



STATE BOARD OF EQUALIZATION

August 8, 1988

R--- R. B---, C.P.A.
I---, L---, B---, D---, B--- & Co.
P.O. Box XXXX
---, CA XXXXX

Re: B--- C--- Co.
B--- D--- Co., Inc.

Dear Mr. B---:

This is in response to your letter dated July 8, 1988, regarding the application of sales or use tax to a transfer of tangible personal property between B--- C--- Co. ("partnership") and B--- D--- Co., Inc. ("corporation"). The information set forth below is based on your letter and our telephone conversation of July 25, 1988.

The partnership is a general building contractor. About nine years ago, it held a seller's permit for the operation of a furniture store. Since that time, it has engaged in no activity requiring the holding of a seller's permit. The partnership is owned equally by T--- B--- and L--- B---. The partnership owns property you have divided into five categories. Categories 1 and 2 are real estate holdings. Category 3 is construction equipment and vehicles used by the partnership for business purposes, and includes a Beech aircraft for which the partnership is indebted \$435,160. Category 4 is office furniture and equipment used by the partnership for business purposes. Category 5 is property used by the individual partners for personal use or investment.

The corporation is also a general building contractor. T--- B--- and L--- B--- each own 50% of the stock of the corporation. The corporation has never held a seller's permit, and I assume it is not engaged in a business requiring it to hold a seller's permit.

L--- B--- is also the sole shareholder of a corporation which owns a 50% partnership interest in an [gas] station which holds a seller's permit. L--- B--- also held a 50% partnership interest in a car parts store and a 50% partnership interest in a clothing store. Each of those businesses held a seller's permit, but has now gone out of business.

The parties are contemplating the following transactions. All assets listed in categories 3 and 4 would be distributed to T--- B--- and L--- B---, an undivided one-half interest in these assets to each partner. Since categories 1 and 2 are real estate holdings and category 5 property is presumably not used in the operation of the partnership's business, the category 3 and 4 property transferred appears to be all the tangible personal property used by the partnership in the course of its business operations. Each partner will assume liability for one-half of the indebtedness on the Beech aircraft. Immediately after these transfers, T--- B--- and L--- B--- will each contribute his undivided one-half interest in the transferred assets to the capital of the corporation. The corporation will then assume the entire indebtedness on the Beech aircraft. Neither T--- B--- nor L--- B--- will receive additional stock or other equity interest in the corporation as a result of these transfers. (The transitory transfers of assets and liability to the partners is being done for federal income tax purposes.)

You ask for our conclusion that the above transfers are not subject to sales or use tax. Alternatively, you ask for our conclusion that, except for the transfer of the aircraft and related liability, the transfers will not be subject to sales or use tax.

Discussion

A retailer's retail sale of tangible personal property in California is subject to sales tax unless specifically exempted by statute. (Rev. & Tax. Code § 6051.) Alternatively, the use of property in California purchased from a retailer is subject to use tax unless specifically exempted by statute. (Rev. & Tax. Code § 6201.)

The relevant exemptions with respect to these transfers are provided by Revenue and Taxation Code Sections 6281 and 6367. Section 6367 exempts occasional sales as defined by Revenue and Taxation Code Section 6006.5 from sales and use tax, except sales of, as relevant here, vehicles and aircraft. Section 6281 exempts sales of vehicles and aircraft from sales and use tax under specified circumstances.

1. Sales of tangible personal property except vehicles and aircraft

Section 6006.5(a) defines occasional sale as:

“A sale of property not held or used by a seller in the course of activities for which he or she is required to hold a seller's permit or permits or would be required to hold a seller's permit or permits if the activities were conducted in this state, provided the sale is not one of a series of sales sufficient in number, scope, and character to constitute an activity for which he or she is required to hold a seller's permit or would be required to hold a seller's permit if the activity were conducted in this state.”

Generally, three or more sales within twelve months is a series of sales requiring the seller to hold a seller's permit. (Reg. 1595(a)(1).) Thus, if the partnership makes more than one sale in addition to the subject sale during any twelve month period during which the subject sale occurs, that sale would be one of a series of sales requiring the partnership to hold a seller's permit. Such a twelve month period could be the twelve months ending with the subject sale, the twelve months beginning with the subject sale, or, for example, the twelve months beginning six months before the subject sale occurs. The other sales which would cause the partnership to need to hold a seller's permit would include, for example, sales of furniture displayed in model homes and sales of the property used by the partners for personal use and investment.

