

Headquarters - Audit Review Unit (RN)

June 24, 1965

Tax Counsel (WEB) - Headquarters

This memorandum is with reference to your two unanswered legal questions which arose at the workshop conducted at the Begin deleted text REDACTED TEXT End deleted text conference.

The first question presented is the issue of whether a guest speaker should be regarded as a teacher for purposes of the meals exemption provided by § 6366 of the Revenue and Taxation Code.

I have reviewed our administrative precedent on this point and also discussed the problem with Tax Counsel E. H. Stetson. We have concluded that the speaker should be regarded as a "lecturer" and thus a "teacher" for purposes of exemption notwithstanding the fact that he may only speak or lecture on a single occasion and may not have any academic title.

The second problem requests a definition of what constitutes a statutory merger for sales and use tax purposes.

The Corporations Code does not define a statutory merger and a single definition is not given by any California Code provision. The term merger, however, has been defined in several court cases. In J.C. Peacock v. Hacko, 184 Cal. App. 2d 142, merger was defined as "compact whereby constituent corporations are merged into a surviving corporation." Merger effects an organic change in the enterprise which does not represent complete liquidation but does result in the instant dissolution of the merged corporation. All mergers do not qualify as "statutory mergers." The distinction is important since only statutory mergers are exempt from sales tax.

The prescribed procedure for accomplishing a statutory merger is set forth in §§ 4100-4124 of the California Corporations Code. The merger must be completed in compliance with the requirements of these provisions in order to constitute a statutory merger. Among the more important requirements are:

1. There must be a merger agreement approved by the board of directors of each corporation (Corporations Code § 4103).
2. Shareholders representing not less than two-thirds of each class of stock issued must approve the merger (Corporations Code § 4107).

3. Certificate of approval of merger must be issued by each corporation accompanied by an affidavit attesting approval of the required number of shareholders (Corporation Code § 4110).
4. The executed merger agreement and the certificate of approval of each constituent corporation must be filed with the Secretary of State (Corporation Code § 4113).
5. Upon completion of the merger all rights of creditors of the constituent corporations are preserved unimpaired (Corporation Code § 4116).
6. Shareholders who do not approve the merger have the right to receive fair market value of their shares (Corporation Code § 4123).

If the merger is not accomplished in the prescribed statutory manner it is a de facto merger. A de facto merger may be accomplished by several methods among which are:

1. A bargain and sale of the corporation's assets to another corporate entity followed by dissolution of the selling corporation.
2. By a stock for stock exchange without compliance with the prescribed statutory procedure for merger followed by dissolution of one of the corporations.

The resulting rights of creditors and shareholders in a de facto merger situation are quite different from those involved in a statutory merger. The dissenting shareholders ordinarily would have no right to approve the merger or to require the corporation to purchase their stock. Only limited protection would be provided to creditors.

The determination that statutory mergers were not to be regarded as "sales" for sales and use tax purposes was made after a conference with the office of the Attorney General. The ruling is not embodied in any formal writing. It is believed that the basic reason for concluding that statutory mergers were not sales is that the transfer of property is regarded as being effected by "operation of law" i.e., the property is transferred to the surviving corporation by virtue of compliance with the prescribed statutory procedure and not by bargain and sale or by conveyance. (See E.J. Gallo Winery v. Commissioner of Internal Revenue, 227 F.2d 699; also Stanton Brewery, Inc., v. Commissioner of Internal Revenue, 176 F.2d 573).

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This should provide you with sufficient information to frame your reply to the unanswered questions.

WEB:mm

Enclosure

Cc: Mr. E.H. Stetson