

Memorandum

To Mr. Michael T. Perry Consumer Use
Tax Division

Date: July 7, 1992

From David H. Levine
Senior Tax Counsel

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Subject:

This is in response to your memorandum dated May 18, 1992 regarding whether the transfer of a vessel is subject to tax.

On June 7, 1977, _____ incorporated a corporation in Oregon named _____ Corporation. On July 10, 1977, a marine surveyor and adjuster executed a _____ document which states that the surveyor accompanied the vessel, on that date, and that the vessel was sailed "well outside the continental limits" which "was for the purpose of sale and transfer of title to the new owner." Upon completion of that voyage, the vessel was returned to a berth in the _____ Marina. A mortgage on the vessel was executed on June 24, 1977. (It is not clear if the mortgage was executed in preparation of the sale or if, instead, the date of the mortgage indicates that the sale actually occurred before delivery to the purchaser.)

The corporation was dissolved on August 31, 1984. As explained by the representative _____ in an undated letter to the Board, "[a]t that time the _____'s retained the ship and assumed the liability on the mortgage." (Emphasis added.) You state that the _____ refinanced the original mortgage for the remaining balance due of \$100,000 in December 1988. It was apparently not until this time that title to the vessel was officially transferred into the _____'s names (from the name of their corporation).

A Notice of Determination was issued to the _____ on March 18, 1991, measured by the estimated cost of the vessel. The _____ filed a petition for redetermination, but the assessment was redetermined because insufficient documentation was furnished to establish that tax was not due. Although the _____ were advised in a letter dated February 19, 1992 by _____

Senior Tax Auditor Dale R. Kuehne that their remedy at that time was to pay the amount of the redetermination and then file a claim for refund, it appears that you are now considering some other procedure (you are apparently contemplating canceling the liability if you conclude the transaction was not taxable). You ask:

"Please provide your opinion as to whether or not the tax is due or should the liability be canceled as the vessel was a corporate asset distributed to the sole shareholders at the time of dissolution. If it is determined to be a taxable transaction, should the measure be that at the time of dissolution in 1984?"

Discussion

The corporation owned the vessel and owed money on the mortgage. Upon dissolution of the corporation, its sole shareholders became the owners of the vessel and assumed the liability owed with respect to the vessel. Thus, there was a transfer of title in exchange for consideration, which constitutes a sale under section 6006. This is not a case of a mere liquidating dividend since a true liquidated dividend would involve no consideration, such as an assumption of liabilities, other than shares to be canceled. That is, the liquidated dividend doctrine covered in the annotations is a corollary to the commencing corporation doctrine of Regulation 1595 - an assumption of liabilities in either situation means that tax will be due unless the transaction qualifies as an occasional sale.

Mr. [redacted] implicitly concedes this by his argument that the transaction in question was an occasional sale exempt from tax under section 6281. We agree that this is the relevant question. Mr. [redacted] also cites as support subdivision (b)(2) of Regulation 1595. If this were the case, the transaction would clearly not qualify for the exemption since that provision is limited to transfers of property used in activities requiring the holding of a seller's permit. This vessel was not used in the course of such activities, and therefore could not qualify for exemption under subdivision (b)(2) of Regulation 1595. However, this is not the relevant provision.

Subdivision (c) of Regulation 1595 specifically explains that there is no occasional sale exemption for vessels under the previous provisions of the regulation, and that the only basis for an occasional sale exemption for sales of vessels is "when such property is included in a transfer of all or substantially all the property held or used in the course of business activities of the person selling the property...."

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This vessel was the only asset of the corporation. The ultimate ownership was presumably the same before and after the transfer. The remaining question is whether it was used in the course of the corporation's business activities.

The question of whether the assets of a corporation were used in the course of its business activities normally does not arise since corporations by definition are generally created for the conduct of business. Such does not appear to be the case here. Based on letters from Mr. [redacted] dated April 5, 1991 and October 1, 1991, it appears possible that the creation of the corporation was somehow relevant to an attempt to avoid sales tax. According to Mr. [redacted] however, plans to keep the vessel in Oregon fell through and use tax was paid on the vessel in 1978. Mr. [redacted] then explains: "The corporation was never functioning, there are no minutes, there were no business transactions taking place throughout all these years....." It is therefore clear that the vessel was not used in the course of the corporation's business activities.

What we have here is a case where the [redacted] created a separate person, under the Sales and Use Tax Law, for purposes of owning the vessel, possibly to avoid paying tax when purchasing the vessel in 1977. For whatever reason, they changed their plans and apparently had to pay use tax. (This is probably what Mr. [redacted] means when he says that they considered the corporation a moot point, in that it did not serve their apparent purpose in creating it.) Nevertheless, the [redacted] did create a separate person to own the vessel. When that person was dissolved, there was an actual transfer of the vessel to the [redacted]. We cannot disregard that transfer even though the [redacted] never received the benefit they apparently sought when they created the events leading to this problem.

You ask whether the measure of tax should be at the time of dissolution. It is not entirely clear what you mean. The date is relevant, but only for purposes of ascertaining the date the tax was due. The measure of tax is the amount of consideration paid for the vessel. My interpretation of your question is that you are asking whether the amount owed by the corporation is the measure of tax or if the amount refinanced is the measure of tax. The measure of tax is the consideration paid, which here is the amount of the assumed liabilities. Based upon Mr. [redacted]'s statement that when the corporation was dissolved on August 31, 1984, the [redacted] at that time "retained the ship and assumed the liability on the mortgage," we conclude that the measure of tax is the amount owed to the mortgagee on August 31, 1984.

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