax Regulation 1595(a)(1) provides as follows:

"Tax applies to all retail sales of tangible personal property including capital assets whether sold in one transaction or in a series of sales, held or used by the seller in the course of an activity or activities for which a seller's permit is required or would be required if the activity or activities were conducted in this state...."

“Generally, a person who makes three or more sales for substantial amounts in a period of 12 months is required to hold a seller’s permit. A person who makes a substantial number of sales for relatively small amounts is also required to hold a seller’s permit.

“Tax does not apply to a sale of property held or used in the course of an activity not requiring the holding of a seller’s permit unless the sale is one of a series of sales sufficient in number, scope and character to constitute an activity for which the seller is required to hold a seller’s permit or would be required to hold a seller’s permit if the activity were conducted in this state....”

The issue presented by this petition centers upon the application of two Business Taxes Law Guide annotations, i.e., 395.0800 (Dec. 16, 1952) and 395.0820 (Nov. 16, 1959), which provide as follows:

395.0800. “Partnership, sale of one partner’s share to another person regarded as an occasional sale if made by the individual partner and not by the partnership and if the individual had not otherwise made a series of taxable sales.”

395.0820. “Partnership--Sale of Interests. A simultaneous transfer by all of the partners of their respective partnership interests for a consideration constitutes a sale within the meaning of Section 6006(a). Although in form the partners are making transfers of their respective ‘interests’ in the partnership, the transfers are in fact transfers of specific partnership property to a third person.”

The evidence herein plainly supports the conclusion that the November 15, 1984 transactions constituted sales by petitioners of their respective partnership interests. Those sales accordingly qualify as exempt occasional sales since petitioners as individuals were not required to hold seller’s permits. The fact that all three partners sold their partnership interests to M--- on the same day is irrelevant under the circumstances presented and, specifically, those circumstances are easily distinguishable from annotation 395.0820. First of all, C---’s sale to M--- was not simultaneous with those of W---, Inc. and S---. In fact, M--- and C--- had attempted to consummate their transaction months earlier. That sale was thwarted by the litigation referenced above. When C--- and M--- finally did complete their transaction, it was on vastly different terms than were the sales of the W--- and S--- interests.

Annotation 395.0820 addresses a situation wherein a transfer by all partners of their individual interests in reality constitutes a transfer by the partnership itself. That annotation contemplates action in concert by the partners, thereby explaining the reference to “a simultaneous transfer”. Where, as here, there is not only a lack of concerted effort by the partners, but actually open conflict between them, the annotation has no application. Finally, the fact that C---’s sale was transacted on the same day as the S--- and W--- sales does not alter our conclusion. The sales were not simultaneous and they were on different terms. The same-day closings were a response to the litigation, not evidence of commonality of action by the partners.

The measure of tax of audit item D is \$2,914,930. The protested portion is \$2, 641,131.

Recommendation

Grant the petition. Redetermine without further adjustment.

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John B. Adamo, Hearing Officer

July 5, 1988

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Date