



STATE BOARD OF EQUALIZATION

August 30, 1967

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Dear Mr. ---:

We have completed review of the above-named taxpayer's petition for redetermination of sales and use taxes.

You have contended that (1) sales by an executor are not made in the course of the conduct of a business or any activity for which a seller's permit is required and, therefore, are not subject to sales tax. (2) In any event, the allocation of a portion of the sales price to the tangible personal property assets is incorrect. Specifically, you have contended that the use of the ratio of the net book value of the property sold to establish the sales price of the tangible personal property is incorrect for the reason that depreciation was not deducted to the date of sale.

With respect to the first contention, we direct your attention to Market Street Railway Co. v. State Board of Equalization, 137 Cal. App 2d 87, wherein the court held "business" is not to be used in the commercial sense for sales or use tax purposes but is to be interpreted in the light of the statutory definition set forth in the act. Section 6013 of the Revenue and Taxation Code defines business to include:

"...any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect."

It is our opinion the sales in question were made for gain, benefit, or advantage within the meaning of this section. It is not required that the sales be made within the intention of making a profit. Union League Club v. Johnson, 18 Cal. 2d 275.

As we view it, the narrow question is whether the sales qualify as "occasional sales". What constitutes an occasional sale is limited to the classifications set forth in Section 6006.5 of the Revenue and Taxation Code. Pacific Pipeline Construction Co. v. State Board of Equalization, 49 Cal 2d 729; U.S. Industries, Inc. v. State Board of Equalization, 198 Cal. App. 2d 775.

Since three or more retail sales of tangible personal property of substantial amount were made with a 12-month period, the executors are classified as a "seller" for sales and use tax purposes (see Sales Tax General Bulletin 52-6, copy enclosed). Persons classified as sellers are required to hold seller's permits (Revenue and Taxation Code § 6006). It follows that the sales fail to qualify as occasional sales for the reason that each transaction 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" (see Revenue and Taxation Code § 6006.5(a)).

We have examined the field staff's basis for allocating a portion of the bulk sales price to the tangible personal property assets. We consider it a reasonable basis for allocation. Prior to the date of the sale, decedent had depreciated the tangible personal property assets at 150 percent by the declining balance method. There is no evidence that the personal property assets declined in value at a greater rate than the building improvements which were depreciated at the same basic rate. Nor is there any evidence that warrants a finding that a greater pro rata portion of the sales price was attributable to the land. Under the circumstances, we cannot conclude that the addition of a few months depreciation would produce a more accurate allocation.

For the reasons set forth above, we have recommended that the tax be redetermined without adjustment. In due course you client will receive official notice of action taken by the Board on its petition for redetermination.

Very truly yours,

W. E. Burkett  
Tax Counsel

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