

00-011  
Response November 16, 2000

## **REQUEST LETTER**

00-011

March 14, 1999

RE: Our March 10 Meeting

Gentlemen,

Thank you for taking time to meet with us on Friday. Trying to get both the practical and theoretical issues on the table with all of you at once was a very efficient way to begin our discussion.

We tried to cover lots of ground during our meeting, and we realize that you will need some time to reflect and to look at the question from a variety of perspectives. Please, if you do have any questions, do not hesitate to contact me promptly and directly. Meanwhile, I do hope that you will keep our perspective in mind.

1. Our question is not a question of nexus. Potential customers of COMPANY B may or may not already have nexus with Utah, and nexus situations may change over time.
2. We seek only the correct application of standard Utah unitary tax law to the potential transactions. The correct application, we believe, should not result in any change in the customer's Utah tax position.
3. A reasonable application of Utah law must necessarily recognize that the customer's relevant business activities are outside of Utah and that COMPANY B's customers are merely purchasing limited, incidental services from COMPANY B.
4. Under the particular circumstances here - where the out of state gold mining company has no mines in Utah and no customers in Utah - the purchase of incidental services from COMPANY B should not result in any change in the mining company's Utah tax situation.
5. The practical, marketplace question is: Can out of state mining companies safely purchase service from COMPANY B without those purchases changing the mining companies' own Utah tax situations? We believe that the answer should be affirmative and seek a confirmation that will remove the unfortunate cloud that currently exists.

I believe the that both the practical and theoretical answers are and should be affirmative, and I look forward to your being able to remove the unfortunate cloud that has arisen. However,

if for any reason you have any doubts that our analysis represents a correct application of Utah unitary law, please share them with me your doubts and questions so that we may consider them.

You can contact me any time by phone at a #####, by fax at #####, or by using the addresses provided below.

Thank you again for your time and your consideration. We very much appreciate the promptness with which you scheduled our meeting and the personal time and resources you dedicated to the meeting.

Very truly yours,

## **RESPONSE LETTER**

November 16, 2000

RE: Advisory Opinion - Tax Consequences for COMPANY

Dear NAME,

You have requested the Tax Commission to issue an advisory opinion on whether COMPANY A can purchase services from COMPANY B's Utah facility without these purchases affecting COMPANY's tax situation in Utah. From telephone conversations and further correspondence with you, we understand that this proposed transaction would involve the following circumstances.

COMPANY mines gold and partially refines it into "gold dore" bars in STATE. It proposes to hire COMPANY B's Utah facility to sample and verify the gold and silver content of the gold dore. This service is often expressed as a "refining charge" on contracts between COMPANY B and its clients. To perform this service, COMPANY B would take physical possession of the gold dore bars and, as per common practice in the gold industry, issue "credits" to COMPANY B for the gold. COMPANY B auctions these credits to buyers around the world, although it would not auction them to buyers in Utah. At issue is whether the exchange of credits for gold dore would be considered a "Utah sale" for corporate franchise tax purposes. If so, the entire value of the gold dore would be included in the numerator of COMPANY A's sales factor of the Uniform UDITPA apportionment fraction as a Utah sale, thereby increasing COMPANY A's Utah income tax liability.

You assert that the exchange of credits for gold dore is a unique transaction that should not be deemed a sale. The holder of these credits is only entitled to a specific unit measurement of gold indicated by the credit, not to specific or identifiable bars of gold. The credits are not a claim check or warehouse receipt for the gold, nor are they secured obligations. Credits are widely traded in the gold market and may be used, similar to currency, to fulfill obligations.

When COMPANY A auctions the credits received from COMPANY B, all bid invitations, bids, and winning bid confirmations will take place outside Utah and be completed prior to the gold dore being moved from STATE to COMPANY B's facility. In addition, the recognition of revenue for purposes of COMPANY B's Federal tax returns occurs at the time the gold dore processing is completed in STATE, prior to the time the gold dore leaves STATE for delivery in Utah. The gold for which COMPANY B issues credits to COMPANY A under these circumstances is not reflected in COMPANY B's inventory. Nor is there any contract between COMPANY A and COMPANY B for the sale of the gold.

We recognize that there are unique circumstances surrounding the gold industry that obfuscates whether the transfer of credits for gold dore is a sale for corporate franchise purposes. Nevertheless, if COMPANY A and COMPANY B enter into a contract for the purchase of sampling and verification services (as described above) without contracting for the sale of the gold dore, we will neither view the proceeds from the gold COMPANY A auctions to non-Utah buyers as a Utah sale nor attribute such revenues to the numerator of the sales factor of the UDITPA three-factor formula for purposes of the Utah corporate franchise tax. Our opinion is based on the representations and assumptions discussed above. Should the actual facts be otherwise, our opinion may be different.

Please contact us if you have any other questions.

For the Commission,

Marc B. Johnson  
Commissioner