

**STATE BOARD OF EQUALIZATION**

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May 30, 1990

Mr. J--- L. W---
Law Office of W--- H. P---
XXX --- Place, Suite XXX
---, CA XXXXX

V--- C---, Inc. – FR --- XX XXXXXX
Transfer of equipment from trustee in bankruptcy

Dear Mr. W---:

In your February 20, 1990 letter to the Board's legal staff, you write:

“V--- C---, Inc., was purchasing numerous items of equipment, including vehicles. Mr. P--- V---, majority shareholder and corporation president, was the guarantor on the purchase contracts. V--- C---, Inc., has filed for relief under Chapter 7 of the Bankruptcy Code. The Bankruptcy Trustee is obtaining approval of the court to abandon the equipment. When the trustee releases the interest of the bankruptcy estate, the equipment is to be transferred to a new corporation.

“A list of the affected equipment is attached hereto as Exhibit A and fully incorporated herein. Please note that the amount of the debt against each equipment item exceeds its value in most cases.

“This office represents P--- V---. Mr. V--- proposes to effect the above transfer by one of two methods, depending upon the tax consequences: 1) the trustee abandons the equipment to Mr. V--- who then contributes it to the new corporation for shares under Internal Revenue Code §351; or 2) the trustee abandons the equipment directly to the new corporation. The ultimate ownership of the equipment will be slightly different I the new corporation from the old. The shareholders of V--- C---, Inc., are P--- V--- (80%), R--- M--- (10%), and F--- I--- (10%). The shareholders of the new entity will be P--- V--- (50%) and R--- V--- (50%).

“Please advise me as to the sales and/or use tax consequences of transferring the equipment to the new corporation by both of the above proposed conveyances. If you need any further information to make your evaluation, please do not hesitate to call.”

In our telephone conversation on May 3, 1990, you related that Mr. V--- has been personally making the payments due on the indebtedness on this equipment. The trustee in bankruptcy will transfer title to the equipment either to Mr. V--- individually or to the new corporation. The indebtedness on the equipment will be assumed either by Mr. V--- or by the new corporation. You believe the trustee has not made any other sales in the bankruptcy proceeding.

Opinion

Under the Sales and Use Tax Law, sales at retail of tangible personal property for a consideration are subject to the sales tax, unless a specific exemption or exclusion applies. (Rev. & Tax. Code §§ 6006, 6051). An assumption of indebtedness constitutes consideration for a sale, and is included in the measure of the tax. (Cal-Metal Corp. v. State Board of Equalization (1984) 161 Cal.App.3d 759).

The sales tax is imposed on retailers. A retailer is a person who is engaged in the business of making sales of tangible personal property at retail. (Rev. & Tax. Code §§ 6051, 6007). In order to interpret and apply the provisions of Section 6007 regarding the definition of a retailer, the Board has adopted Sales and Use Tax Regulation 1595. In part, subdivision (a) of that regulation requires a person who makes three or more sales for substantial amounts in a 12-month period to hold a seller's permit. Under Revenue and Taxation Code Section 6005, a trustee in bankruptcy is specifically included in the definition of a “person” for sales and use tax purposes. In California State Board of Equalization v. Sierra Summit, Inc. (1985) 109 S.Ct. 2228, 104 L.Ed. 2d 910, the U. S. Supreme Court held that the state could constitutionally impose its sales tax on liquidation sales by a trustee in bankruptcy.

An exemption from sales and use tax is provided for occasional sales. (Rev. & Tax. Code § 6367). A person may make an occasional sale exempt from sales tax if he is not engaged in activities requiring a seller's permit, or if he does not make a series of sales sufficient in number, scope, and character to require the holding of a seller's permit. (Reg. 1595(a)(1) and (a)(4)). In addition, certain types of transactions involving business reorganizations described in subdivision (b) of Regulation 1595 are also exempt occasional sales.

With respect to the equipment listed in your letter other than vehicles, if the trustee has not made three or more sales for substantial amounts from this bankruptcy estate in a 12-month period, the trustee in this bankruptcy proceeding is not a retailer within the meaning of Section 6007. No sales or use tax will apply to the trustee's sale of the equipment either to Mr. V--- or the new corporation, since the transaction would qualify as an occasional sale exempt from tax under Sections 6606.5(a) and 6367.

However, the occasional sale exemption does not apply to sales of vehicles required to be registered with the Department of Motor Vehicles. (Reg. 1595(c)). Instead, if a vehicle is purchased from a non-dealer, the applicable tax is the use tax imposed on the purchaser and is payable to the Department of Motor Vehicles (DMV) when the purchaser registers the vehicle with that department. (Reg. 1610(c)).

Please note that if your belief is not correct that the trustee has not made three or more sales for substantial amounts from this bankruptcy estate in a 12-month period, then the trustee is required to hold a seller's permit, and report and pay sales tax on the sales of the equipment other than vehicles required to be registered with DMV. If this is the case, then the occasional sale exemption provided by subdivision (b) of Section 6006.5 (business reorganizations) would not apply to exempt this transaction from tax. The transaction to which the tax applies is the sale by the trustee in bankruptcy, rather than the transfer of the bankrupt corporation's assets into the bankruptcy estate.

I enclose Regulations 1595 and 1610 for your information. Please feel free to contact me if you have any further questions or comments about this letter.

Sincerely,

John Abbott
Senior Tax Counsel

JA:jb
Enclosures