

M e m o r a n d u m**415.0113**

To: Mr. Richard Reger
Compliance Planning &
Evaluation Section – MIC:44

Date: September 22, 1993

From: Thomas Cooke, Tax Counsel
Legal Division – MIC:82

Subject: Massachusetts or Business Trusts

Gordon Adelman has requested that I respond to your memorandum to him dated June 22, 1993 concerning the above subject.

In your memorandum, you state that there are increasing numbers of taxpayers obtaining permits as Unincorporated Business Organizations, aka Massachusetts or Business Trusts. You ask for the opinion of the Legal Division as to guidelines for the issuance of these permits.

In Ballantine & Sterling California Corporation Laws, § 22.07[1], it is stated:

"The so-called Massachusetts or business trust is simply an unincorporated business in which the business assets are owned or held in the name of trustees and are operated or managed by them for the benefit of holders of certificates of beneficial interest in the trust. Thus, a business trust actually represents the use of a common law trust for the purpose of carrying on a business enterprise."

In Goldwater v. Ottman (1930) 210. Cal. 408, the court stated that in a Massachusetts or business trust, the chief advantage is freedom from regulation and corporate taxation and its members enjoy the freedom from personal liability that is imposed upon partners.

The court held that if the trust document establishing the trust provides that the trustees have complete control of the business, the creators of the trust (the beneficial owners) are exempt from direct personal liability to the creditors of the business; but if the trustees are subject to the control of the beneficial owners, the beneficial owners will be liable as partners. If the trust document permits the beneficial owners to elect trustees and fill any vacancies in the board, this gives the beneficial owners such control as they will be treated as partners.

You state in your memorandum that the trustees are personally liable for the debts of the trust unless specifically exempted. However, our research indicates that the trust instrument can

contain a provision that the trustee will not be personally liable for obligations that he incurs for the benefit of the trust and these provisions are valid. The Board should always consider trustees personally liable as "sellers" pursuant to Revenue and Taxation Code section 6014 along with the trust. We believe that Revenue and Taxation Code section § 6005 permits a "trustee" and a "trust" to be a "group or combination action as a unit."

It is our recommendation that each taxpayer seeking registration of a Massachusetts or business trust be required to furnish a copy of the document setting up the trust.

Our other recommendations are –

1. That the trustees each be considered as partners in the business with the other trustees and the trust and be registered as “ Trust and A and B individually and as Trustees of said Trust”
2. Each trustee provide personal asset information and be advised that each trustee will be liable for the full business liability.
3. That the Board file liens as "X----- Trust and A and B individually and as Trustees of said Trust."
4. Issue dual determinations against beneficiaries or "creators" only if the beneficiaries or "creators" have control over the business or the trustees as stated in the trust document

TJC:plh

cc: Mr. Gary Jugum - MIC:82
Mr. Gordon Adelman - MIC:82
Ms. Sue Coty - MIC:46
Mr. Rick Slater - MIC:55
Mr. John Gibbs - Out of State District - OH