

**Revenue Ruling
No. 06- 002
April 7, 2006
Sales and Use Tax**

**Transfer of Motor Vehicles in Exchange for Payment of Indebtedness
and a Membership Interest in a Commencing Limited Liability Company**

This revenue ruling clarifies the sales tax treatment of a transfer of motor vehicles in exchange for payment of indebtedness and a membership interest in a commencing limited liability company.

Facts

Company A, a Louisiana business, plans to reorganize by merging with other affiliated entities into a newly created Louisiana limited liability company (LLC). The transaction will entail the movement of vehicles currently titled in Louisiana and other assets from the pre-existing business entities to a newly created Louisiana LLC in exchange for membership interest in the LLC in proportion to the value of the assets transferred from the pre-existing entities. Applicable sales or use tax was paid to the state of Louisiana on the initial purchase or use of the trucks in Louisiana.

There will be no consideration given in the transfer of the motor vehicles from Company A other than an equity interest in the LLC and the payment by the new LLC of the remaining balances due on the motor vehicles. Some of the vehicles to be transferred are encumbered; the outstanding balances will be paid off by the new LLC.

Subsequent to the transfer, the vehicles will be mortgaged to a new lender. Company A and its affiliated entities will have no responsibility for the new mortgages. The vehicle transfer will happen simultaneously with the creation of the new Louisiana LLC.

After the reorganization, an out-of-state company will purchase a controlling interest in the new LLC from various Company A entities. In essence, Company A and its affiliated entities will continue to exist as holding companies for the units they own of the new LLC. Both the new LLC (partnership status) and Company A and its affiliated entities (S-corporations) will be “pass-through” entities for federal and state income tax purposes. The nonresident member of the new LLC will be a C-corporation for tax purposes, and its assets will primarily be units in the new LLC that it purchased from the Company A entities. The transferred vehicles will remain titled in Louisiana.

Applicable Law

Louisiana imposes a tax upon the sale at retail or use in this state of each item or article of tangible personal property pursuant to La. Rev. Stat. Ann. § 47:302(A), § 47:321(A), and § 47:331(A). La. Rev. Stat. Ann. § 47:301(12) defines sale as “any transfer of title or possession, or both, exchange, barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration....”

Retail sale is defined by La. Rev. Stat. Ann. § 47:301(10)(a)(i) as “a sale to a consumer or to any other person for any purpose other than for resale as tangible personal property....” The Department clarified the term “retail sale” in its regulation LAC 61:I.4301(C) that provides that “the intent of the law is to classify every sale made to the final user or consumer for any imaginable purpose, other than for resale, as a retail sale or a sale at retail.” The regulation also

provides, “For purposes of La. Rev. Stat. Ann. § 47:301(10), whether a transaction is exempt from taxation by statute, jurisprudence, or by constitution has no bearing on classification of the transaction.”

Paragraph (10)(c)(ii) further states that a sale at retail does not include “...an isolated or occasional sale of tangible personal property by a person not engaged in such business.” The regulation on occasional sales, LAC 61:I.4301(C) “Retail Sale or Sale at Retail,” states that [t]he primary consideration in determining whether a sale meets exemption requirements is whether the seller is in the business, or holds himself to be in the business, of selling merchandise or tangible personal property of similar nature, and not solely upon the frequency of the transactions.

However, La. Rev. Stat. Ann. § 47:303(B)(4) provides that “[t]he provision contained in R.S. § 47:301(10). . . which excludes isolated or occasional sales from the definition of a sale at retail is not to apply to the sale of vehicles which are the subject of this subsection.” That section further provides, “Isolated or occasional sales of vehicles are hereby defined to be sales at retail and as such are subject to the tax.”

Historically, administrative agencies in Louisiana have considered any assumption of indebtedness in exchange for a motor vehicle to constitute adequate consideration for the finding of a retail sale transaction. Department of Public Safety Policy Statement No. 58 states that if the corporation receiving the vehicle assumes an outstanding mortgage balance, the transaction will not be considered a contribution to capital, but rather will be deemed a taxable sale. That agency also posts in its Motor Vehicle Registration Requirements Number 24.00 “Transactions Involving Corporations” that taxable transactions when a vehicle is transferred from one entity to another include “the assumption of mortgage by the newly chartered corporation” and “transfer of a vehicle from a corporation still in existence to another corporation.”

