ARIZONA DEPARTMENT OF REVENUE

ARIZONA TRANSACTION PRIVILEGE TAX RULING

TPR 93-11

(Note: On 9/2/2020 the statute and rule references were updated. See the footnotes for details. No substantive changes were made.)

This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona administrative procedure act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under Arizona Revised Statutes § 41-1033 for a review of the statement.

ISSUE:

Taxability under the retail sales classification of business assets "sold" by an acquired corporation pursuant to an election made by an acquiring corporation under Internal Revenue Code § 338.

APPLICABLE LAW:

Arizona Revised Statutes (A.R.S.) § 42-5061 [1] levies the transaction privilege tax on retail sales of tangible personal property.

Arizona Administrative Code (A.A.C.) R15-5-103 [2] addresses the sale of business enterprises.

A.R.S. § 42-5155(B) [3] levies the use tax on tangible personal property purchased for resale which is subsequently used or consumed by the purchaser.

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[1] This ruling originally cited A.R.S. § 42-1310.01 which was renumbered as A.R.S.) § 42-5061.
[2] This ruling originally cited A.A.C. R15-5-1817 which was renumbered as A.A.C. R15-5-103.
[3] This ruling originally cited A.R.S. § 42-1408.B which was renumbered as A.R.S.) § 42-5155(B).

Internal Revenue Code (I.R.C.) § 338 allows a corporation that has purchased a qualified interest in the stock of another corporation to elect to treat the acquisition as a purchase of the acquired corporation's assets.

DISCUSSION:

This ruling addresses the Arizona transaction privilege tax treatment of the acquisition of a corporation where the acquiring corporation makes an election under I.R.C. § 338 to treat the acquisition as a purchase of the acquired corporation's assets ("acquired corporation" hereafter referred to as "Target").

A.R.S. § 42-5061[4] imposes the transaction privilege tax under the retail classification on gross income derived from the business of selling tangible personal property at retail.

Regarding the sale of business enterprises specifically, A.A.C. R15-5-103[5] provides that gross receipts from the sale of a business as a going concern shall not be taxable if the sale is for the business as an operating enterprise.

In order for a corporation to elect to treat the purchase of a controlling interest in the stock of the Target as a purchase of the Target's assets under I.R.C. § 338, the corporation must purchase at least 80 percent of the Target corporation's stock within a 12-month period. It is the stock purchase that triggers the election.

The treatment of the Target as a new corporation on the day after the acquisition date applies only for federal income tax purposes. The Target is still the same legal entity for all other purposes. There is no actual sale of all the Target's assets, commonly referred to as a liquidation. The sale of stock is only treated as if it were a sale of assets for federal income tax purposes.

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[4] See footnote number 1.
[5] See footnote number 2.

Although the Target is deemed to have been liquidated for federal income tax purposes pursuant to an election under I.R.C. § 338, technically no liquidation occurs for three reasons. First, pursuant to an I.R.C. § 338 election, the deemed purchase of assets is not in redemption of all the stock of the target pursuant to a plan as required in a liquidation. In reality, under the step-up election, the Target is selling its stock, not redeeming it. Second, the Target is the same legal entity, preserving its nontax attributes and assets. The Target is not winding up its affairs which is essential to a liquidation. Third, although the Target is treated as having been liquidated, this liquidation has no effect on its old or new shareholders. None of the shareholders of the Target recognize any gain or loss as a result of the step-up election.

The transaction is, in reality, a sale and purchase of stock only. Corporate stock is an intangible item and, as such, is not subject to the transaction privilege tax. Therefore, when an acquiring corporation elects to treat a qualified stock purchase of a Target as a purchase of the Target's assets pursuant to I.R.C. § 338, the assets incorporated in the transaction are not subject to the transaction privilege tax.

RULING:

When an acquiring corporation elects to treat a qualified stock purchase as a purchase of assets pursuant to I.R.C. § 338, the purchase is not treated as a retail sale of tangible personal property subject to the transaction privilege tax.

Harold Scott, Acting Director
Signed March 15, 1993

Explanatory Notice
The purpose of a tax ruling is to provide interpretive guidance to the general public and to department personnel. A tax ruling is intended to encompass issues of law which are not adequately covered in statute, case law or administrative rules. A tax ruling is a position statement which provides interpretation, details or supplementary information concerning the

application of the law. **Relevant statute, case law, or administrative rules, as well as a subsequent ruling, may modify or negate any or all of the provisions of any tax ruling.** See GTP 92-1 for more detailed information regarding documents issued by the Department of Revenue.