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Letter Ruling 91-9: Nexus; Apportionment; Shipment or Delivery of Tangible Property

October 24, 1991

I. Facts

("the Company") is a Delaware corporation with offices in Denver, Colorado, that provides management services and acts as a marketing and sales agent for its three wholly-owned subsidiary corporations: (the Subsidiaries). The principal business activity of each Subsidiary is the mining of precious metals. Each Subsidiary operates gold mines outside of Massachusetts.

The Company is considering entering into a refining contract with an unrelated company ("the Refiner") located in Massachusetts. Under the proposed contract, all or part of the output of the Subsidiaries would be shipped to the Massachusetts refiner in the form of dore bars ("dore") whose precious metal content exceeds 75 percent. The Refiner will weigh, melt, sample, and assay the dore and will ultimately refine the product to 99 percent purity. The refining process normally takes fifteen days from the receipt of the dore bars. In some cases, however, bullion may be accumulated at the refinery over several weeks in order to make up a saleable quantity.

The Subsidiary corporations will maintain title to the dore until it is smelted into bullion. At this point, the bars will be sold to commercial buyers, which may be either the Refiner or a third party. The Refiner has offered to deliver the bullion to third party purchasers either FOB the Refiner's location in Massachusetts or FOB London, Zurich, or any other major gold trading center where the Refiner has a place of business.

In the case of delivery outside of Massachusetts, the Company pays an additional [] per ounce for refining, and the Refiner offers the purchaser delivery of bullion that the Refiner already holds outside of the state. The purchaser may take physical delivery of the bullion outside of Massachusetts, or it may authorize the Refiner to hold bullion on its behalf at the out-of-state location. Once the transaction is complete, the Refiner may own and retain possession of the refined bullion in Massachusetts, rather than shipping it to the delivery location requested by the purchaser. You state that, because bullion is a fungible commodity, it is a common commercial practice of precious metal refiners to offer several points of delivery in this manner.

Apart from holding title to the dore bars during the refining process, you state that neither the Company nor its subsidiaries will own or rent property, maintain an office, or conduct business in Massachusetts. You have asked whether the Company and/or its Subsidiaries will be subject to the Massachusetts corporate excise under G.L. c. 63, § 39, if it proceeds with the refining contract described above. In the event that the Company or its Subsidiaries are subject to tax, you ask how the sales factor of the apportionment formula should be calculated under G.L. c. 63, § 38.

II. Analysis

A. Nexus

Foreign corporations are subject to the Massachusetts corporate excise under the circumstances described in G.L. c. 63, § 39. Among the activities that will subject a foreign corporation to the excise is the "owning or using of any part or all of its capital, plant or other property in the commonwealth in a corporate capacity." The Company's Subsidiaries will own dore that will be located in Massachusetts while it is refined. Therefore, they are subject to the excise under G.L. c. 63, § 39.

The Company, on the other hand, will not own or use any property in the Commonwealth. Furthermore, the Department has ruled that procuring the services of a bona fide independent contractor in Massachusetts does not constitute "doing business" in Massachusetts for purposes of G.L. c. 63, § 39. See Letter Ruling 91-6. The Company will not be subject to the excise under G.L. c. 63, § 39, provided that it does not execute contracts in Massachusetts or undertake business activities apart from those described above.

B. Sales Factor

The calculation of foreign corporation's sales factor for purposes of determining an apportionment percentage is controlled by G.L. c. 63, § 38(f), which states in relevant part:

(f) The sales factor is a fraction, the numerator of which is the total sales of the corporation in this commonwealth during the taxable year, and the denominator of which is the total sales of the corporation everywhere during the taxable year. As used in this subsection, "sales" means all gross receipts of the corporation except interest, dividends, and gross receipts from the maturity, redemption, sale, exchange or other disposition of securities. Sales of tangible personal property are in this commonwealth if:

The property is delivered or shipped to a purchaser within this commonwealth regardless of the f.o.b. point or other conditions of sale; or

the corporation is not taxable in the state of the purchaser and the property was not sold by an agent or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside this commonwealth....

For the purposes of this subsection the corporation will be deemed to be taxable in the state of the purchaser if the tangible personal property is delivered or shipped to a purchaser in a foreign country....

Under these provisions, the sales of bullion by the Company's Subsidiaries are Massachusetts sales and must be included in the numerator of the sales factor if the bullion is purchased either by the Refiner or by any purchaser that accepts delivery in Massachusetts. Sales of bullion to purchasers that accept delivery outside of Massachusetts are not included in the numerator of the sales factor. ¹

We recognize that, in the case of deliveries accepted by purchasers outside of Massachusetts, the precious metals mined by the Company's Subsidiaries may not physically leave the Commonwealth. In the special case of fungible commodities, however, and in light of the industry practices that you have described, we conclude that the Refiner's delivery of bullion that it already holds outside of Massachusetts to the Company's customers outside of Massachusetts is the equivalent of the delivery or shipment of the Subsidiaries' property to a purchaser outside of the commonwealth for purposes of G.L. c. 63, § 38(f).

III. Conclusion

Under the facts you have described, the Company's Subsidiaries are subject to the excise under G.L. c. 63, § 39, but the Company itself is not. In computing their sales factors under G.L. c. 63, § 38(f), the Subsidiaries must treat sales to the Refiner and sales to any purchaser that accepts delivery of bullion in Massachusetts as sales in the Commonwealth that are included in the numerators of their Massachusetts sales factors.

Very truly yours,
/s/Mitchell Adams
Mitchell Adams,
Commissioner of Revenue
October 24, 1991
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Footnotes:

1 In the case of deliveries accepted outside of the United States, the sales will not be Massachusetts sales because the Subsidiary corporations will be deemed to be taxable in the state of the purchaser under the provisions of G.L. c. 63, § 38(f). In the case of deliveries accepted outside of Massachusetts but within the United States, the sales will not be Massachusetts sales either because the subsidiaries are taxable in the state of the purchaser or because the sales were made by an agent (the Company) chiefly situated outside Massachusetts.(1)