

M e m o r a n d u m**395.0071**

To: Mr. R. Thompson
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August 20, 1991

From: Victoria Lani Arena
Tax Counsel

Subject: V--- C--- C--- Hotel, Inc.
SR --- XX-XXXXXX
Occasional Sales Exemption

This is in response to your memorandum of May 17, 1991, requesting our opinion as to whether the occasional sales exemption applies to the sale of hotel furnishings and equipment.

Facts, Issues and Assumptions

You described the facts and issues in this matter as follows:

V--- C--- C--- Hotel Inc. dba R--- H--- V---, was sold to the V--- P--- F--- A---. We are auditing the V--- C--- C--- Hotel Inc. and need an opinion as to the measure of tax on the sale of the furnishings and equipment. We would like to ascertain as to what property would be exempt under Section 6006.5 in view of the Hotel Del Coronado Corporation decision.

“The hotel has 201 room. It has a restaurant, cocktail lounge, several meeting rooms, an exercise room, business offices, rooms for holding banquets and other areas available to the guests including a large lobby. The hotel was built less than a year ago and there have been no previous sales of furnishings or equipment.

“The hotel provides 24 hour room service. Each room has a refrigerator stocked with singel serving size liquors, beer, wine, sodas, candies, cookies and other snack items. The refrigerators require a key to open them. The key is given to the customer when they register with a credit card. If the customer intends to pay with cash, a \$15.00 deposit is required to obtain a key to the refrigerators. Inside of each refrigerator is a price list for the items available. When the guests check out, the items are inventoried and the missing items are billed.

“We believe the fixtures and equipment used in the operation of the restaurant and cocktail lounge are subject to sales tax when they were sold to the V--- P--- F--- A---

but are unsure of the remaining furnishings. Please advise us whether the fact that items are sold from the refrigerators in the rooms would make all of the furnishings in the hotel subject to the sales tax on the sale of the hotel.”

We assume for the purposes of this opinion that the real or ultimate ownership of tangible personal property was not substantially similar before or after the sale.

Sales and Use Tax – General Discussion

Except to the extent specifically excluded or exempted by statute, the Sales and Use Tax Law, California Revenue and Taxation Code (Section 6001 et seq) imposes sales or use tax on the gross receipts from the retail sale of all tangible personal property sold or purchased for use in this state. (Section 6051 and 6201). (All statutory citations are to the California Revenue and Taxation Code, unless otherwise noted herein.)

Occasional Sales – Sales of a Business – Business Reorganization

Sales and Use Tax Regulation 1595(a)(1) provides in relevant part:

(a) ACTIVITIES REQUIRING SELLER’S PERMIT.

(1) General. Tax applies to all retail sales of tangible personal property including capital assets whether sold in one transaction or in a series of sales, held or used by the seller in the course of an activity or activities for which a seller’s permit or permits is required or would be required if the activity or activities were conducted in this state....

Generally, a person who makes three or more sales for substantial amounts in a period of 12 months is required to hold a seller’s permit. A person who makes a substantial number of sales for relatively small amounts is also required to hold a seller’s permit.

Tax does not apply to a sale of property held or used in the course of an activity not requiring the holding of a seller’s permit unless the sale is one of a series of sales sufficient in number, scope and character to constitute an activity for which the seller 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. . . .”

Section 6367 contains the occasional sales exemption. It provides in relevant part:

There are exempted from the taxes imposed by this part the gross receipts from occasional sales of tangible personal property and the storage, use, other consumption in this state of tangible personal property, the transfer of which to the purchaser is an occasional sale....

Section 6006.5 defines "occasional sales". This section provides in relevant part:

"Occasional sale" included all of the following:

(a) 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....

Regulation 1595(a)(4) interprets and implements 6006.5(a). It provides:

(4) SERIES OF SALES REQUIRING THE HOLDING OF A SELLER'S PERMIT. When a person not otherwise engaged in an activity requiring the holding of a seller's permit makes a series of sales sufficient in number, scope and character to require the holding of a seller's permit, the gross receipts from all of such sales are subject to tax.

(A) Number. Generally, the minimum number of sales to require the holding of a seller's permit is three within any 12 month period.

(B) Scope. The extent of the sales measured by their frequency or dollar volume.

(C) Character. This relates to the similarity in type and value giving effect to the taxpayer's operations. For example, a processor of food products for human consumption is not required to hold a seller's permit for the processing and sale of food products. Sales of used lug boxes, obsolete or used machinery, food handling and similar items are of a character that three or more sales of sufficient scope will require the processor to hold a seller's permit for this selling activity.

Consequently, if the property being sold is not used by the seller in the course of activities which require a seller's permit and if the sale is not one of a series of sales of sufficient number, scope and character so as to require the seller to obtain a seller's permit, it would not be subject to sales or use tax.

Sale of Hotel

The case of Hotel Del Coronado Corp. v. State Board of Equalization [15 Cal.App.3d 612, 620 (1971)], involved the sale of all of the hotel's fixtures, furniture and equipment (hereinafter, "personal property assets"). The California Court of Appeals held in that case that the occasional sales exemption under Section 6006.5(a) and Regulation 1595(a)(4) was not available for two reasons. First, the fact that a seller's permit was required in connection with the operation of the hotel restaurant and bar, was sufficient to render all of the hotel's personal property assets subject to sales tax. Second, the court determined that as there had been twelve salvage sales of capital assets within a seven month period of time, the sale of all of the hotel's personal property assets was one of a series of sales sufficient in number, scope and character to require the holding of a seller's permit, thereby precluding the use of the occasional sales exemptions.

The reasoning of the Hotel Del Coronado case was analyzed by the California Supreme Court in the case of Ontario Community Foundation, Inc. v. State Board of Equalization, [35 .3d 811, 820-821 (1984)]. The California Supreme Court determined that the operative fact which rendered the occasional sales exemption in Hotel Del Coronado was the series of twelve salvage sales in which the hotel had been engaged before the final liquidation sale took place. The California Supreme Court further made it clear that the fact that a seller's permit is required in connection with the operation of a restaurant and bar is not, in itself, sufficient to subject all of the personal property assets to sales tax. The California Supreme Court held that although the two hospitals in the Ontario Community Foundation case were required to have seller's permits because of certain sales made from their restaurants and pharmacies, the remainder of the hospitals' personal property assets were not used in the course of such activities. Nor, in the case of either hospital, was the sale of such assets one of a series of sales which might independently require a seller's permit.

In our opinion, pursuant to the Ontario Community Foundation case, the fact that a seller's permit is required in connection with the operation of the R--- H--- V---'s restaurant and bar and in connection with in-room sales of liquor and snacks, is sufficient to render the restaurant and bar fixtures, furniture and equipment subject to sales tax. The hotel room refrigerators are also subject to sales tax as they were used to sell "bottled water, spirituous, malt [and] vinous liquors [and] carbonated beverages" which are not exempt from sales tax as food products pursuant to Section 6359(b)(3). All of the hotel's remaining fixtures, furniture and equipment are exempt from sales and use tax.

If you have any further questions, please do not hesitate to contact us again.