The Office of the Attorney General of the State of Louisiana addressed in two pronouncements the sales taxability of donations of automobiles between related individuals. In La. Atty. Gen. Op. No. 1978-1539, a father sought to have a tax-free transfer of a motor vehicle subject to a pre-existing chattel mortgage to his daughter by donating the vehicle to her. The attorney general stated that there would be no consideration as required in the state’s definition of “sale” for tax purposes if a father merely donated a vehicle with a pre-existing chattel mortgage to his daughter. On the contrary, the opinion went on to state that there would be consideration necessary for a taxable sale if the receiver of the vehicle assumed the liability on any pre-existing chattel mortgage. That portion of the opinion reads:

Only if the daughter personally assumed the debt, thereby relieving the father of his obligation to pay it or entitling him to subrogation and right of recovery from her if he was compelled to pay it, would there have been a taxable consideration and a sales price equal to the debt balance thus personally assumed.

Again, the Attorney General revisited the same fact pattern in La. Atty. Gen. Op. No 1978-1539 A. Based on the same facts, the attorney general emphatically stated that a transaction contemplated by two parties where one received title of a motor vehicle in exchange for the

assumption or payment of an outstanding liability was a taxable sale. The Attorney General stated his finding as to the taxability of the transaction as follows:

I cannot call this an exempted donation if the transferee assumes an existing chattel mortgage. You and I know of many 'sales' of real estate for example when the only 'consideration' is assumption of a mortgage. Rules of 'sale,' rather than 'donations' apply to those transfers, of either 'immovables' or movables.

This treatment is consistent with the Louisiana Civil Code articles on onerous donations. La. C.C. Art. 1523 defines an "onerous donation" as a donation "which is burdened with charges imposed on the donee." La. C.C. Art. 1524 states "[t]he onerous donation is not a real donation, if the value of the object given does not manifestly exceed the value of the charges imposed on the donee." Furthermore, La. C.C. Art. 1526 explains, "the rules peculiar to donations *inter vivos* do not apply to onerous and remunerative donations, except when the value of the object given exceeds by one-half that of the charges or of the services."

Analysis

First, this analysis does not address any theory of reverse veil-piercing to look through the LLC status of the newly created entity. Absent extraordinary facts indicating that the LLC and Company A are so connected that the form of the LLC should be ignored, an LLC is a separate entity apart from the members.

Company A's transfer of movable assets in exchange for its membership interest in the newly created LLC and the payment by the LLC of Company A's pre-existing indebtedness meets the definition of sale in § 47:301(12) because the possession and/or titles to all the transferred motor vehicles will be exchanged in consideration of Company A's membership interest in the new LLC and payment of outstanding balances due on the transferred motor vehicles. The definition of retail sale is also met since the transfers are not for resale.

Many states specifically exempt from sales and use taxation contributions to commencing LLC's in exchange for a membership interest in the LLC. Louisiana does not have such an exemption, but occasionally similar transactions in Louisiana are free from sales and use tax. When this occurs, the assets exchanged for a membership interest in a 26 U.S.C. § 721 exchange qualify for occasional sale treatment and, thus, there are no sales or use taxes due. In the case at hand, however, the exchange cannot be deemed an occasional sale because motor vehicle sales do not qualify as "occasional sales" pursuant to § 47:303(B)(4).

Where the assumed indebtedness arises directly from the transferred motor vehicles, the full amount of the assumed indebtedness is subject to sales or use tax. In transactions where part of the amount assumed is to satisfy existing liabilities for motor vehicles or other items not qualifying as occasional sales and part of the amount assumed is attributable to assets transferred that would qualify for occasional sale treatment, one may allocate among the taxable and nontaxable portions by dividing the value of the taxable assets transferred by the total value of the assets transferred and then multiplying that amount by the total indebtedness assumed.

Last, we examine the tax consequences if Company A donated the vehicles to the new LLC. Although our facts do not include the values of the vehicles transferred and the amount due that will be paid off by the LLC to allow us to determine if the test under La. C.C. Art. 1526 is met, the definition of sale for tax purposes would nevertheless be applicable since there is an

exchange of title of tangible personal property, the motor vehicles, for consideration, the payment of pre-existing indebtedness on the motor vehicles. La. Atty. Gen. Op. No 1978-1539 and La. Atty. Gen. Op. No 1978-1539 A both dealt with donations and reached the same conclusion.

Conclusion

A transfer of motor vehicles and other assets of a Louisiana business in exchange for both a membership interest in a newly created LLC and the payment of pre-existing indebtedness of the transferor by the transferee LLC is a taxable sale for the purposes of Louisiana sales and use tax. Louisiana does not have an exemption expressly for contributions to commencing limited liability companies like some other states. At times, contributions to capital will escape sales taxation by qualifying as occasional sales; however, there are no occasional sales of motor vehicles. If the motor vehicles were transferred as a donation with the transferee paying the existing debt of the transferor, the transaction would still be a taxable sale since there is an exchange of title of tangible personal property, the motor vehicles, for consideration, the payment of pre-existing indebtedness on the motor vehicles.

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