

M e m o r a n d u m**390.0005****To :** Mr. William D. Dunn
Assistant Principal Tax Auditor**Date:** February 16, 1995**From :** Kelly W. Ching
Staff Counsel**Telephone:** (916) 322-2976
CalNet 8-492-2976**Subject:** G---'s Inc.
SY -- XX-XXXXXX

This is in response to your memorandum dated January 26, 1995. You have asked our opinion regarding a petition for redetermination and supporting legal brief filed by G---'s, Inc. The issue concerns the application of tax to fund-raising activities.

In its petition, petitioner states that it is a California corporation which manufactures and sells candies and other gift items. Petitioner also conducts business under the names H--- G--- C--- and H--- G--- C---. A large part of its business consists of providing candy and other gift items to non-profit organizations such as youth groups, which are comprised of students and their sponsors. The sponsors are the schools and/or their teachers or principals. The youth organizations sell the products for fund-raising purposes.

The petition includes as "Exhibit B" a copy of a document entitled "Pre-sale Order Form" which is imprinted with the name, address, and telephone number of H--- G--- C---. Attached as "Exhibit C" is a document entitled "Instructions Prior to Computer Tally, Packing and Delivery" in which detailed instructions are set out for the teachers to follow regarding how they should fill out the order forms, how to make the payments to H--- G--- C---, and how to arrange for pick-up of each order.

As you know, retail sales of tangible personal property in California are subject to sales tax, measured by gross receipts, unless specifically exempt by statute. (Rev. & Tax. Code § 6051.) A retail sale is a sale for any purpose other than resale in the regular course of business. (Rev. & Tax. Code § 6007.)

The general rule is that sales of tangible personal property are presumed to be taxable retail sales. Since petitioner did not accept timely and valid resale certificates in good faith from the youth organizations, petitioner has the burden of establishing that its sales were sales for resale and not retail sales. (Rev. & Tax. Code § 6091, Reg. 1668.) If petitioner's sales were at retail, they are subject to sales tax unless otherwise exempt.

An organization such as a youth group may buy and sell for its own account, or it may act as an agent. The nonprofit youth groups will be regarded as the agents of the supplier (such as petitioner) if they are selling the products on behalf of the supplier rather than on their own behalf. When the evidence shows that the organizations solicited orders, collected payments, and distributed tangible personal property on the supplier's behalf, the organizations must be regarded as having made the sales on the supplier's behalf. (Reg. 1597(g).) If such is the case here, petitioner, and not the organizations, must be regarded as having made the retail sales of the property to the consumer.

In Scholastic Book Clubs, Inc. v. State Board of Equalization (1989) 207 Cal.App.3d 734, the out-of-state bookseller had no employees or locations in California. It sold its products by distributing catalogs, by mail, to teachers and school librarians. They distributed order sheets to their students, collected the completed orders, compiled the orders and payments, and sent the orders and payments to the bookseller.

The court held that the bookseller's use of the teachers and librarians to solicit orders, its acceptance of the orders and the payments, and its shipment of books pursuant to the orders solicited clearly ratified the acts of the teachers and librarians, and confirmed their authority as agents or representatives of the bookseller. Since the teachers and librarians were agents of the bookseller, they were not considered the retailers of the property sold by their principal; instead, the bookseller was regarded as the retailer.

The rules applicable to the present case are explained in subdivision (g) of Regulation 1597. The organizations are presumed to be selling on their own behalf rather than as agents or representatives of their supplier if the following factors are present: 1) the organizations solicit the orders from the public in their own name; 2) the organizations collect the sale price from the customers in their own name; 3) the organizations are responsible for and pay the supplier for the merchandise; and 4) the contracts between the organizations and the supplier clearly identify the fact that the organizations will purchase and resell the products to their customers. (Reg. 1597(g).) If all of these factors cannot be established, the presumption does not arise, and the organizations are regarded as the agents of the supplier.

Petitioner has failed to establish the first factor required to raise the presumption that the organizations purchased and resold the property on their own behalf rather than as petitioner's agents. The pre-sale order form is pre-printed with the name, telephone number and address of H--- G--- C---. Although there is a blank space on the copy of the order form provided to us where each organization can write in its name, the pre-printed name of H--- G--- C--- on the form shows that orders were solicited in petitioner's name.

