

M e m o r a n d u m**480.0115**

To : Mr. Glenn Bystrom
Principal Tax Auditor - MIC:34

Date: December 31, 1993

From : Ronald L. Dick - MIC:82

Subject: INVESTOR vs. RETAILER GUIDELINES AND
INDEPENDENT CONTRACTOR vs. EMPLOYEE GUIDELINES

This is in reply to your March 23, 1993 memorandum suggesting we annotate (i) the guidelines to determine whether a person is an investor of tangible personal property or a retailer of that property and (ii) the guidelines to determine whether the operator of a catering truck is the retailer of products the operator sells from the catering truck or is an employee of the catering house from which the operator obtains the property. Our suggested wording follows:

INVESTOR vs. RETAILER

Sales of tangible personal property to persons who hold the property for investment purposes or to hold as part of a collection are retail sales. The law presumes that the gross receipts from sales are subject to sales tax and that property shipped or brought into this state by the purchaser was purchased from a retailer for use in the state. The following criteria will be considered in determining whether the purchaser is holding property for resale in the regular course of business or is holding property for other purposes. (The criteria are generally the same as those in Sales and Use Tax Regulation 1599 pertaining to the purchase of coins and bullion as an investment.)

(a) Whether the purported seller has a place of business or otherwise clearly holds out to the public that he or she is engaged in the business of making retail sales of the type of property in question.

(b) Whether or not the person has records typical of a normal business (e.g. accounting records, advertising, letterhead stationery, business cards, or letterhead invoices.)

(c) Whether the person has established suppliers of inventory.

(d) Whether the person makes sales sufficient in number, scope and character to

require the person to hold a seller's permit for the sale of the type of tangible personal property in question.

(e) Whether the person does in fact, hold a business license and seller's permit for sales of a tangible personal property in question.

(f) Whether there is evidence of merchandise available for sale to the public with discernable sales prices.

(g) Whether the person's markup over cost is an amount which shows a reasonable expectation of sale.

(h) Whether the person treats the activity as a business for income tax purposes and regularly reports income from the activity.

CATERING TRUCK OPERATOR

When a catering house hires a person to operate a catering truck to sell products on behalf of the catering house, the catering house, rather than the operator of the truck is the retailer responsible for reporting and paying sales tax on the sales. Whether the operator of the truck performs nontaxable employment services for the catering house or purchases property from the catering house for resale is a question of fact which is answered by the relevant evidence. For example, the catering houses paying a salary to the truck operator and making normal withholding from the salary for social security taxes, income taxes, unemployment insurance, and worker's compensation, is strong evidence that the catering house is the retailer of the property.

The following is evidence which indicates that the truck operator is the retailer. No one factor is determinative; the board will make a determination based on all facts available.

(a) The contract between the catering house and the truck operator specifies that the operator is an independent contractor.

(b) The operator is not required to purchase all food and supplies from the catering house.

(c) The truck operator is not required to provide an accounting to the catering house for the operator's receipts. Rather, the income from the sales belongs to the operator.

(d) The operator prepares a Schedule C for income tax purposes.

(e) The truck operator rather than the catering house determines the sales price of the

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property for sale.

If you have any comments or wish to provide further criteria, please let me know. Also, I assume you will send this on to Ms. Joan Armenta-Roberts to take the action necessary to have the annotation published. I think they should be published under the heading "Retailer" (Anno. 480.0000 et seq.)

RLD:plh
Gideline.ret

cc: Ms. Joan Armenta-Roberts