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**STATE BOARD OF EQUALIZATION**

September 24, 1971

Mr. M--- T---  
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--- ---, CA XXXXX

SR -- XX XXXXXX

Dear Mr. T---:

Reference is made to the August 25, 1971 preliminary hearing regarding your April 2, 1971 petition for redetermination with respect to tax assessed for the audit period April 1, 1969 to June 30, 1970. At the hearing, you questioned the inclusion of the amount of \$13,881 in the taxable measure, sale of equipment not reported at close-out date. This is to advise you of the conclusions we have reached with respect to this disputed item.

The September 22, 1970 minutes of a special meeting of the board of directors of H--- E. C--- D--- Laboratory, Inc. (C---), at which possible procedures for combining your laboratory with C--- were discussed, stated, in part:

“...it was decided that in order to avoid the expense and time required to incorporate the T--- D--- Laboratory and thereupon merge T--- D--- Laboratory with our company that some method should be worked out where the H--- E. C--- D--- Laboratory might exchange stock for the T--- D--- Laboratory.

It was decided...that an amendment to the H--- E. C--- D--- Laboratory's Articles of Incorporation should be made to increase the authorized number of shares to an amount that would allow an adequate number of shares to exchange with Mr. T--- for the assets of his business and bring him into ours.”

Per the agreement of sale, you agreed to sell and transfer all of the assets of your laboratory, including the name and goodwill, and subject to all liabilities thereof as shown on a July 1, 1970 financial statement, to C--- in return for 170 shares of C--- common stock.

At the hearing, it was asserted that the transfer of your assets to C--- in return for C--- stock and the assumption of your liabilities was not a sale, and alternatively, that as the result thereof was the same as if the transfer had been accomplished by means of a statutory merger, the transaction should be treated for sales tax purposes as though it were a statutory merger, with the result that the transfer would not be subject to sales tax.

As previously explained, "person" includes, among others, any individual or corporation (Sales and Use Tax Law section 6005), and the sale of tangible personal property by an individual, one person, to a corporation, another person, is not exempt from tax upon the ground that the individual becomes a stockholder of the corporation. The corporation, not its stockholders, is the person purchasing the property under the law. "Sale" means and includes any transfer of title, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. (§6006(a).)

As you transferred all your assets in return for shares of C--- stock and the assumption of your liabilities, there was a transfer of title to tangible personal property by you to C--- for which you received consideration. This was a "sale" within the meaning of section 6006(a).

The sales tax is imposed upon the gross receipts of the retailer from the retail sale of tangible personal property (§6051). "Gross receipts" mean the total amount of the sale price of the retail sales of retailers, valued in money, whether received in money or otherwise (§6012).

Here, you were a retailer and the transfer of your assets was a retail sale of tangible personal property. As you received shares of C--- stock therefore and as your liabilities were assumed by C---, there were taxable gross receipts, and they were subject to sales tax.

In the case of a statutory merger, a merger under section 4100, et seq., of the California Corporations Code or similar laws whereby upon the filing of the approved merger agreement with the Secretary of State, the transferor corporation ceases to exist and without other transfer its assets and liabilities become the assets and liabilities of the surviving corporation, there is a transfer of title for consideration to support the merger agreement but since with the required filings, the continuing corporation has title to the assets of the "disappearing" corporation and the transferor corporation ceases to exist as a separate legal entity, is enveloped within and is the continuing corporation, no gross receipts exist to which tax can apply, and thus, for this reason, it has been concluded that statutory mergers do not give rise to sales tax liability. (Cal. Tax Service Ann. No. 395.2140).

Thus, sales of assets in return for stock and liabilities assumed, whether by individuals, corporations or other persons, are distinguishable from statutory mergers for sales tax purposes, the former having all the elements of taxable sales, the latter not having all such elements. Even though the results of both types of transactions may be the same, the former are subject to sales tax, but the latter are not.

Accordingly, it will be our recommendation to the board that the tax be redetermined without adjustment. If we do not hear from you within 30 days from the date of this letter, we shall assume that you concur in our recommendation, and we shall present the matter to the board for final action. In this event, you will receive official notice of the board's action in due course. In the event that you do not concur in our recommendation and you desire an oral hearing before the board, please notify Mr. J. L. Martin, P. O. Box 1799, Sacramento, CA 95808, of this fact within the 30-day period and he will inform you of the time and place of hearing.

Very truly yours,

J. Kenneth McManigal  
Tax Counsel

JKM:smb