

M e m o r a n d u m**395.2150**

To: Headquarters – Petition Unit

September 23, 1971

From: T. P. Putnam

Subject: G--- F. A--- Company

SR -- XX XXXXXX

A--- M--- Company

SR -- XX XXXXXX

Please schedule this matter for final action. The facts involved are that G--- F. A--- Company acquired equipment ex tax for resale and then transferred it to its subsidiary, A--- M--- Company, ex tax for resale. The subsidiary leased the equipment to the parent for a period of time and reported tax on the rental receipts, exclusive of property taxes paid by the parent. The subsidiary was then merged into the parent pursuant to section 78.540 of the Nevada Revised Statutes. That section provides, in substance, that a wholly owned subsidiary may be merged into its parent by action of the parent in filing a certificate of ownership and a resolution of its board of directors to merge the subsidiary and assume its obligations, whereupon the parent acquires all of its liabilities and obligations. At the time of the merger, the rental receipts equalled about a third of the purchase price of the equipment. Most of the equipment was used by the parent after the merger. Some of it, however, was sold or shipped outside the state without functional use by petitioner after the merger.

It is my opinion that the parent became subject to use tax when it acquired and used the equipment pursuant to the merger, in the same manner that the subsidiary would have become subject to use tax based on sections 6094 and 6244 of the Revenue and Taxation Code and ruling 70(c)(3)(C), by terminating the leases and using the property. The person of the subsidiary continued in the parent as the surviving corporation in the statutory merger and the ex tax status of the property and the obligation of the subsidiary with respect to it carried over to the parent (Mutual Building & Loan Association v. Wiborg, 59 Cal. App 2d 325; Gallo Winery v. Commissioner, 227 F. 2d 699; Koppers Co. v. United States, 134 F. Supp. 290). Use tax does not apply, however, with respect to those items of equipment sold after the merger without prior use or those used solely outside the state after the merger (sections 6008, 6009, 6009.1 of the Revenue and Taxation Code).

The transfer of the equipment to the parent pursuant to the merger was not itself a taxable use by the subsidiary, since under the particular facts, the subsidiary exercised no right or power

incident to ownership, within the meaning of section 6009 of the Revenue and Taxation Code. The merger and transfer was effected by the action of the parent alone. The subsidiary was, however, obligated to include the property taxes paid by the parent prior to the merger in the taxable rental receipts.

The determination against G--- F. A--- Company should be reduced by the amount of the tax on items sold or shipped out of the state after the merger, per the reaudit.

The determination against A--- M--- Company should be reduced by the amount of the tax on all of the leased equipment involved in the merger. Please note that the reaudit figures appear to require adjustment in this respect, since the reaudit apparently would eliminate from the determination against A--- M--- Company only those items subsequently sold or shipped out of the state.

The statements of board action for each determination are as follows:

1. G--- F. A--- Company

The board concluded that petitioner became subject to use tax with respect to the equipment acquired by petitioner's subsidiary, A--- M--- Company, ex tax for resale, leased by the subsidiary to petitioner and then acquired and used by petitioner pursuant to the statutory merger of the subsidiary into petitioner. The person of the subsidiary continued in petitioner as the surviving corporation in the statutory merger and the ex tax status of the equipment and the obligation of the subsidiary with respect to it carried over to petitioner. The board also concluded, however, that use tax did not apply with respect to those items of equipment which were sold or shipped out of the state without taxable use after the merger.

2. A--- M--- Company

The board concluded that personal property taxes paid by the parent-lessee of the equipment in question were properly included in the measure of tax on the rental receipts of petitioner. The board also concluded, however, that the acquisition of the equipment by the parent, G--- F. A--- Company, pursuant to the statutory merger, did not constitute a taxable use by petitioner.