

505.0363**Memorandum**

To: Mr. R. A. Slater
Supervisor, Collections Unit

Date: October 16, 1990

From: David H. Levine
Senior Tax Counsel

Subject: REDACTED TEXT

This is in response to your memorandum dated September 18, 1990. REDACTED TEXT held a seller's permit for REDACTED TEXT. The U.S. Marshal seized the restaurant and contracted with REDACTED TEXT to operate it. The U.S. Marshal believes that the restaurant's sales are now exempt sales by the United States Government. Several clauses in the management contract lead you to believe that REDACTED TEXT is the taxpayer. You ask our opinion.

A letter from REDACTED TEXT of the United States Marshals Service to Carl Expoinoza of the Board states that the restaurant was seized pursuant to a warrant in Rem for violation of 21 U.S.C. section 881(a)(7). A Complaint of Forfeiture was filed in the United States District Court for the District of Hawaii on December 14, 1989. That complaint alleged that the restaurant was subject to forfeiture to the United States pursuant to the provisions of 18, U.S.C. section 1956 (money laundering). The Seizure Warrant issued by the district court on December 14, 1989 stated that the property was subject to forfeiture under section 981 because of a violation of section 1956.

Subsection (a) of section 981 sets forth the grounds for forfeiture of property to the United States. Subsection (f) states: "All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section." Thus, it appears that upon forfeiture to the United States of the subject restaurant, the United States became the owner of that restaurant. Based upon the warrant and the complaint, it is clear that REDACTED TEXT's citation to 21, U.S.C. section 881 was incorrect. However, even if that reference were correct, we note that we would reach the same conclusion. Subsection (h) of the section 881 state: "All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section."

That the United States contracted with REDACTED TEXT to manage the restaurant does not alter the fact that REDACTED TEXT does so on behalf of the United States and that the United States must be regarded as the owner of the restaurant making the sales. There is no indication in that contract that anyone other than the United States is the owner of the restaurant. Therefore, we conclude that sales made by the restaurant are exempt sales by the United States.

I note that in REDACTED TEXT's letter to Mr. Espinoza, he asks that taxes be exempt during the period of seizure. He also states that upon the forfeiture action all taxes will be brought current. It is unclear what REDACTED TEXT means. Perhaps he means that taxes owed by the restaurant prior to the time of seizure, but which were not yet paid, would in fact be paid. This of course is appropriate since those taxes were owed by the restaurant owners and the United States Government has seized property upon which our tax lien applies.

As we discussed on September 25, if court proceedings on this matter are resolved by returning the seized property to REDACTED TEXT, we will have to resolve the question of whether the United States was making exempt sales during the period of seizure or whether, in retrospect, the United States held the restaurant in conditional constructive trust on behalf of the owners. If we were to make the latter conclusion, it is possible that we would also conclude that, upon transfer back to the owners along with proceeds from those sales, the owners owe sales tax on those sales.

I have one final note on this situation. The United States is arguing that it is making sales exempt from California sales tax and we agree. Presumably, the United States, through its restaurant manager REDACTED TEXT, is not collecting sales tax reimbursement with respect to these exempt sales. It should not do so. If it does, that sales tax reimbursement would be excess tax reimbursement. Then the question would be whether we have the power to require the United States to pay that excess reimbursement to the customer or to the state. Hopefully, this is not a question we have to address.

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