

**M e m o r a n d u m****170.0007.205**

To: Mr. Rick Slater  
Supervisor, Collections Unit

Date: May 4, 1989

From: Gordon P. Adelman  
Tax Counsel

Subject: M---, Inc.  
dba D--- T--- P--- and S---  
Account No. SR -- XX-XXXXXX

You requested a review of the circumstances which gave rise to a request by San Bernardino Compliance to refer the above captioned account to the Attorney General for a Debtor's Examination based on a fraudulent transfer.

My opinion is that this account should not be referred to the Attorney General for the reasons stated below.

The Uniform Fraudulent Conveyance Act in the California Civil Code, specifically section 3439.04 upon which San Bernardino hangs its hat, requires two critical factors, among others, to be present before a conveyance will be deemed fraudulent.

The first factor is that we would need to establish that the Board was a creditor at the time of the conveyance. The second is that the conveyance was made without fair consideration.

Section 3439.04 protects only existing creditors, and the person (Board) invoking the section must establish that he was a creditor at the time of the conveyance. Furthermore, in order to establish the conveyance as fraudulent under the section, it must appear that the transferor is insolvent at the thereby and the the conveyance was made without fair consideration....if the consideration is fair, the conveyance cannot be set aside under section 3439.04 (TWM Homes Inc. v. Atherwood Realty and Investment Co. Inc., 214 Cal.App.2d 826 (1983)).

In the case of M---, the property sold at auction in November 1987. Notices of determination were issued in January 1988 and February 1988. Demands were made in March and April 1988 and a lien filed April 14, 1988. From a review of the file, it would be very difficult to establish the Board as an existing creditor as of November 1987.

Taxpayer received over \$63,000 from the proceeds of the auction. This may or may not be a "fair consideration;" however, since the property sold at auction, I tend to believe there is little evidence to support a finding that that amount was not a fair consideration.

Although another section of the Civil Code (3439.07) refers to "future creditors," under that section actual fraud must be proven by clear and convincing evidence, and fraud will not be found if the circumstances of the conveyance comport with the theory of honesty and fair dealing. (Homes v. Atherwood Realty, supra.)

For the reasons stated, I don't think this case should be referred to the Attorney General for a Debtor's Examination of M--- M---, President, M---, Inc.

GPA:sr

cc: Mr. E. L. Sorensen, Jr.  
Mr. Ronald L. Dick