

Auditing - San Mateo (WRP)

August 31, 1966

1610.05 Occasional Sales—Activity Requiring Permit. A sale is not an "exempt occasional sale" under §6006(a) when such sale is one of a series of sales sufficient to constitute an activity requiring the holding of a seller's permit, notwithstanding the fact that one of the sales occurred prior to the date the seller applied for a seller's permit. 8/31/66.

Tax Counsel (EHS:EDM) - Headquarters

This is in reply to your memorandum of June 1, 1966, which had attached, thereto, a copy of the taxpayer's protest letter as well as a copy of your hearing report dated May 12, 1966. Your main inquiry appears to be whether the sale of taxpayer's 1961 (herein, "yacht") for a stated consideration should be exempted from sales tax as an occasional sale under § 6006.5(a) of the Sales and Use Tax Law.

After reviewing the foregoing materials, it is our understanding that, prior to the time the taxpayer (Mr. ) applied for a seller's permit, Mr. ) while acting in the capacity of a "yacht broker," sold the subject yacht (which he privately owned at the time) to another person for \$5,000. The contract of sale shows " ) as the seller, which is the dba of taxpayer's sales and use taxes account. While holding a valid seller's permit, Mr. ) continued his operation as a yacht broker. Apparently some confusion resulted from this.

The taxpayer's representative (Mr. ) Public Accountant) makes two main contentions: (1) That since his client was a yacht broker at the time of the subject sale and was acting in that capacity in respect to his personally owned yacht, he was, therefore, not required to pay sales tax on his sale of the "yacht" to another; and, (2) that since the subject sale occurred prior to the time his client had procured a valid seller's permit, it should be exempt from sales tax as an occasional sale.

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We have regarded brokers generally as retailers under ruling 39, where they possess tangible personal property for the purpose of sale. It has been our view that the liability of a "yacht broker" for sales and use taxes depends upon whether he has the right to beneficial use of the boat or the power by his own act to vest ownership in another. Since the facts establish that Mr. \_\_\_\_\_ owned the "yacht," which was the subject of the sale, it clearly appears that he not only had the right to beneficial use of the yacht, but also the power by his own act to vest ownership in another. Accordingly, if Mr. \_\_\_\_\_ exercised such power by vesting title in another, it is our opinion that he is a retailer, with respect to the sale of the "yacht," and tax applies to the receipts from such sale.

Since the facts indicate that Mr. \_\_\_\_\_ made more than two sales of yachts in a 12-month period, it is our opinion that he was a "seller" within the meaning of § 6014 and, accordingly, should have held a seller's permit for engaging 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 addition, since the subject sale in question was one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit, it is our opinion that such sale could not be regarded as an exempt occasional sale within the meaning of § 6006(a) of the Sales and Use Tax Law. Also, the fact that the subject sale occurred prior to the time the seller applied for a seller's permit does not prevent its inclusion in the measure of the tax. Accordingly, it is our recommendation that the taxpayer's protest on the single item in question be denied and the receipts derived from the sale of the subject "yacht" be included in the total measure of tax.

Moreover, since part of the deficiency for which a deficiency determination has been made by this board is due to the taxpayer's negligence in failing to report certain sales, as required by the Sales and Use Tax Law, it is our further opinion that the 10 per cent penalty was proper under the circumstances. (See § 6484.)

EDM:mm

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