

Memorandum

410.0197

To: Mr. X-----

Date: April 4, 1994

From: Gary Jugum, Assistant Chief Counsel
Legal Division – MIC:82

Subject:

In your memorandum dated March 22, 1994, concerning the above taxpayer, you state that the taxpayer was a 50 percent partner in a general partnership and sold his interest to the other partner on June 30, 1989. Neither partner notified the Board of the change in ownership until November of 1991. The Board conducted an audit of the business for the period of July 1, 1990 through March 31, 1992. On December 23, 1993, the taxpayer received a determination for the audit deficiency.

You ask if newly-enacted Revenue and Taxation Code Sections 6071.1 and 6487.2 limit the liability of this taxpayer and that of other taxpayers with liabilities which pre-date this legislation.

Revenue and Taxation Code section 6071.1(a) provides:

"A permitholder who fails to surrender a seller's permit upon transfer of a business shall be liable for any tax, interest, and penalty incurred by the transferee if the permitholder has actual or constructive knowledge that the transferee is using the permit in any manner. The predecessor's liability shall be limited to the quarter in which the business is transferred, and the three subsequent quarters."

Revenue and Taxation Code section 6487.2 provides, in part,

“(a) A notice of determination issued pursuant to Section 6486, 6515, or 6536 to an individual who was a general partner, as shown on the board's records, and who, prior to the period covered by the determination, withdrew from the partnership, causing a change in ownership, and failed to notify the board, shall be mailed within four years after the last day of the calendar month following the quarterly period in which the change of ownership occurred.

“(b) An individual who was a general partner, as shown on the board's records, who withdraws from a partnership without notifying the board of

the change of ownership, shall not be liable for any unpaid, self-assessed liability of the partnership that becomes due at least three years after the last day of the calendar month following the quarterly period in which the change in ownership occurred.”

Any taxpayer liability that has previously become “due and payable” under provisions of the Revenue and Taxation Code cannot be subject to the new legislation. In Estate of Stanford (1899) 126 Cal. 112, the court held that the Legislature was barred from retroactively reducing taxes where the right to those taxes had vested in the state (i.e., when those taxes became "due and payable" to the state). See also Estate of Spinker (1956) 47 Cal.2d 290.

In Allen v. Franchise Tax Board (1952) 39 Cal.2d 109, the Legislature amended a tax statute with an effective date of February 4, 1941 that was to have application to taxable years beginning with January 1, 1940. The court addressed a provision of the statute that reduced the tax otherwise returnable by the taxpayer in 1940. The court held that the right of the state to income tax does not vest until April 15, following the close of the preceding year. The court also held that that date was the time when the tax was "due and payable" and that the retroactive application of the act did not impair the state's right to payment of delinquent taxes. The court stated that the statute became effective prior to the time when the "state's right to receive or collect the tax accrued." (39 Cal.2d at 115.)

Prior to 1994, Sales and Use Tax Regulation 1699(e) was fully operative and provided, in part, that –

"[u]nless the permit holder who transfers the business notifies the board of the transfer, or delivers the permit to the board for cancellation, he will be liable for taxes, interest and penalties ... incurred by his transferee who with the permit holder's actual or constructive knowledge uses the permit in any way The liability shall continue and include all liability incurred up to the time the board receives notice of the transfer."

Regulation 1699(f) provided that –

"[w]here a person authorized to file tax returns on a yearly basis transfers the business to another person or discontinues it before the end of the yearly period, a closing return shall be filed with the Board on or before the last day of the month following the close of the calendar quarter in which the business was transferred or discontinued."

It is our opinion that the liability of a transferor pursuant to Regulation 1699(e) accrued, except as provided in Regulation 1699(f), at the same time as the liability of the transferee of the business for sales conducted by the transferee. Revenue and Taxation Code section 6451 provides that taxes on sales are due and payable quarterly on or before the last day of the month next succeeding each quarterly period.

In People v. Buckles (1943) 57 Cal.App.2d 76, 79, it was stated:

"If a retailer withholds any portion of said sales tax, it remains 'unpaid' and in the primary sense of the word 'due' It remains due to the state until it is paid it is true that section 20 [now Revenue and Taxation Code § 6565] does provide that all assessments 'shall become due and payable' at the time they become final, but this does not justify a holding that such taxes were not 'due and unpaid' when the sale of the business to appellant was consummated, because as a matter of plain fact they were taxes which the vendor had theretofore failed to pay but which he became obligated to pay under the act when the taxable sales were made."

Until December 31, 1993, the state had a "vested right" to taxes from a permit holder who transferred a business without notice to the Board. The permitholder was liable for all taxes incurred by the transferee until the Board received notice of the transfer. It is our opinion that any discharge or cancellation of any part of those taxes by statute would constitute a "gift, of public money ... to any individual within the meaning of Article 16, section 6 of the California Constitution.

It is our opinion that Revenue and Taxation Code sections 6071.1(a) and 6487.2(b) cannot be applicable to tax liabilities that were "due and payable" within the meaning of Revenue and Taxation Code section 6451 prior to January 1, 1994.

It is also our opinion that any determination issued after January 1, 1994 must be issued (or mailed) within the shortest applicable limitations period specified in any Revenue and Taxation Code section which is directed to the taxpayer's situation.

The taxes for which a determination was issued to Mr. X----- were all "due and payable" prior to January 1, 1994. It is our opinion that the Board is now prohibited from canceling any part of his liability on the basis of the enactments which became effective on January 1, 1994.

TJC:plh