

**M e m o r a n d u m****410.0410**

To: Mr. T. A. Krummell  
Compliance Planning & Evaluation Unit

Date: August 8, 1989

From: Ronald L. Dick  
Tax Counsel

Subject: Trusts

This is in reply to your April 27, 1989 memorandum regarding the issues raised by a recent increase in application for seller's permits by trusts and transfers of vehicles to trusts. Your questions and our responses follow.

"I. REGISTRATION OF TRUSTS

- A. Probate Code Section 15200, 'Methods of Creating Trusts,' permits creation of trusts by various methods. Section 15200(e) allows creation by '...An enforceable promise to create a trust...' Field Offices have generally requested written documentation of a trust's existence prior to issuance of a permit or allowing an ex-tax transfers of vehicles into a trust. This section may conflict with Section 15201, 'Intention to create Trust,' by stating an enforceable promise to create a trust creates a trust, whereas Section 15201 states a '...settlor properly manifests an intention to create a trust...' creates a trust.

Would there be a legal basis for us to:

1. Refuse issuance of a permit to a taxpayer who states he/she intends to form a trust and provides no documentation so that effect?
2. Refuse issuance of a use tax clearance on a vehicle, vessel or aircraft if a taxpayer states he/she intends to form a trust and provides no documentation to that effect?"

We believe that the staff should refuse to issue a permit or refuse to issue a Certificate of Exemption Use Tax where there is no evidence that a trust is in existence. We do not read Probate Code Section 15201 to mean that a person presently creates a trust by manifesting an intention to create a trust in the future. Section 15201 provides, "A trust is created only if the settlor properly manifests an intention to create a trust." The issue is generally not whether the

settlor intends to create a trust in the future. Rather, the issue arises when there is a question after the fact as to whether the person who transferred property intended to create a trust or to make some other disposition of his or her property, such as a gift.

- “B. Probate Code Section 15207, ‘Oral Trust of Personal Property,’ permits formation of a trust by oral declaration.

In the event of an oral trust being formed as allowed under Section 15207:

1. What evidence must be presented for the Board to issue a permit?
2. Must court approval be obtained by a trust to operate a business?
3. May the Board require written evidence to support issuance of vehicle, vessel or aircraft use tax exemption?”

The oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property. The existence and terms of an oral trust of personal property may be established only by clear and convincing evidence. (Prob. Code § 15207, subs. (a) and (b).) There are various types of evidence which the staff may request to prove the existence of a trust. We believe that when the trust applies for a seller’s permit, the staff should request evidence of bank accounts in the name of the trust, a lease of business premises in the name of the trust, purchase of inventory by the trust, written authorization of the person applying for the permit to so act on behalf of the trust, or any similar evidence.

Generally, a trustee need not obtain court authorization to operate a business where the power is conferred by the trust instrument. (Probate Code § 16200, subd. (a) and 16222, subd. (b).)

The staff may require written evidence of the existence of a trust to support a claim that the transfer of a vehicle, vessel or aircraft is nontaxable; however, in general, the transfer may be nontaxable because made for no consideration. If there is a consideration, the transaction may qualify for exemption from tax under Revenue and Taxation Code section 6281 if it is a transfer of all or substantially all of the property held in the course of business activities of the seller when the real or ultimate ownership of the property is substantially similar to that which existed prior to the transfer. For a discussion of this type of transaction, see page 52 of Pamphlet 23, “Guidelines for the Application of Sales and Use Tax to the Occasional Sales of Vehicles, Vessels, and Aircraft,” section VIII, subsection T.

“II. COLLECTION AGAINST TRUSTS

- A. When a trust assumes operation of an ongoing business, presuming all assets are transferred into the trust:
1. Do provisions of Sections 6811 and 6812, Sales and Use Tax Law, relating to successor’s liability, apply?

2. If a debt is incurred by the predecessor or transferor, may the Board proceed against the trust (successor)?
3. If the Board may proceed against the trust as successor, are any legal limitations to be expected?
4. If the Board chooses to proceed against the trust as successor, and the trustee chooses to remove assets from the trust, may a nominee lien be filed?
5. To what extent is a trustee liable for debts incurred by the trust?
6. Is there any personal liability of a trustee for debts incurred by the trust?"

Preliminary we note that, if the trustor transfers his property into a trust, we believe the transfers would be subject to the fraudulent conveyance statutes. (See Civil Code § 3439.01 et seq.) A person cannot create a trust that will protect his or her property from the claims of his or her creditors. (Estate of Schneidel, 140 Cal. App. 2d. 710.)

Further, as to liabilities incurred by the trustor after the transfer of property to the trust, where the trustor has made a transfer for no consideration to a revocable trust during the trustor's lifetime, the Board can consider the trust property as property of the trustor to the extent of the power of revocation during the lifetime of the trustor. (Probate Code § 18201.) Upon the death of a trustor who had retained the power to revoke the trust in whole or in part, the property that was subject to the power of revocation at the time of the trustor's death is subject to the claims of creditors of the decedent trustor's estate to the extent that the estate is inadequate to satisfy those claims and expenses. (Probate Code § 18201.)

