795.2015

Ms.
Chicago Auditing

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[redacted]

After a couple of stops, your memorandum dated November 27, 1990 has been referred to the Legal Division for response. You have two questions concerning sales of vehicles. Your first question relates to the statute of limitations for filing a claim for refund. A transfer of vehicles was made on December 31, 1986, but the tax was not paid to the DMV until September 22 and December 18, 1987. The taxpayer filed a claim for refund on July 24, 1990 based on the Woosley case. You note that although this is more than three years after the tax was due it is within three years of the date the tax was paid. You ask whether the statute of limitations has expired.

The period within which a claim for refund of sales or use tax must be filed is set forth in Revenue and Taxation Code section 6902. A claim for refund is timely only if it is filed within: (a) three years from the last day of the month following the close of the reporting period for which the overpayment was made; (b) with respect to determinations, within six months from the date the determination becomes final; or (c) within six months from the date of overpayment. A claim for refund is timely if it is filed within any of these three periods. In this case the three year period started to run January 31, 1987 (the last day of the month following the period for which the tax was due), and therefore expired on January 31, 1990. Since there was no determination issued in this case, the second period is inapplicable. The final period expired on March 22, 1988 for the first payment and June 18, 1988 for the second payment (six months after each payment was made). The applicable periods within which a claim for refund may be timely filed, March 22, 1988, June 18, 1988, and January 31, 1990, have all expired.

Your second question relates to a transfer of a portion of the trucks owned by [redacted]. to [redacted] in exchange for original issue of its stock. These trucks consisted of less than eighty percent of the assets of [redacted] The trucks were used as rental units. Upon registration, the DMV assessed tax on only two of the one hundred vehicles transferred. A claim for refund was timely filed for refund of the taxes paid with respect to those vehicles. You ask whether the trucks in lease service retain their tax paid status in a transaction that is exempt as a contribution to a commencing corporation.

Initially, I note that there is no statutory exemption for a transfer to a commencing corporation. If the transfer comes within subdivision (b)(4) of Regulation 1595, the transaction is not "exempt" but rather is not subject to tax either because no sale actually occurred (no consideration) or a sale occurs without a measure of tax since the stock has no value until after the transfer is complete. You do not state whether there was any consideration paid with respect to this transfer. For example, if [redacted] assumed liability related to the trucks it received, then there was clearly a sale, with tax measured by the consideration paid by [redacted] For the remainder of this opinion, I assume that no consideration was paid except for the transfer of stock in a commencing corporation that was not capitalized.

You have described the transferred vehicles as trucks. Trucks are mobile transportation equipment (MTE) under section 6023 unless they are identified as one-way rental trucks under section 6024. If the subject trucks are not one-way rental trucks under section 6024, they are MTE. A lease of MTE is never a sale. (Rev. & Tax. Code §§ 6006(g)(4), 6010(e)(4).) The lessor is the consumer of the MTE and tax applies to the sale of MTE to the lessor or to the lessor's use of the MTE. If the lessor's use of the MTE will be limited to leasing and the lessor makes a timely election to do so, the lessor may pay its tax liability measured by fair rental value. (Rev. & Tax. Code §§ 6092.1, 6094(d), 6243.1, 6244(d), Reg. 1661.)

As assumed above, [redacted] obtained the trucks in a transaction not subject to sales or use tax. This means that [redacted] may use the trucks itself without paying use tax. Since the lease of MTE is not a sale and is regarded as being consumed by the lessor, if the transferred trucks constitute MTE, no tax is due with respect to their rental.

If the trucks are one-way rental trucks under section 6024, then they are treated as are any other non-MTE tangible personal property. A lease of non-MTE tangible personal property is a continuing sale and purchase unless leased in substantially the same form as acquired and the lessor has paid sales tax reimbursement or use tax to its vendor or timely paid use tax measured by purchase price. As relevant here, the only time a purchaser obtains tax paid status in property when the purchaser does not actually pay tax is when that purchaser's transferor paid tax measured by purchase price and the property is acquired in a transaction described in subdivision (b) of section 6006.5. Since less than eighty percent of [redacted] assets were transferred to [redacted], this transaction does not come within subdivision (b) of section 6006.5 and [redacted] does not obtain any tax paid status by virtue of payment of tax by [redacted]. (See Reg. 1595(b)(2), 1660(b).) If the trucks are not MTE, [redacted]'s lease of the ninety-eight trucks with respect to which no tax has been paid would be regarded as continuing sales subject to use tax measured by rentals payable.

I note that I have not considered the effects of any lease agreement that was in existence when the subject transfer was made. If there was an existing lease at the time of the transfer, this could have a bearing on whether tax, if due, would be required to be measured by rentals payable or by purchase price. (See Reg. 1660(c)(9).) If, after obtaining further information, you have questions on this subject or others, feel free to write again.

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