

M e m o r a n d u m**395.1527**

To: Mr. John Huk
Supervising Tax Auditor
San Jose Auditing

Date: August 30, 1990

From: David H. Levine
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Subject: B--- C---, Inc.
SR -- XX-XXXXXX

This is in response to your memorandum dated August 3, 1990. You are auditing B--- C---, which has undergone several changes in its corporate form over the past few years. Taxpayer contends that all mergers are statutory and exempt from tax. You believe that at least one of the transactions in which the parent assumed liabilities of taxpayer may not qualify as a statutory merger and may be taxable.

In July 1987, B--- C--- merged into B--- C--- Delaware. B--- C--- Delaware was the surviving corporation, but changed its name to B--- C---. A Certificate of Merger filed with the California Secretary of State certified that the merger was pursuant to the provisions of subsection (c) of section 252 of the General Corporation Law of Delaware. We conclude that this was a statutory merger and the transfer of property pursuant to that merger was not subject to sales or use tax. (Reg. 1595(b)(3).)

In September 1987, B--- C--- merged with a subsidiary of 3--- Corporation and itself became a subsidiary of 3---. The documentation shows that this was a statutory merger pursuant to the applicable provisions of California and Delaware law. We conclude that no sales or use tax applies to the transfer of property pursuant to that merger. (Reg. 1595(b)(3).)

In May 1989, B--- C--- declared a dividend to its parent 3--- in return for which 3--- assumed certain of B--- C---' liabilities. This property was transferred to 3--- by a bill of sale dated May 26, 1989. The assets transferred were:

- “1. All contracts to which B--- is a party and which can be assigned by B--- without the consent or approval of the other party thereto, excluding the ULAWA and any other government contracts to which B--- is a party.
- “2. All of B---’s right, title, and interest in any patents, trademarks, or any other proprietary rights in any technologies owned in whole or in part by B---.
- “3. All tangible assets of B---, including, without limitation, inventory, equipment and accounts receivable, except such as may not be transferred without the consent of any third party.”

We agree that this transfer of assets was not pursuant to a statutory merger. The sale price (that is, the assumed liabilities) is subject to sales tax with respect to the portion related to tangible personal property not sold for resale unless that sale is entitled to an exemption. The relevant exemption is provided by section 6367 for occasional sales as defined by subdivision (b) of section 6006.5. Since B--- C--- was a wholly-owned subsidiary of the purchaser, 3---, if it transferred substantially all the tangible personal property it held or used in the course of its activities requiring a seller’s permit (80% or more), then its sale to 3--- is an exempt occasional sale. (Reg. 1595(b)(2).)

The contracts transferred to 3--- do not appear relevant to the calculation of the percentage of B--- C---’ property transferred to 3---. It appears that the contracts were obligations to sell tangible personal property but may not have involved the transfer of existing tangible personal property to 3---. If this were the case, the fact that not all contracts were transferred by B--- C--- is not relevant to the analysis. However, if tangible personal property related to these contracts was transferred along with the contracts or retained with respect to those contracts not transferred, then that tangible property would, of course, be relevant to the analysis. For example, government contracts were involved, and it is possible that B--- C--- retained certain tangible personal property related to those contracts by virtue of retaining the contracts.

The transfer of B--- C---’ patents, trademarks, and other proprietary rights in technologies also does not factor into the calculation of the percentage of tangible personal property transferred to 3--- because these items are intangibles. The assets transferred specifically included all tangible assets of B--- C--- except those assets which could not be transferred without consent of a third party. If the tangible personal property retained by B--- C--- by virtue of the contracts it retained and by virtue of being unable to transfer without the consent of a third party consisted of less than 20% of the tangible personal property it held in the course of activities requiring a seller’s permit, then B--- C---’ sale to 3--- was an exempt occasional sale.

In a certificate of ownership and merger dated December 21, 1989 and filed March 30, 1990 with the California Secretary of State, B--- C--- (then under the name of 3--- F--- S---) certified that it merged into 3--- pursuant to section 1110 of the California Corporations Code and section 253 of the Delaware General Corporations Law. We conclude that this was a statutory merger and no sales tax applies to the transfer of any tangible personal property pursuant to that merger. (Reg. 1595(b)(3).)

If you have further questions, feel free to write again.

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