Absent any consideration given to the trustor for property placed in the trust, the successor liability statute would not apply. (See Sales and Use Tax Reg. 1702, subd. (a).)

We turn now to the situation where the transfer to the trust occurs upon the death of the trustor. Under Probate Code section 9201, a claim by the Board of Equalization against the estate of a decedent is generally barred only after the administrator of the estate files a written notice or request to the Board and expiration of the period of time provided in the applicable tax section. See, for example, Revenue and Taxation Code section 6487.1 which provide that a notice of deficiency determination shall be mailed within four months after written request. If the estate distributes property before the expiration of time allowed the Board to file a claim, the Board has a claim against the distributees to the extent of the Board's claim, or each distributee's share of the distributed property, whichever is less. (Probate Code § 9203.)

Regarding the liability of a trustee for debts incurred by the trust, generally, a trustee is personally liable for obligations arising from ownership of trust property only if the trustee is personally at fault. A trustee is "personally at fault" when the trustee, either intentionally or negligently, acts, or fails to act. (Probate Code § 18001; Law Revision Commission Comment.) We believe that, if a trustee operates a business and negligently fails to pay taxes incurred by the business, the trustee is personally liable for the taxes. However, since the "person" holding the

seller's permit and incurring the tax liability is the trust, any liability the Board seeks to impose upon the trustee should be by referral to the Attorney General's office to file a court action.

There is a different rule where the trust is not a traditional trust but, rather, is a "Massachusetts" or business trust. A business trust is an unincorporated association created by voluntary act, based on contract, of owners of property or property interests for purposes of carrying on some type of business or commercial activity for profit. Title to the capital of the organization is usually vested in trustees who manage the affairs of the trust. Beneficial interest in the trust estate is evidenced by transferable certificates, similar to corporate shares.

The object of a Massachusetts or business trust is not to hold and conserve particular property, with incidental powers, as in the traditional trust, but to provide a medium for the conduct of the business and the sharing of its gains. Generally, the trustees of a business trust are personally liable for debts of the trust. (*People v. Sisco*, 31 Cal.App.2d. 345.) The *Sisco* case concerned a business trust which held a permit issued to the trust estate as a retailer. The trust instrument specified that the trustees were not personally liable for obligations of the trust. However, the court held, citing the leading case of *Goldman v. Ottman*, 210 Cal. 408, that the trustees were personally liable, and that only an agreement to the contrary by the creditor at the outset could avoid the general rule of liability. We understand that the position of the compliance staff is that the Board holds trustees personally liable and will not consent to any other arrangement.

We believe there may be situations whereby the shareholders of the trust may be liable for the trust debts. Liability of shareholders will depend on whether or not a true trust or a partnership relation exists. The criterion most frequently applied is the right to control. If, under the trust instrument, the trustees are vested with title to the property and with the exclusive right to manage its business and conduct its affairs free from the control of the shareholders, the organization is treated as a trust. If the shareholders have the right, even though unexercised, to control the trustees in these particulars, the organization is treated as a partnership and the shareholders as partners. (13 Am. Jur. 2d., Business Trusts, §§ 9-12; *Goldman v. Ottman*, *supra*.)

"B. If a trust which owes a debt to the Board distributes its assets, may the Board pursue any legal remedies against beneficiaries of the trusts?"

Since the transfer of trust assets to the beneficiaries would be without consideration, the transfer would be subject to the fraudulent conveyance statutes.

"C. If a trust which owes a debt to the Board transfers assets back to the settler:

1. Do provisions of Sections 6811 and 6812, Sales and Use Tax Law, relating to successor's liability, apply?
2. May the Board proceed against the trust (successor)?

3. If the Board may proceed against the settlor as successor, are any legal limitations to be expected?"

Again, absent a purchase price, successor's liability would not apply. Since, under the facts you present here, the trust is revocable, the Board can look to the trust property to the extent of the power of revocation for payment of liability of either the trustor or the trust. (Probate Code § 18200.)

"III. REVOCABLE TRUSTS

- A. Probate Code Chapter 3, Section 15400 et. seq. creates a presumption of revocability.
  1. If a trust owing a debt to the Board, and which is registered under Business Taxes statutes, is revoked by the trustee, what avenues of collection are open to the Board?
  2. May the Board proceed against the trust (successor)?
  3. If the Board may proceed against the settlor as successor, are any legal limitations to be expected?"

Since the revocation of a trust would result in a transfer of the trust property for no consideration, the transfer would be subject to the fraudulent conveyance statutes.

If the trust discontinues business and does not notify the Board, then the predecessor liability provision of Sales and Use Tax Regulation 1699, subdivision (e), applies.

You also asked questions regarding two McDonald franchises which are operated by trusts. We are unable to provide you with specific answers to your questions without further facts regarding the tax liability owed by the trusts. Please send the files and a memorandum outlining the specific problems you are experiencing with the accounts, and we will be able to provide you with an answer. Also, if you need further information regarding your questions, feel free to write again.

RLD:sr

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