

CALIFORNIA FRANCHISE TAX BOARD

Legal Ruling No. 271

September 17, 1964

SALE OF ASSETS: DATE OF SALE

Syllabus:

X, a qualified foreign corporation, filed its tax returns on a calendar year basis. On December 7, 1959, the taxpayer, and its wholly owned subsidiaries entered into a contract of sale of the assets and business to Y.

The contract provided that the taxpayer will sell, with minor exceptions, its assets and business on the closing date. At that time all deeds, checks, bills of sale and other instruments of transfer or conveyance were to be delivered to the buyer. The closing date was designated as January 4, 1960, but could be changed to a date not later than January 15, 1960, by agreement of the parties. The contract also provided, however, that the effective date of all sales, transfers and conveyances "shall be the close of business on December 31, 1959." Provision was also made for the amendment of various accounting statements which had been prepared as of August 31, 1959, to reflect the changes as of December 31, 1959.

Did the sale occur on December 31, 1959 or January 4, 1960?

Before a sale or exchange can have any tax consequences, the transaction must be closed, and a closed transaction for tax purposes results from an executed contract. While no one single factor is controlling in determining when the sale occurred, consideration must be given to the intention of the parties. Civil Code Sec. 1636. Other factors considered is the transfer of possession and whether there has been such substantial performance of conditions precedent as imposes upon the purchaser an unconditional duty to pay. Commissioner v. Segall, 114 Fed. 2d 706, 40-2 USTC P9676.

The language appearing in the contract to the effect that the taxpayer "will sell, convey, assign and deliver . . . by checks, drafts, deeds, bills of sale, endorsements, assignments and other instruments of transfer and conveyance" on the closing date indicates that it was intended to be the date on which the numerous documents pertaining to the sale were to be signed and delivered rather than the date of the sale. Otherwise, the provision in the contract to the effective date of the sale would be without meaning; and it must be presumed that the parties meant something by the language used. Bradner v. Vasquez, 102 CA 2d 342.

There are other provisions in the agreement which support the view that the sale occurred on December 31, 1959. The closing date could be changed at any

time for the mutual convenience of the parties; yet regardless of the selected date for closing, the effective date of the sale remained at December 31, 1959. The accounting statements were amended to show the condition of the taxpayer on December 31, 1959, but not on the closing date. The annual report of Y to its stockholders reported the purchase of the taxpayer as of December 31, 1959. In addition, an affidavit by the taxpayer's president and stockholder states that the buyer had full possession of the assets on December 31, 1959; that there were no business activities carried on after such date, and that it was the intent of the parties that the sale be consummated as of that date.

In view of the above, it seems clear that the parties to the agreement intended the sale to take place on December 31, 1959, and since the taxpayer has substantially performed all conditions precedent, the obligations of both parties were fixed on that date. Accordingly, for tax purposes the transaction was closed on December 31, 1959.

Since the sale occurred on December 31, 1959, all that remained thereafter was the signing and delivery of the various documents of the sale by the taxpayer and the receipt of money from the buyer. Such activity is not a transaction for the purpose of financial gain or profit and, consequently, does not constitute "doing business" within the meaning of Section 23101. Appeal of Columbia Supply Co., State Board of Equalization, June 9, 1960.