

M e m o r a n d u m**465.1550**

To: Out-of-State – District Administrator
(DRK)

January 29, 1969

From: Tax Counsel (JKM) - Headquarters

Subject: W--- Division of G--- T---
Corporation of New York
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SR – XX XXXXXX

Reference is made to your memorandum dated November 19, 1968, concerning the meeting held November 15, 1968, at the Chicago office with the attorneys for the G--- T--- Corporation. At that meeting, it was again asserted by the attorneys that W---Division was not a “person” under the Sales and Use Tax Law and, therefore, was not subject to the eight-year limitation period under section 6487 or the penalty provisions of section 6511.

Under section 6005, “person” includes, among other things, any corporation. Thus, G--- T--- Corporation is a “person” as defined by this section, and the attorneys are correct in asserting that W--- Division, one of several unincorporated divisions of G--- T---Corporation, is not a person under the law.

Section 6487 provides that except in the case of fraud, intent to evade the law, failure to make a return, or claim for additional amount pursuant to section 6563, notice of a deficiency determination shall be mailed to a taxpayer within three years. In the case of the latter two exceptions, the period is extended eight years. We have attempted to uphold the eight-year determination in this case on the ground that G--- T--- Corporation failed to make returns for its W--- Division during the audit period. However, as we read section 6452, 6481, 6487 and 6511, a person (G--- T--- Corporation) is only required to make one timely return per period, and if it does so, the board is required to proceed pursuant to the provisions of section 6481 rather than those of section 6511 in the event that it is not satisfied with the return. Thus, since G--- T--- Corporation made returns through its S--- Division and its H--- Division during this audit period, it was not a person which failed to make returns, and the eight-year determination cannot be supported on this ground.

In your memorandum you raise the possibility that G--- T--- Corporation might have intentionally disregarded the law in not reporting the taxable transactions of its W--- Division. Under section 6487, the eight-year determination could be upheld if it could be shown that G---

T--- Corporation was guilty of fraud or intent to evade the law. However, as held in Marchica v. State Board of Equalization, 107 Cal.App.2d 501, the presumption is against fraud, and the burden of proving fraud or intent to evade is on the board if the deficiency is assessed after the statute of limitations has run, as is the case here. Thus, we request that you inform us of any evidence or information you might have which would support the conclusion that G--- T--- Corporation was guilty of fraud or intent to evade the law by failing to make returns for its W--- Division during the audit period. Upon receipt of your response, we shall weigh your evidence and information against the apparent position of the G--- T--- Corporation, namely, that the reason its W--- Division was not registered with the board or filing returns was because G--- T--- Corporation's tax department was of the opinion that it had incurred no tax obligation or liability during the audit period.

In the event that fraud or intent to evade the law cannot be established, we propose to recommend to the board that the determination be redetermined by deleting the assessment made in the audit for the period July 1, 1955, to June 30, 1960, together with the interest thereon. With regard to the penalty assessment, we propose to recommend the elimination of the entire penalty for the reasons set forth in your memorandum.

Please forward your reply at your convenience.

JKM:smk

cc: Chicago
San Francisco – Dist. Admin.