Petitioner notes that on the copy of the standard contract attached as "Exhibit B," "[t]he school sponsor on this contract is H--- School and the guarantor is M--- A---, the principal of the school." However, this in no way is the clear contractual statement that the

organization is purchasing and reselling the property on its own behalf, as required by factor four of Regulation 1597(g). Thus, petitioner has also failed to meet factor number four.^{1/} Since petitioner failed to establish all of the factors, the presumption that the organizations are selling on their own account does not arise. Therefore, we must regard the youth organizations as petitioner's agents, and we must regard petitioner as the retailer.

Petitioner states that while there is "no bright-line test determining whether an agent/principal relationship exists, the distinguishing characteristic that separates agent/principal relationships from other relationships is that of control: that the agent agrees to act under the control and direction of the principal." Petitioner then asserts that "Taxpayer's control over the youth groups and their students and parents was, at best, minimal."

Even if this assertion were relevant (see discussion below), it is clearly contradicted by "Exhibit C," which contains extremely detailed instructions for the organizations. Petitioner sets out three steps the organizations must follow, and each step contains several instructions. For example, petitioner states in step 1: "Make sure each order form has the student's name and classroom clearly printed. Verify each column at the bottom and total. Make corrections as necessary. When a child has more than one order form, add the order takers together and put the totals on the front page. Staple them together. We will pack them as one order. Separate order forms by classroom, band them together alphabetically and put them into a strong box." The instructions setting forth step 2 are even longer than those for step 1. In step 2, petitioner sets out specific rules regarding method and amount of payment. Step 3 includes instructions regarding shipping and delivery. It is clear from these detailed instructions that petitioner enjoys a great deal of control over the youth groups regarding almost every aspect of their selling of the products.

Furthermore, the court in Scholastic Book Clubs,^{supra}, 207 Cal.App.3d at 737, explained that for purposes of an agency relationship, "authority" means the lawful delegation of power by one person to another. In the present case, as in Scholastic, the youth groups act with the permission and under the control of the supplier. The youth organizations derive the authority to solicit orders, collect payments, and distribute merchandise from petitioner, and petitioner ratifies the acts of the youth group members by accepting the orders and payments, and shipping the merchandise pursuant to the orders.

Other cases considered by the Department, the Appeals Section, and the Board have consistently regarded the supplier to be the retailer under these facts. In this context, we note that in a recent appellate decision, the Court of Appeal upheld the Board's determination against the supplier in circumstances essentially identical to those here, stating that California

^{1/}If the organizations held seller's permits and had issued petitioner resale certificates, this would also support the conclusion that the organizations were purchasing the property on their own behalf. Petitioner, however, did not accept resale certificates from the organizations.

statutes and case law both provide that an agency may be implied based on conduct and circumstances and by ratification. Although this opinion is unpublished and therefore cannot be cited to a court, it shows that the court's view on agency relationships in California has not changed since Scholastic, and is consistent with the Board's long-standing treatment of these arrangements.^{2/}

Since the organizations are acting as petitioner's agents, they are not statutory consumers under Revenue and Taxation Code section 6361, and the provisions of that section do not apply. Rather, petitioner is the retailer and owes sales tax, measured by amounts paid by the ultimate consumer, on any sales that were not exempt from tax.

In its petition for redetermination, petitioner asserts that the Board is "estopped from collecting any sales tax on candy sales as it advised Taxpayer that no sales tax was due and Taxpayer relied on that advice to its detriment...." As you know, the only basis for the Board to relieve a person of otherwise properly due taxes is pursuant to the provisions of Revenue and Taxation Code section 6596. To come within the provisions of that section, the taxpayer must have reasonably relied on the Board's written advice which was in response to a written request for advice that disclosed all relevant facts, including the identity of the taxpayer. We did not provide written advice to petitioner, in response to petitioner's written request for advice, in which we stated that it owed no sales tax on its sales that were actually subject to tax. Therefore, petitioner cannot use section 6596 to escape its sales tax liability.

If you have further questions, please write again.

KWC:cl

cc: Mr. David H. Levine

^{2/} I note that petitioner cites Business Taxes Law Guide Annotation 480.0120 (4/17/67) as supporting the proposition that all of the elements discussed in the annotation are required in order for an organization to be considered the agent of its supplier. However, Business Taxes Law Guide Annotation 480.0120 in no way states or supports the proposition that each fact present in that case must be present to consider the organization the agent of the supplier. Rather, it simply states that if those facts are present, the organization is regarded as the agent of the supplier.