

Memorandum

465.1544

To : Audit Program Manager - MIC:49
(Mr. Vic Anderson)

Date: December 19, 1996

From : Ronald L. Dick
Senior Tax Counsel

Subject: C--- B. P--- etal
dba R--- W--- C---
of B---
SR -- XX-XXXXXXX-010

This is in reply to your October 30, 1996 memorandum regarding a Notice of Determination issued against R--- W--- C--- of B---.

The Board audited the taxpayer as a partnership for the period January 1, 1990 through September 30, 1993. The resulting liability is one transaction; that is, use tax owed on the purchase of bottling equipment in March of 1990. The Board issued a Notice of Determination on January 24, 1994. The taxpayer filed a timely petition, and the case proceeded to an appeals conference. Apparently, the Appeals Section recommended denial of the petition, the taxpayer requested a Board hearing, and staff then discovered evidence the partnership may have incorporated. Staff investigated further and determined that the partnership had, in fact, incorporated on September 2, 1988 as D--- W---, Inc.

Given this information, you asked whether a three-year or an eight-year statute of limitations applies to issuing a determination against the corporation.

As you know, Assistant Chief Counsel Gary J. Jugum wrote an opinion on June 3, 1994 addressing the issue of the applicable statute of limitations when a sole proprietor incorporates but fails to notify the Board. In that case, the corporation then files what appears to be tax returns of the proprietorship. Our practice has been to credit, against the liability of the corporation, any payments which may appear to have been made by the sole proprietor. For the period of operation of the corporation, we apply a three-year statute of limitations. Mr. Jugum's opinion applies to the facts you presented. The Notice of Determination issued in the name of the partnership is not notice of a liability owed by the corporation. On the other hand, under Sales and Use Tax Regulation 1699, Permits, subdivision (f), the partnership may owe a

predecessor's liability provided the partnership holds 80 percent or more of the stock of the corporation. (See Rev. & Tax. Code § 6071.1.)

We note that Mr. Jugum's memorandum was written for further discussion at the June 17, 1994 meeting of the Department of Sales Tax and the legal staff. I believe the meeting was postponed until July 15, 1994. The minutes of that meeting show that Mr. Jugum's memorandum resolved the statute of limitations issue; however, Mr. Jugum and Mr. Dunn were to discuss an additional related issue on August 27, 1994. I suggest you contact Mr. Dunn for further information as to that discussion.

Given that the liability against the corporation and the predecessor may be barred by statute, we believe this situation underscores the need for staff to determine at the time of auditing a business, the correct ownership of the entity.

As you further noted, that Sales and Use Tax Annotation 465.1546 (9/13/95) appears to conflict with Mr. Jugum's memorandum. That annotation is not yet published in the Business Taxes Law Guide. It also would conflict with published annotation 465.2542 (3/10/82). By copy of this memorandum, we recommend the annotation be deleted.

RLD:sr

cc: Mr. Robert Nunes - MIC:40
(Please delete Annotation 465.1546.)
Mr. Gary J. Jugum
Mr. David H. Levine
Mr. Thomas J. Cooke