

M e m o r a n d u m**395.0040**

To: Audit Review

August 19, 1964

From: Tax Counsel (PM)

Subject: Question of Whether Sales or Use Tax Applies.

This is in reference to your memo of August 11 requesting advice on the application of tax in the following situation:

A is a retailer and wholesaler of gloves and files; B is a permittized logging contractor. A purchases a Lima crane from B for \$20,000 with the sole intent of reselling it for a profit. This intent is made known by A to the Board. A, however, issues no resale certificate to B. A eventually resells the piece of equipment to a user for \$28,000.

Under these circumstances, B would be liable for tax on the \$20,000 sale to A, assuming A makes less than three sales during a 12-month period (exclusive of his stock-in-trade sales). The sale to A is a retail sale under Section 6007 because it is for a purpose other than resale "in the regular course of business." The fact that A may intend to resell the property at a profit is immaterial. This would be an occasional sale under section 6006.5(a). On the other hand, if the sale of the crane by A is one of a series of sales sufficient to constitute an activity requiring a seller's permit, A would be liable for tax on the \$28,000 and B would be relieved of any liability since his sale to A was, in fact, a sale for resale "in the regular course of business."

PM:ls [1b]

See e-mail of 2/24/98 for corrections & clarifications. DHL.
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Levine, David

From: Levine, David
To: Anderson, Vic; Khabbaz, Leila
Subject: 395.0040 (1/19/64)
Date: Tuesday, February 24, 1998 10:03 AM

This annotation is close to being correct, but the backup letter is definitely wrong. The annotation says that a person with a permit who sells property of a kind which he or she does not normally sell can be regarded as making an occasional sale only if made in his or her individual capacity and the sale is unrelated to normal retail activity. For one thing, it is not "retail activity" that is relevant, but sales activity.

The major problem is the backup. It is focusing on the sale of the property to our taxpayer, who purchases it with the intent of reselling the property at retail. The backup concludes that, since the sale by the taxpayer would be an occasional sale, the sale to the taxpayer is a taxable retail sale. If the taxpayer's sale were an exempt occasional sale, this would be correct (and probably should be annotated). The problem is with the analysis of what would constitute an exempt occasional sale. Although a taxpayer may not normally sell a certain type of property, he or she can properly issue a resale certificate for property (other than vehicles, vessels, and aircraft) which he or she will sell as part of that retailer's business. It does not have to be the type of property usually resold by the taxpayer. (See, e.g., Reg. 16668(d).) For example, a hardware store could purchase computer equipment for resale if it intended to sell it and lease it back prior to use (the sale or leaseback would be taxable). The sale by the hardware store would not be an occasional sale just because it did not normally resell computer equipment since that resale was part of its business activities.

In the case considered in the backup to the annotation, although there are not sufficient facts to be sure, the taxpayer's sale of the crane was probably not an exempt occasional sale. For example, if the business was run by a corporation and the crane was sold by that corporation, the sale was almost certainly not an occasional sale. If the taxpayer were an individual, we would need to know how the property was sold. If the taxpayer had a business location separate from his home and conducted the whole transaction from his home and not during his normal business hours, then he probably sold it individually (i.e. unrelated to his usual selling business) and the backup would be correct. On the other hand, if the sale was in any way generated in connection with the taxpayer's selling business, we would not accept it as an occasional sale, and we would regard the sale to the taxpayer as having been a nontaxable sale for resale in the regular course of business.

As indicated above, the annotation is arguably correct. This message will become a permanent part of the backup to this annotation. Perhaps that is enough. If you determine that is the case, please add the date of this message to the annotation (and change "retail" to "sales"). Otherwise, please rewrite the annotation.