

**STATE BOARD OF EQUALIZATION**

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May 10, 1988

J--- E. S---
W--- & A---, Inc.
XXX West ---, Suite XXX
--- ---, CA XXXXX-XXXX

Re: A--- M--- M--- A--- (A---)
SR --- XX-XXXXXX

Dear Ms. S---:

Your letter dated February 8, 1988 to --- --- Branch Office Supervisor Gordon Ralyea has been referred to this office for response. You have submitted a copy of a contract between your client, A---, and P--- P--- H--- D--- (P---) which you assert establishes A--- as P---'s purchasing agent and not as a seller of tangible personal property.

A--- is a corporation owned by Mr. and Mrs. J--- H---, who are also the majority shareholders of P--- H--- S---, Inc. (PHS). P--- had previously purchased up to 70 percent of its supplies from PHS. Further, the contract contemplates that PHS would continue to furnish a substantial portion of P---'s supplies.

Section 3a states that A--- will purchase supplies on behalf of P---, through group purchasing arrangements or otherwise. A--- guarantees that the prices of supplies will not exceed a certain maximum price. Section 3b states that all supplies will be purchased in the name of P---, who takes title directly from the vendor, and that A--- will not have title to the supplies. A--- will pay vendors and will be responsible for any late charges, interest, or price changes arising from late payment as long as P--- pays A--- as required.

Section 2b provides that A--- will warehouse all supplies at its facilities until these supplies are required at P---'s facilities, and will mark and identify those supplies as for P---. A--- will provide P--- exchange carts pursuant to section 2h. Section 3b provides that P--- will pay to A--- the cost of the supplies from the vendor and will be invoice for that cost upon delivery of the supplies to its facilities. Payment will be due no more than 2 months after the date of delivery to the P--- facilities. Section 12 provides that A--- bears the risk of loss to the supplies until they are actually delivered to the P--- facilities. A--- is required to maintain insurance for those supplies,

naming P--- as an additional insured. Section 4 provides that A--- will be paid a set fee for performance of the requirements of the contract, which also include activities not discussed above.

All acquisitions for consideration by persons of tangible personal property are regarded as purchases by those persons on their own behalf for resale or for use unless the persons clearly establish with respect to any acquisition that they are acting as agents for their clients. To establish that a particular acquisition was made as agent for its client: 1) the person must clearly disclose to the supplier the name of the client for whom the person is acting as agent; 2) the person must obtain, prior to the acquisition, and retain written evidence of agent status with the client; 3) the price billed to the client, exclusive of any agency fee, must be the same as the amount paid to the supplier; and 4) reimbursement for the property must be separately invoiced, or shown separately on an invoice, to the client. (See, e.g., Reg. 1540(a)(2).) A person purchasing tangible personal property as an agent on behalf of its clients may not issue a resale certificate to the supplier. It will be presumed that a person who issues a resale certificate to its supplier is purchasing the tangible personal property on its own behalf for resale and is not acting as an agent for its client. (Id.)

Upon review of the contract between A--- and P--- as a whole, we conclude that A--- is not acting as P---'s agent, but rather is purchasing tangible personal property for resale to P---. In order for A--- to be acting as an agent for P---, it must bill P--- the same amount as is paid to the supplier. However, the subject contract provides that no more than a stated maximum amount will be billed to P---. This means that if the amount paid to the supplier is above the stated maximum amount, A--- pays the difference and does not bill P--- the same amount as paid to the supplier. Further, A--- is responsible for paying the suppliers and is responsible for any late charges, interest, or price changes arising from A---'s late payment. However, P--- does not reimburse A--- until up to 26 days after A--- delivers the property to P---'s facilities. Since property is warehoused in A---'s facilities until required by P--- without any specified time limit, the delay of P---'s reimbursement to A--- is indeterminate. For example, A--- may have to pay the suppliers six months before P--- pays A---. Since there are no provisions for interest to be paid to A--- for the period which its funds are used to pay for the supplies for P---, A--- is, in effect, financing P---'s purchases without reimbursement. This means that P--- is not being billed the same amount as paid to the suppliers because of the time value of money.

We also note that A--- may be making purchases through group purchasing arrangements. Even if all other requirements of establishing an agency relationship are met, group purchasing arrangements would not qualify unless A--- clearly discloses to the supplier that it is purchasing specified property as agent for P---. That is, although section 3b provides that the supplies are purchased in the name of P---, who takes title directly from the vendor, the vendor must actually know that it is transferring title to specified property directly to P---. Otherwise we would regard the vendor as transferring title to A---. We also note that section 2b provides that A--- will warehouse all supplies at its facilities, marked and identified as supplies for P---. However, such supplies cannot be merely "for" P---. Rather, in order for A--- to be an agent with respect to these purchases, these supplies must be actually owned by P---. This contractual language indicates that the supplies are merely designated as for, and not owned by, P---.

Based upon the above considerations, we conclude that A--- acts as a seller to P--- under the contract. We also note that A--- retains risk of loss to the property until it is delivered to P---. Generally, the owner of property bears the risk of loss and the structure of these transactions therefore supports the conclusion that A--- sells property to P---.

Also, under section 2h A--- provides exchange carts to P---. If title to the carts transfers from A--- to P---, then A--- is clearly selling tangible personal property to P---. If title does not transfer, then A--- is leasing tangible personal property to P---. If so, and unless A--- pays sales tax reimbursement to the vendors of the carts or timely pays use tax measured by purchase price of the carts, A--- would be making taxable sales of carts to P---. (Rev. & Tax. Code §§ 6006(g), 6010(e), Reg. 1660.)

Finally, we wish to address the question of retro-activity. In your letter you state that if we were to regard the contract as properly establishing an agency agreement, it would be signed by the parties effective November 1, 1987. If the parties are able to enter into an agreement that properly establishes an agency agreement, it would be effective for application of sales and use taxes on the date it was legally binding. Although you state that the revisions made in the proposed contract reflect the current practices of the parties, the parties apparently have not actually executed the contract and will not do so until you receive our response. Since the parties have delayed signing the agreement pending our response, we conclude that the contract is not actually legally binding on the parties or else there would be no reason to delay executing it. We advise you of this conclusion for your future reference.

If you have further questions, please feel free to write again.

Sincerely

David H. Levine
Tax Counsel

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