

M e m o r a n d u m

535.0093

To: Mr. William E. Burkett

Date: November 6, 1984

From: Ronald L. Dick

Subject:

This is in reply to your request that I give you a recommendation on this file.

_____ held a seller's permit as an individual since January 5, 1977 for the purpose of making retail sales of equipment. After an audit, the Board issued a Notice of Determination to _____ on March 11, 1982 in the amount of \$82,798.08. _____ then closed out his seller's permit effective December 31, 1983. _____ applied for a seller's permit for _____ on December 28, 1983 and noted the date started as of January 1, 1984.

The district office initiated a Notice of Successor Liability to _____. _____'s attorney has filed a Petition for Reconsideration and requested a hearing. The petition is based on the fact that _____ executed a Declaration of Gift dated February 22, 1983, wherein _____ declares he makes a gift to _____ of equipment listed on an attached schedule. The petitioner believes that under the case, Knudsen Dairy Products Company v. State Board of Equalization, 12 Cal.App.3d 47, there is no purchase price upon which to base a successor liability. The petitioner's attorney claims that, unless the Board rescinds its billing, the attorney will apply to a superior court for a writ of mandate directing the Board to cancel its billing. The Petition Unit has asked whether the Board should cancel the billing.

I do not think that we should cancel the billing. Although _____ alleged in the Declaration of Gift that he transfers the property as a gift, he has not explained the disposition of the property as a gift, he has not explained the disposition of any loans that he had on the equipment. To the extent that _____ or the corporation assumed such loans, there is a purchase price.

Further, Mr. Edward P. Hollingshead noted in his September 16, 1982 memorandum to you (copy attached) that we may be able to establish successor's liability in a case such as this by statutory interpretation:

“In People v. Buckles (1973) 57 Cal.App.2d 76, which also interpreted sections 6811 and 6812, the court found the legislature's intent to be to prevent the evasion of tax liability.

Section 6811 applies to a 'successor' to the business... While section 6812 speaks in terms of a 'purchaser' of a business which fails to withhold the taxes of the

acquired firm prior to the latter's liquidation, it can only reasonably be assumed that the legislature intended section 6812 to include successors under section 6811. Otherwise, the two sections cannot be read together intelligently. It cannot reasonably be assumed that the legislature intended an acquiring firm to avoid liability by the expediency of first acquiring the stock and then transferring the assets to a subsidiary. Proof that the two sections are read together is that (1) the predecessor statute to sections 6811 and 6812 (section 26 of the Retail Sales Act, Stats. of 1935, p. 1263) combined both provisions in one section and (2) the last sentence of section 6812 itself refers to a 'successor' in the context of a purchaser.

Numerous California court decisions have laid down rules of statutory interpretation providing that statutes be interpreted in a manner that promote rather than defeat the general purpose of or compliance with the law. Particular attention is called to Comm'r of Internal Revenue v. Court Holding Co. (1945) 324 U.S. 331, where the U.S. Supreme court developed the doctrine that:

“The incidence of taxation depends upon the substance of a transaction...[T]he transaction must be viewed as a whole, and each step...is relevant...To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies...’ See comparable state court holding in Bank of Alameda v. McColgan (1945) 69 Cal.App.2d 464.”

It seems clear that the sole purpose in _____ transferring the property to his wife and her transferring it to the corporation was to avoid the sales tax liability. The district office staff reports that _____ claimed he “was going to beat those tax people”.

As Mr. Hollingshead pointed out, if we were to cancel the successor liability billing in this type of case, we would be defeating the general purpose of the law and permitting the perpetration of a fraud.

I recommend that the matter be scheduled for hearing. If you have any further questions on this, please let me know.