STATE OF CALIFORNIA

330.3130

STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) (916) 445-5550

January 13, 1993

Mr. W--- R. N---
I--- S--- F--- & Company
Certified Public Accountants
XXXXX --- Street, #XXX
---, CA XXXXX

Re: J. S. C--- Company
SR -- XX-XXXXXX

Dear Mr. N---:

This is in response to your letter dated December 8, 1992. J.S. C--- Company leases equipment to F--- Corporation, collecting use tax measured by rentals payable. (I assume that the leased property is not mobile transportation equipment as defined in Revenue and Taxation Code section 6023.) Cole and F--- are contemplating a statutory merger, and you inquire as to the application of tax to the use of the leased equipment by the survivor.

You note that Business Taxes Law Guide Annotation 395.2150 (9/23/71) indicates that the survivor in a statutory merger owes use tax when it uses property after the merger that had been obtained extax for leasing. You ask whether the use tax which will be owed by the survivor of the C--- - F--- statutory merger with respect to the survivor's use of property previously leased by C--- will be reduced by the use tax which had been collected from lessees by C--- and paid to the state.

The reason that this type of question arises when a lessor and lessee merge is that after the merger they become one entity, which means that the property that had been leased by the lessor to the lessee is thereafter used by the survivor. Since that survivor succeeds to all the property and obligations of the constituent corporations, if the pre-merger lessor had purchased the property extax for resale in continuing sales, the survivor is using property that it is regarded as having purchased extax for resale, and that use comes within the provisions of subdivision (c)(6) of Regulation 1660.

The surviving corporation owes use tax measured by its purchase price of the property (i.e., the price paid by whichever of the constituent corporations purchased the property). As explained in subdivision (c)(6), the survivor may apply as a credit against the tax it owes measured by purchase price the amount of tax it (again, meaning whichever of the constituent corporations had been the owner and lessor of the property) had collected and paid to the state. Of course, if the property is subsequently leased, the lease would be subject to use tax measured by rentals payable with a credit against that tax as provided in subdivision (c)(6).

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

Sincerely,

David H. Levine
Senior Tax Counsel

DHL:cl

STATE BOARD OF EQUALIZATION
450 N STREET, SACRAMENTO, CALIFORNIA
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(916) 324-2642

October 8, 1993

Mr. W--- R. N---
Certified Public Accountant
I--- S--- F--- & Company
XXXXX --- Street, #XXX
---, CA XXXXX

Re: J. S. C--- Company
#SR -- XX-XXXXXX

Dear Mr. N---:

This is in response to your letter dated August 15, 1993. J. S. C--- is requesting a further explanation of an opinion previously issued by Senior Tax Counsel David H. Levine. Our response is based on the assumption that none of the leased property is mobile transportation equipment as defined in Revenue and Taxation Code section 6023. In your letter you state:

> J. S. C--- Company (hereinafter Taxpayer A) will be merging in a tax free statutory merger with F--- Corporation (hereinafter Taxpayer B). For purposes of this ruling request, an assumption will be made that the statutory ("A" Reorganization) requirements will be met. In years before this merger, Taxpayer B had been leasing various equipment from Taxpayer A. Taxpayer A calculated and remitted the leased equipment's sales tax using the rental payment method. After the merger, the resulting corporation will cease equipment leasing and use the equipment internally.
>
> ....

> Currently, on some assets, the sales tax calculated and remitted using the rental payment method exceeds the sales tax that will be due under the purchase price method. On other assets, the sales tax calculated and remitted using the rental payment method is less than the tax that will be due under the purchase price method.
>
> ....

You were previously informed that after the merger the lessor and lessee become one entity, which means that the property that had been leased by the lessor to the lessee is thereafter used by the surviving corporation. Therefore the surviving corporation owes use tax measured by the purchase price of the property (i.e., the price paid by whichever of the constituent corporations purchased the property). As explained in Sales and Use Tax Regulation 1660(c)(6), the survivor may apply the amount of tax it had previously paid to the Board with respect to rentals of the property as a credit against its liability for use tax measured by the purchase price of the property.

You now ask whether you can calculate an aggregate tax due and then pay the net tax due for all equipment or alternatively if you can use the credit for tax previously paid under the rental payment method on one item of property to reduce the tax liability on the purchase price of another item of property. (You appear to be proposing two different methods of doing the same thing.) Tax may not be reported in the manner proposed because tax is calculated with respect to each transaction involving a sale of tangible personal property, meaning that for purposes of your inquiry tax is computed on an item by item basis. (Rev. & Tax. Code §§ 6051, 6201.)

Our understanding is that J. S. C--- already elected to purchase the equipment ex-tax and thus has collected use tax from the lessee and paid the tax to the Board measured by the rentals payable. J. S. C--- has made an irrevocable election to treat the equipment as a continuing sale and purchase. (Reg. 1660.) Since J. S. C--- decided not to pay sales tax reimbursement at the time it purchased the equipment or make a timely election to pay use tax measured by the purchase price of the units, tax was properly collected and paid on the rentals payable. Action Trailer Sales, Inc. v. State Bd. of Equalization, (1975) 54 Cal.App.3d 125, 130.

Your proposal appears to be based on the incorrect assumption that when tax collected and paid under the rental payment method exceeds the amount of tax that would have been due on the purchase price method for that item of property, then there has been a tax overpayment. It is irrelevant that on some of the assets the tax which J. S. C--- collected and paid under the rentals payable method exceeds the tax that would have been due under the purchase price method for calculating tax since such "excess" amounts are not overpayments and cannot be refunded. Accordingly, J. S. C--- cannot minimize its tax liability incurred by converting extax rental inventory to its own use by matching the credit available for tax already collected and paid on the rental receipts on one item of property, against its liability for tax measured by purchase

price of another. J. S. C--- must report its use tax liability for its use of property previously held in extax rental inventory on an item by item basis. It may take the credit allowed by Regulation 1660(c)(6) only on an item by item basis, meaning that it can claim a credit only to the extent of its tax liability with respect to the item for which the credit relates.

I note that under these circumstances, any future lease of the property by J. S. C--- is a continuing sale subject to tax measured by rentals payable. However, Regulation 1660(c)(6) does allow J. S. C--- to apply the amount of tax it pays measured by purchase price (i.e., the tax due on purchase price in excess of tax previously paid on rentals) against its liability for tax measured by rentals payable from future rentals of the property. What this means is that if the survivor later decides to lease a particular item of property for which it paid tax on purchase price less the credit for tax paid on rentals, it can apply that amount of tax paid (i.e., tax on purchase price less the credit for taxes previously paid on rentals) against the tax due on rentals payable from future leases of that property. This again is on an item by item basis.

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

Sincerely,

Gerald Morrow
Tax Counsel

GM/md
Enclosures: Regulation 1660