

**M e m o r a n d u m****395.2265**

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

Date: April 2, 1993

From : Elizabeth Abreu  
Tax Counsel

(916) 327-8208

Subject: [G]  
S- -- XX-XXXXXX

This is in response to your memorandum dated February 24, 1993 in which you ask whether a dividend in kind made by [G] to [W], the sole shareholder of [G], is subject to tax. The declaration of dividend specifically provides:

"RESOLVED that (i) all the assets, properties and business, of every kind, character and description, whether tangible or intangible, and whether real, personal or mixed, as are allocable or attributable or related to the Division including, without limiting the generality of the foregoing, all plants, structures, equipment, machinery, vehicles, supplies, inventories and all rights and claims of the Corporation in, to or under contracts, licenses, leases, agreements, trademarks, trade names, brand names, patents and copyrights, foreign or domestic, all books, papers and records, and all accounts and notes receivable, and (ii) the obligations and liabilities allocable or attributable exclusively to the Division under the above-mentioned contracts, licenses, leases and agreements, including, without limiting the generality of the foregoing, all accounts and notes payable, all as of the date hereof, be, and they hereby are, declared and paid as a dividend to the sole shareholder of record of the Corporation's capital stock. . . "

As you pointed out in your memorandum, Annotation 495.0725 provides that the transfer of property from a corporation to a sole shareholder which is shown on the books of both entities as a dividend is not a sale unless the corporation declaring the dividend receives consideration for the property transferred. The issue in this transaction is whether [W]'s assumption of the liabilities of the [M] Division of [G] is consideration.

As you are probably aware, there are numerous cases which hold that assumption of liabilities constitutes consideration. E.g., Newco Leasing Co. v. SBE, 143 C.A. 3d 120; Cal-Metal Corp. v. SBE, 161 C.A. 3d 759; Industrial Asphalt v. SBE, 5 C.A. 4th 1237; and Beatrice Co. v. SBE, 1992 LEXIS 127. Only one case, Macrodyne v. SBE, 192 C.A. 3d 579, held that under the facts before it, assumption of liabilities did not constitute consideration.

We conclude that the transfer of assets by [G] to [W] is a sale because [W] gave consideration for the assets of [G] by assuming the liabilities of the [M] Division of [G]. Macrodyne does not apply here because [G] did not transfer the assets to a preexisting subsidiary and because [G] did not stipulate in writing to remain jointly liable for the assumed liabilities. In addition, the continuing validity of Macrodyne is in doubt because of the recent decision of Beatrice Co. v. SBE which specifically holds that the analysis in Macrodyne is in error.

If you have any further questions concerning this opinion, please call me.

EA:cl