

395.0670**M e m o r a n d u m**

To : Honorable Brad J. Sherman
Honorable Ernest J. Dronenburg, Jr.
Honorable William M. Bennett
Honorable Matthew K. Fong
Honorable Gray Davis

Date : June 24, 1991

From : Gary J. Jugum
Assistant Chief Counsel

Subject : Occasional Sale Exemption

During the Board hearing held on June 5, 19XX in regard to the petition for redetermination of sales tax filed by M--- W--- (SR -- XX-XXXXXX), staff was asked whether resale transactions are counted in determining whether transactions may qualify as exempt as occasional sales.

Answer: Resale transactions are counted in determining whether a seller has made a series of sales of sufficient number, scope and character to require the holding of a seller's permit.

Analysis: Every person desiring to engage in business or conduct business as a "seller in this state" is required to hold a seller's permit. Rev. and Tax. Code sec. 6066. "Seller" means every person who sells tangible personal property of the kind which is taxable if sold at retail. This means that wholesalers, as well as retailers, are "sellers" if they sell tangible personal property which does not qualify for exemption from tax if sold at retail. In other words, wholesalers are "sellers" and need a seller's permit even if they make no retail sales, unless they sell property like food products for human consumption, which are exempt when sold at retail.

Transactions which qualify as "occasional sales" are exempt. Rev. and Tax. Code Sec. 6367. The term "occasional sale" is defined, as relevant here, as follows:

"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 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." (Rev. & Tax. Code Sec. 6006.5, subd. (a).)

In determining the “number” of sales, resale transactions are counted. Regulation 1595, “Occasional Sales - - Sale of a Business - - Business Reorganization” provides, in paragraph (a)(4)(A), as follows:

“Generally the minimum number of sales to require the holding of a seller’s permit is three within any 12-month period.”

Sales for resale are “sales.” “Sale” means and includes “any transfer of title...for a consideration.” Rev. and Tax. Code Sec. 6006.

The short answer is that resales are counted. However, it is fairly rare to come across a situation where disqualification for the occasional sale exemption would be dependent upon our counting resale transactions. Ordinarily it is clear whether the taxpayer is required to hold a seller’s permit. Any property held or used in the course of activity requiring the holding of a seller’s permit does not qualify for the occasional sale exemption and is taxable. Whether qualification for the exemption is dependent upon the series of sales analysis, the sales are almost always retail sales.

What was unusual about the taxpayer’s case heard on June 5, 19XX was that she was simultaneously arguing that she was making resales in the regular course of business, but was also making occasional sales. A sale for resale must be distinguished from a “sale at retail.” A “sale at retail” or “retail sale” means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. On the one hand, she was arguing that she was in business, making sales for resale. On the other hand, she was arguing that she was not in business but making only casual or isolated sales, which were exempt as occasional sales. These arguments are inconsistent. This is why resale transactions are counted with retail transactions in determining whether there has been a series of sales requiring the holding of a permit.

GJJ:sr

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6/26/91 – cc: Mr. Glenn A. Bystrom
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