

Memorandum

395.0675

To : Mr. J. W. Cornelius
Supervisor, Petition Section

Date: January 27, 1993

From : Ronald L. Dick
Senior Tax Counsel

Subject: ---.

This is in reply to contentions raised by ---. (petitioner) regarding its Petition for Redetermination.

The issue in this case boils down to whether petitioner qualifies as a retailer under Revenue and Taxation Code section 6019 which defines "retailer" generally as every individual, firm, co-partnership, joint venture, trust, business trust, syndicate, association or corporation making more than two retail sales of tangible personal property during any 12-month period.

In this case, petitioner made a number of sales. First, petitioner made a sale of two computers to A for a total of \$5,000 on August 10, 1989. At the Board hearing, petitioner's counsel noted that sale was actually two transactions which included a sale of a \$200 computer to Mr. XX, controller of petitioner. Petitioner made 14 other separate sales of used computers which it correctly considered as sales subject to sales tax. Petitioner also made the final sale in issue. We believe that, under section 6019, petitioner qualifies as a retailer.

Petitioner takes the position that the Board should view the 14 separate sales of used computers as one sale, because the sales resulted from one repossession. In this regard, petitioner relies on dicta in the case, Hotel del Coronado v. State Board of Equalization (1971) 15 Cal.App.3d 612, wherein the court noted:

"The occasional exemption is not available if the sale in question was one of a series of sales sufficient in number (here, 12 salvage sales between August 20, 1962, and March 28, 1963), scope and character to require the holding of a seller's permit. "

The Board won the Hotel Del Coronado case. The court did not hold that the Hotel's

multiple sales would represent one sale. As noted by petitioner in its September 14, 1992 letter, the court noted on page 616 of its opinion that the salvage sales "do not necessarily represent one sale, but may represent more than one sale." I believe that, had the facts been such that the court interpreted a series of sales to be one sale and the Board were to have lost the case on that interpretation, the Board would have appealed the decision.

Petitioner believes that its sales were not of sufficient number, scope, and character to require it to hold a seller's permit.

Subdivision (a)(4) of Sales and Use Tax Regulation 1595, Occasional Sales--Sale of a Business--Business Reorganization, provides:

"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."

Attached are copies of the invoices for the 15 sales in question. We believe that if a food processor's three sales of used lug boxes requires the processor to hold a seller's permit, petitioner's 15 sales in amounts averaging in excess of \$1,000 within one year are alone a series of sales sufficient in number, scope, and character to constitute an activity for which petitioner was required to hold a seller's permit. The final sale of petitioner's assets for \$700,000 was also one of that series and does not qualify as an exempt occasional sale as defined at Revenue and Taxation Code section 6006.5, subdivision (a).

In reviewing the file to draft this memorandum, I note another relevant transaction. Schedule 12C2 in the audit workpapers indicates that petitioner was leasing the computers to

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A in California and erroneously considering the leases as nontaxable sales in interstate commerce. The amount was included in audit item D with which petitioner agreed. We believe that, independent of the other sales, petitioner's leasing activity would require it to hold a seller's permit. Of course, petitioner has not had an opportunity to respond to this transaction.

RLD:sr

Attach.