

M e m o r a n d u m**395.2550**

To: Oakland – Auditing (LHW)

Date: February 10, 1971

From: Tax Counsel (JM) - Headquarters

Subject: ---

In your memorandum of December 11, 1970 you request our opinion as to whether or not there is an exempt occasional sale as contemplated by regulation 1595 under the following facts.

We understand that ---. (Subsidiary) is a wholly-owned subsidiary of X (Parent). Beginning in 1967 and continuing to the present, equipment has regularly been transferred from Subsidiary to Parent ostensibly for the ultimate purpose of closing down the Subsidiary plant. Parent is building a completely new facility in Fresno to be partially equipped with this equipment.

The physical transfers are evidenced by memo invoices which show the net book value of the asset transferred. General journal entries relieving Subsidiary's asset accounts are prepared on a summary basis not necessarily concurrent with the physical transfer. The equipment is being used and depreciated by Subsidiary until the date of transfer. The assets are not used in an activity requiring the holding of a seller's permit. There are no substantial or numerous other sales of equipment to third parties. There is no sales agreement or bill of sale in existence.

Taxpayer contends that the piecemeal transfers over a long period of time constitute an occasional sale since the board of directors intended that there be one sale and that title has passed to Parent since Parent allegedly could demand and take immediate possession of all or any part of the equipment. Counsel for both corporations asserts the intention of the board of directors is evidenced by the minutes of such board. No documentary evidence has been presented in support of the contention.

It is our opinion that each individual "transfer" of equipment by Subsidiary to Parent constitutes a separate and distinct sale within the meaning of section 6006. Furthermore,

if three or more such transfers have occurred in a twelve-month period, Subsidiary is engaged in activities requiring the holding of a seller's permit.

Regulation 1595(b)(2) provides that tax does not apply to a transfer of all or substantially all of the property....

Accordingly, the transaction is not an "occasional" sale unless the transfer is of all or substantially all the property.

We do not believe that the regulation (and section 6006.5) contemplate the piecemeal transfers of individual items over a period of more than three years as "a transfer of all or substantially all the property".

Absent documentary evidence to demonstrate that a sale of all or substantially all of the property of the subsidiary did occur, and expressly providing that title did pass to Parent in 1967 as contended, the transfers cannot be considered as an occasional sale.

Taxpayer's contention appears inconsistent with the facts. The retention of the equipment in the asset accounts of Subsidiary, the possession and use in its business activities and the claiming of depreciation on such assets strongly suggests that it has retained title to the property until the physical transfer to Parent. The fact that taxpayer asserts that Parent could, at any time, demand and take immediate possession of the assets does not necessarily lead to the conclusion that a sale has occurred and that title has passed. It is conceivable that Parent may never demand and take possession of the remaining property. There is no documentary evidence that it is legally obligated to do so.

JM:smb