You state that the partnership is not engaged in a business requiring a seller's permit. Assuming the sale is not one of a series of sales requiring the partnership to hold a seller's permit, the partnership's sale to the partners would be an occasional sale under Section 6006.5(a). As an occasional sale, except with respect to the sale of the vehicles and aircraft (discussed below), the sale from the partnership to the individual partners is exempt from sales or use tax. (Rev. & Tax. Code § 6367.)

The same analysis discussed above applies to the sale by the individual partners to the corporation. T--- B--- is apparently not involved in any other business requiring the holding of a seller's permit. Assuming his sale to the corporation is not one of a series of sales for which he would be required to hold a seller's permit, his sale of the tangible personal property, except the sale of the vehicles and aircraft, to the corporation would be an occasional sale exempt from sales or use tax. L--- B--- is apparently also not involved in any other business requiring him to hold a seller's permit. His ownership interest in other entities required to hold a seller's permit does not mean he is engaged in a business requiring the holding of a seller's permit provided the other entities are "persons" required to hold seller's permits in their own names. (Rev. & Tax. Code §§ 6005 ("persons" includes partnerships and corporations), 6066.) Assuming also that his sale to the corporation is not one of a series of sales for which he would be required to hold a seller's permit (which would include the sale of an interest in a partnership owning tangible personal property since a partner owns specific partnership property pursuant to Corporations Code Section 15025), L--- B---'s sale of tangible personal property, except the sale of the vehicles and aircraft, to the corporation would be an occasional sale exempt from sales or use tax.

2. Sales of Vehicles and Aircraft

The sale of the vehicles and aircraft is exempt from sales or use tax if it is included in a transfer of all or substantially all property held or used in the course of business activities of the person selling the property and the real or ultimate ownership of the property is substantially similar to that which existed before such transfer. (Rev. & Tax. Code § 6281, Reg. 1595(c).) "Substantially all the property" means 80% or more of all tangible personal property held or used in the course of the business activities of the person selling the property. The real or ultimate ownership is "substantially similar" to that which existed before a transfer if 80% or more of that ownership of tangible personal property is unchanged after the transfer. (Reg. 1595(b)(2).) For

purposes of this exemption, stockholders and partners are regarded as having the real or ultimate ownership of the property of the corporation or partnership. (Rev. & Tax. Code § (6281.)

Although it is not entirely clear from the description and documents you have provided, it appears that at least 80% of the tangible personal property used by the partnership in the course of its business activities is being transferred to the individual partners. For purposes of this opinion, I assume this understanding is accurate. Based on this assumption, substantially all of the property held in the partnership's business activities is being transferred. Please note, however, that if the tangible personal property in category 5 is properly regarded as used in the course of the partnership's business activities, it appears that substantially all of the property used by the partnership in the course of its business activities would not be transferred. Further, if the aircraft is not transferred, substantially all of the property used by the partnership in the course of its business activities would not be transferred.

Before the transfer, each partner apparently owns 50% of the partnership and would therefore be regarded as owning 50% undivided interest in all assets. After the transfer, each partner will still own a 50% undivided interest in all tangible personal property transferred. Therefore, the ownership is substantially similar to that which existed before the transfer. Since both conditions of the exemption would be satisfied, the transfer of the vehicles and aircraft to the individual partners would be exempt from sales and use tax under Section 6281.

A similar analysis applies to the transfer by the individual partners of the vehicles and aircraft to the corporation. Since T--- B--- and L--- B--- each own 50% of the stock of the corporation, after the transfer they will each be regarded as owning 50% of the tangible personal property transferred to the corporation. (Rev. & Tax. Code § 6281.) Since they each own 50% of those assets before the transfer and 50% after the transfer, the ownership would be substantially similar. Assuming the transfer is part of a transfer of at least 80% of the tangible personal property held or used by each of the individual partners in the course of their business activities, their transfer to the corporation would be substantially all the property held or used by them in the course of such activities. Based on the assumptions made above, the sale by L--- B--- and T--- B--- to the corporation would be exempt from sales or use tax. (Rev. & Tax. Code § 6281.)

In case one of the understandings or assumptions upon which this opinion is based is incorrect, I will also respond to your other question. If the aircraft is not transferred and its related liability not assumed, there would apparently be no consideration for any of the transfers. A "sale" and "purchase" is a transfer of tangible personal property for a consideration. (Rev. & Tax. Code §§ 6006(a), 6010(a).) If all tangible personal property, except the aircraft, listed in your categories 3 and 4 are transferred without consideration for the transfer, no sale or purchase would occur. Since there would be no sale or purchase, the transfer would not be subject to sales or use tax. (See Rev. & Tax. Code §§ 6051, 6201.)

R--- R. B---, C.P.A.

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August 8, 1988
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If you have further questions, feel free to write again.

Sincerely,

David H. Levine
Tax Counsel

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