

**M e m o r a n d u m****330.2285**

To: Mr. Jack Warner  
Out-of-State District Principal Auditor

Date: March 15, 1989

From: David H. Levine  
Tax Counsel

ATSS 485-5550  
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Subject: Leverage Leasing Transactions

This is in response to your memorandum dated February 24, 1989 and a memorandum to you from Arthur Goldner of New York Out-of-State District dated February 10, 1989. Mr. Goldner has provided contracts for two leveraged lease transactions and asks which party is responsible for reporting and paying California use tax. Mr. Goldner has also included a copy of an opinion dated March 1, 1978 from Tax Counsel James Mahler on this subject.

In the transactions considered by Mr. Mahler, the owner/lessor formed a trust, selecting a bank to act as trustee of that trust (designated as owner/trustee). The trust purchased equipment and leased it to a lessee. The rental receipts were assigned to an independent bank called a loan/trustee which acted under a trust indenture for the benefit of outside lenders. The loan/trustee collected the rents, making loan payments to the outside lenders and remitting the balance, less service charges, to the owner/lessor. Mr. Mahler concluded that it was the owner/trustee who was the only party who could issue a valid resale certificate when purchasing the property to be leased. The reason for this is that a trust is a "person" for sales and use tax purposes. (Rev. & Tax. Code § 6005.) Since it was the trust that was actually purchasing the property and leasing it, only the trust could issue a valid resale certificate when purchasing the property. The trustee would hold a seller's permit on behalf of the trust.

The transactions about which Mr. Goldner inquires do not have an owner/trustee, but do have an indenture trustee. The ---, the indenture trustee in these transactions, disputes that it is the proper party to collect and report use tax on these transactions. We agree.

In the transactions considered by Mr. Mahler, the actual owners of the leased property were the owner/trustees. Although the owner/lessors may have controlled the trusts, the owner/lessors were not the actual owners and lessors of the property. Rather, the owner/trustees owned the property and leased the property to the lessees. A similar analysis would apply to a lessor/corporation wholly owned by one stockholder. Although the sole stockholder may control the corporation, a corporation is a person for purposes of sales and use tax and it is that person

that owns the property and leases it to the lessees. The corporation is therefore responsible for collecting and paying use tax.

The transactions considered by Mr. Mahler sometimes had a loan trustee acting pursuant to a trust indenture agreement. This did not alter his analysis. The responsibilities of the loan trustee in those transactions and the purpose of the trust indenture agreement appear to be identical to those involved in the transactions at issue in which the --- acts as indenture trustee. Just as in the transactions considered by Mr. Mahler, the existence of an indenture trustee does not alter the analysis of how tax applies to leases.

Throughout the documents involved in both transactions, it is clear that the owner/lessor, ---, is the owner of the leased property as well as the lessor of that property. The indenture trustee holds only a security interest on behalf of the lenders. Thus, for purposes of sales and use taxation, the difference between these transactions and those considered by Mr. Mahler is that no independent "person" was established to own the leased property. Rather, the owner/lessor retained ownership of the property. As the owner and the lessor, --- is responsible for collecting, reporting, and paying use tax. Although it may assign to an indenture trustee the responsibility for collecting that tax from the lessee, is the retailer and is ultimately responsible for payment of that tax pursuant to Revenue and Taxation Code section 6201 et seq.

As you requested, the attachments you transferred to us are being returned to you with this memorandum. If you have further questions, feel free to write again.

DHL/smt

cc: E. L. Sorensen, Jr.