

M e m o r a n d u m**395.0677**

To: _____ Date: February 2, 1967

From: Tax Counsel (EHS:EDM) - Headquarters

Subject:

This is in reply to your memorandum of December 8, 1966, in which you ask our opinion on whether the sale of a yacht in this state by the above named taxpayer is an exempt occasional sale under §§ 6006.5(a) and 6367 of the California Sales and Use Tax Law.

After reviewing your memorandum and the audit report on this account, the facts appear to be as follows:

We understand that taxpayer's original intent in applying for a seller's permit was to engage in the manufacture and sale of fiber glass boats. After discovering that their intended method of production was not feasible, they abandoned this venture. No boats were ever built. The taxpayer then rented or leased the land and buildings it had acquired for the original venture. The taxpayer acquired the milling equipment which was the subject of two of its sales during the audit period (6/1/64 to 4/30/65) through a liquidation of the --- Both of these sales were reported to the state. There was also a sale reported as taxable in the fourth quarter of 1963. We assume that the subject of this sale was also equipment held or used in taxpayer's business activity. The sale of the subject yacht occurred on April 7, 1965. The taxpayer did not report this sale.

Taxpayer listed three boats on its (partnership) books. Two were based in Portland, Oregon, and the above mentioned one in California. The Oregon based yacht was carried on the partnership books as marine inventory. It was sold in Oregon on August 21, 1964, for \$15,384.62. All expenses incidental to operation, repair, and licensing of taxpayer's boats were charged to the partnership books. Depreciation was computed on the yacht and shown on the books. However, it appears that neither the expenses nor the depreciation was claimed on the partnership's federal income tax return. The last mentioned sentence would appear to support taxpayer's contention that the subject yacht was the personal property of the partners and was, therefore, not being held by the partnership as a business asset.

Section 6367 of the Sales and Use Tax Law exempts from tax the receipts from "occasional sales." Section 6006.5(a) defines "occasional sale" as including a sale of property not held or used in the course of an activity requiring the holding of a seller's permit, provided the sale is not one of a series sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit. In interpreting the latter phrase, we have considered the fact that the making of more than two retail sales of tangible personal property in any 12-month period constitutes the seller a retailer under § 6019 of the Sales and Use Tax Law. We have also ruled that a sale is not one of a series of sales if the property sold was used exclusively in a private or personal capacity (i.e., family automobile).

Applying this test to the facts presented for our opinion, it would appear that the taxpayer has made three substantial sales of tangible personal property within a 12-month period. Inasmuch as we have assumed that the 1963 sale which occurred in the last quarter of that year was of a business asset, we believe that when this sale is combined with the two equipment sales in 1964 (June and July), there has been a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit.

We have consistently taken the position that where a person or firm continually makes a variety of sales there is no basis to single out one specific sale merely because it has "certain characteristics that the other sales do not have. While we fully realize that the sale of the yacht may be an unusual type of sale in light of taxpayer's prior sales (i.e., milling equipment), it is our opinion that it cannot be isolated from the other various sales made by taxpayer and treated as an exempt occasional sale. In a similar matter, we ruled that a major oil and gas company was a retailer of a yacht it sold even though the sale was an unusual and nonrecurring type of sale in comparison to other types of sales made by the company.

The fact that the taxpayer carried the yacht on its partnership books as a business asset (i.e., expenses of yacht paid by partnership and depreciation computed) appears to be more compelling in determining its true nature and character than the taxpayer's statement that the yacht was personal property belonging to the individual partners in their private capacity because neither the expenses nor the depreciation were claimed for federal income tax. From this we must conclude that the sale of the yacht was one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit.

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