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JACOBO & A+1 C&H019 "deemed"
Sales and not "Sales" for
OUR PURPOSES.

916/323-0823

March 7, 1986

Dear _____

Your letter of February 20, 1986, addressed to Mr. Gary Jugum, has been directed to me for a response. Your letter states as follows:

"We hereby request a written response in confirmation of the telephone answer you gave to one of our San Diego Office tax professionals on February 20, 1986. The question concerned the imposition of California sales and use tax in the context of IRC 338 stock purchases treated as asset acquisitions for Federal income tax purposes (or Section 24519 transaction treated as asset acquisitions for California tax purposes). Your preliminary response was that rules similar to the prior exemptions for IRC 334 (b)(2) transactions would apply to IRC 338 or California 24519 transactions.

"In the way of background, IRC 338 replaced IRC 334 (b)(2) effective, in general, for acquisitions after August 31, 1982. The State Board of Equalization had viewed IRC 334(b)(2) as essentially two transactions. In the first transaction, an acquiring corporation purchased at least 80% of the stock of the _____ 1. The stock purchase is considered to be the purchase of an intangible and therefore is not within the scope of sales tax requirements. The liquidation of the acquired corporation (second transaction)

is considered exempt under the occasional sale rule of Sales and Use Tax Section 6367. Sales and Use Tax Section 6006.5 (b) provides that an occasional sale is a sale of substantially all of the property held or used by a person in the course of activities that require the holding of a seller's permit, when after such transfer the real or ultimate ownership of such property is substantially unchanged. The sale or exchange in a 334(b)(2) transaction of property not requiring the holding of a seller's permit will normally qualify as an occasional sale under Section 6006.5(a).

"We would like to confirm that either:

"(a) Neither a Federal election under Section 338 nor a California election under Section 24519 will result in a deemed sale of assets by the _____ in for California sales tax purposes; or

"(b) a sales and use tax exemption similar to that applicable to Section 334(b)(2) transactions will apply to exempt an election under Federal IRC 338 or California 24519.

"We would like you to address two scenarios: (1) purchasing corporation acquires 100% of the stock of the target; (2) purchasing corporation acquires less than 100% of _____; stock and therefore partial gain is recognized under IRC 338(c)(1).

"The _____, of _____ is has several IRC 338 elections in process. With the filing due date approaching, we would appreciate your extra effort to issue a prompt response regarding the position of the State Board of Equalization on the aforementioned questions."

Initially, we note that the Sales and Use Tax Law is unique and distinct from the income tax law. (See King v. State Board of Equalization, 22 Cal.App.3d 1006 (1972); Mercedes-Benz v. State Board of Equalization, 127 Cal.App.3d 871 (1982).) The Internal Revenue Code Section 338 election referred to in your letter allows a corporation that makes a "qualified stock purchase" of a subsidiary corporation to elect to have the target treated as if it: (i) sold all of its assets at fair market value in a complete liquidation on the acquisition date; and (ii) as a new corporation, bought all of its assets on the next day at a price determined by the purchasing corporation's basis in the target's stock. Section 338 deems there to have been a sale of the 's assets. (See also Revenue and Taxation Code Section 24519.)

The "deemed" sale provided for by Section 338 of the Internal Revenue Code and Section 24519 of the Revenue and Taxation Code does not constitute a "sale" as that term is defined by the Sales and Use Tax Law (see Revenue and Taxation Code Section 6006), nor will it be treated as a taxable sale. This is our conclusion regardless of whether 100 percent or less of the 's stock is purchased.

Very truly yours,


John B. Adamo
Tax Counsel

JBA:ba

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