

802.2

Verne, B. Michael

From: [REDACTED]
Sent: Monday, October 24, 2005 1:31 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: HSR - "warehouse exemption" (802.2(h))

[REDACTED]

Mike:

I have been in touch with [REDACTED] ("seller' counsel") about a proposed transaction between a client of my firm and a client of her firm. I understand that seller's counsel provided you the attached letter confirming an analysis that you had done in respect of a prior "warehouse exemption" transaction (the "2002 letter") and that you confirmed to her that the PNO's position hadn't changed between 2002 and then.

I'm sending you this email to confirm the factual differences (which may or may not be material) between the proposed transaction and the transaction that was described in the 2002 letter do not change your conclusion regarding the availability of the 802.2(h) exemption. I also wanted, on a broader basis, to make sure I understood the rationale underlying your conclusion that the "warehouse exemption" was available in the 2002 transaction, despite the stated "exception" within that "exemption." Also, from the buyer's side of the transaction, I thought it was a good idea to confirm the analysis in any event.

Here's a summary of the significant factual differences between the proposed transaction and the transaction described in the 2002 letter:

1. Seller's counsel confirmed to you that the proposed transaction is a stock sale, and not an asset sale as described in the 2002 letter. I understand, nevertheless, that the target company doesn't operate any business other than its refrigerated warehouse business. The principal assets that comprise that business are the warehouses (the target has either fee ownership or leasehold interests), related equipment and contracts (including short- and long-term customer contracts, a portion of which may be characterized as leasehold interests but some of which enable customers to store goods "at will").
2. The target does arrange for trucking services on behalf of its client (and has contracts with third-party trucking companies for that purpose) but no longer owns the physical assets involved in the trucking segment of its warehousing business. (In the 2002 letter, those physical assets were acknowledged not to be exempt under 802.2(h). I would imagine that, in the proposed transaction, the contracts with third-party trucking companies would similarly not be exempt under 802.2(h) and that their value would be determined pursuant to the "fair market valuation" rule.)
3. The parties are not intending to transfer trade names or marks. (In the 2002 letter, those assets were acknowledged not to be exempt under 802.2(h).)
4. The "handling services" may be somewhat broader in scope than those described in the 2002 letter. For example, we understand that there are some food preparation/packaging services provided at one of the warehouses and that the target performs customs brokerage services for

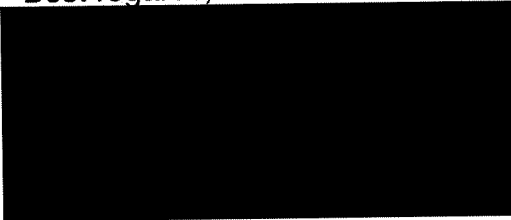
some of its customers. We believe that those types of services are comparable in nature to those described in the 2002 letter and should also be characterized as "incidental" to the warehouse business and that, to the extent those services are incidental to that business, the related assets should also be exempt under 802.2(h).

My understanding of the rationale for the availability of the 802.2(h) exemption with respect to the warehouses and incidental assets is that, where the "business [to be] conducted on the real property" is itself the operation of the warehouse (and services incidental to warehousing), then the "exception" within 802.2(h) is not implicated. Based on that understanding, our facts are generally distinguishable from example no. 12 to 802.2 (re the purchase of a drug wholesale distribution business) and the facts in interpretation no. 3 in the ABA manual (because no inventory is to be transferred in the proposed transaction).

I'd appreciate your confirming the above analysis or letting me know whether you disagree with any portion of it. I'm generally available to talk today or tomorrow.

Thanks in advance for your assistance in this matter, Mike.

Best regards,



Agree
B. [unclear]
10/29/05