

September 29, 1964

Indefinite

A HNO 1612.05

1612.05 "Held or Used." The tangible personal property assets of a concessionaire are held or used in the course of an activity for which a seller's permit is required notwithstanding the fact that the retailer in control of the premises elects to report the gross receipts of the concessionaire on his own returns pursuant to the provisions of sales and use tax ruling 79. 9/29/64.

Dear

We have reviewed your client's petitions for redetermination of sales and use tax in the light of information obtained at the preliminary hearing on these matters in . The purpose of this letter is to advise you of our conclusions on the merits of your client's petitions.

In support of your client's petitions you have contended:

1. That there was no sale of the assets in question because the assets were not removed and sold outright;
2. that, if there was a sale, each of the transfers qualified as an occasional sale since the concessionaire was not required to hold a seller's permit;
3. that petitioner was not liable as a successor in any event because it first obtained the fixtures and equipment by exercising its option to purchase the items pursuant to lease agreement and then subsequent thereto made an offer and acquired the concessionaire's inventory of stock in trade.

We have concluded that the various transfers made to your client, (hereinafter referred to as "concessionaire"), constitute retail sales. The terms of the lease agreement very clearly demonstrate that the assets in question were the property of the concessionaire during the term of the leases and that your client was to have the option to purchase these assets upon termination of the various lease periods.

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While we have not been provided with a copy of the underlying agreements for the transfer of the assets from the concessionaire to your client, it seems clear that the information developed by the field audit staff demonstrates that the transfer was for a consideration such as to constitute a sale within the meaning of § 6006(a) of the Revenue and Taxation Code. Since the sales were not for resale in the regular course of business, they were made at retail.

Likewise, we have concluded that the transfer does not qualify as an occasional sale under the provisions of § 6006.5(a) of the code. The pertinent part under which your client seeks exemption provides as follows:

"'Occasional sale' includes: (a) A sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit...."

Under § 6014 of the Revenue and Taxation Code, a seller is defined as:

"'Seller' includes every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax."

In view of the above quoted provisions, it is hardly disputable that the concessionaire was a "seller". The assets in question were held by it and actually used by it in its activity as a seller making sales of tangible personal property required to be included in the measure of the sales tax. The mere fact that your client had elected to report the concessionaire's liability on its returns does not, in our opinion, remove the concessionaire from the category of a seller. Your client's obligation for the sales of the concessionaire is imposed under Sales and Use Tax Ruling 79 (copy enclosed). The requirements imposed on your client under the provisions of this ruling are valid under the board's rule making power as provided by § 7051 of the Revenue and Taxation Code. That sales and tax ruling 79 was not intended to remove a concessionaire from the category of the seller as is amply demonstrated by that portion of ruling 79 which provides:

"In the event the retailer fails to make a return and remit the amount of tax due with respect to operations of the concessions, the concessionaires must secure permits and file returns together with remittances of the amount of tax due."

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While it is not regarded as necessary to support the various determinations, we have also concluded that your client is a successor to the concessionaire. In substance, there were near simultaneous transfers of the assets and stock in trade of the various concessionaire departments for a purchase price valued in money. Your client took possession of the concessionaire's facilities and began operating these departments in very much the same manner as did the concessionaire. We believe this is sufficient to constitute your client a successor within the meaning of § 6811 and § 6812 of the Revenue and Taxation Code and Sales and Use Tax Ruling 82 (copy enclosed).

In view of the above, we have concluded that no valid legal basis exists for adjustment to the measure of tax originally determined. Please review our letter and advise us, in view of what is set forth herein, if your client still desires an oral hearing before the board on these petitions. If we do not hear from you within a period of 30 days from this date, we shall presume that no further hearing is desired and direct that the tax be redetermined without adjustment.

Very truly yours,

*W. E. Burkett*

W. E. Burkett  
Associate Tax Counsel

EB:mm  
Enc.

cc: Oakland - District Administrator: Attached are two copies of the Report of Hearing Officer dated 9-18-64, which has been approved. The hearing was held in San Francisco on 6-9-64.

Also attached are two copies each Reports of Hearing Officer dated 9-18-64, under accounts C-125361 and C-121866. These hearings were held at the same time as C-133474.

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