

M e m o r a n d u m**505.0025**

To : Mr. Dario J. Romano
Business Tax Representative, Return Review

Date: December 7, 1993

From : Gerald Morrow
Tax Counsel

Telephone: (916) 324-2642
CalNet 454-2642

Subject: Agent of the United States Government/Regulation 1614
Taxpayer: D--- A--- E--- - SR -- XX-XXXXXX

This is in response to your memorandum to the Legal Department dated October 6, 1993, regarding the application of tax to a photographer's sale of tangible personal property to a United States government contractor.

My understanding is that, you are questioning a deduction for "agent of the U.S. under 7 USC 2611 et seq." on the sales and use tax return of D--- E---. Apparently, K--- C--- Inc. purchased \$71,440.00 of photographs from D--- E--- (the taxpayer). K--- paid the invoice with a check drawn on their corporate checking account. The taxpayer submitted a letter that was sent from the National Potato Promotion Board to K--- C--- Inc. claiming that K--- is exempt from tax due to their being an "authorized agent" of the Potato Board.

K--- provided you with a letter from Tax Counsel Richard H. Ochsner, dated November 9, 1978, which states that the California State Board of Equalization regards the National Potato Board to be an instrumentality of the United States. Mr. Ochsner's conclusion is still valid and thus sales of photographs to the Potato Board are exempt from tax. (Rev. & Tax. Code § 6381, Reg. 1614.)

The problem here is that D--- E--- sold the photographs to K--- and not to the Potato Board. K--- believes that they do not need to pay sales tax reimbursement to D--- E--- because they are an "authorized agent" of the Potato Board. However, we do not have sufficient facts to make a determination as to whether K--- was acting as an agent for the Potato Board when it purchased the photographs or as a retailer on its own behalf.

Regulation 1540 (a)(2)(A) defines when a person who acquires tangible personal property for another can be considered an agent rather than a retailer. As relevant here, Sales and Use Tax Regulation 1540(a)(2)(A) provides:

"To establish that a particular acquisition was made as agent for its client (i) the agency must clearly disclose to the supplier the name of the client for whom the agency is acting as agent, (ii) the agency must obtain, prior to the acquisition, and retain written evidence of agent status with the client, and (iii) the price billed to the client, exclusive of any agency fee, must be the same as the amount paid to the client, exclusive of any agency fee, must be the same as the amount paid to the supplier. The agency may make no use of the property for its own account, such as charging the item to the account of more than one client. An advertising agency purchasing tangible personal property as an agent on behalf of its client may not issue a resale certificate to the supplier. It will be presumed that an advertising agency 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.

"The reimbursement for the property should be separately invoiced, or shown separately on an invoice, to the client."

Unless K--- meets all of the requirements set forth in the regulation above, it will be treated as the retailer and not the agent of its client, the Potato Board.

If K--- is acting as an agent for the Potato Board in acquiring the photographs, it is neither a purchaser of the property with respect to the supplier (E---) nor a seller of the property with respect to its principal (Potato Board). (Reg. 1540(a)(1).) Therefore, E---'s sale of the photographs to the Potato Board, with K--- acting as its agent in these transactions, would be regarded as exempt sales made directly to an instrumentality of the United States.

You ask whether D--- E--- could be relieved from tax liability under section 6421 if he accepted the letter from the Potato Board dated December 18, 1990, in good faith. This letter which was sent to K--- C--- from the Potato Board states:

"The purchaser is not required to hold a seller's permit. The National Potato Board is exempt from state taxes as an agency of the United States under 7 USC 2611 et seq.

"K--- C---, Inc., is authorized as agent to purchase property for the National Potato Promotion Board for use in furtherance of the Board's advertising, research and public relations activities on behalf of the United States' potato industry."

By presenting the above letter to E---, K--- held itself out as an agent of the Potato Board. Additionally, K--- would be the party in the best position to know the true facts about the relationship between K--- and the Potato Board, with respect to the transactions in question.

Based on the assumptions that E--- accepted the above letter in good faith and the letter was timely, since the letter contains the elements necessary to claim an exemption under Regulation 1667(c), D--- E--- should be relieved from tax liability.

I make the following observations in case K--- did not, in fact, act as the Potato Board's agent in purchasing the photographs. There is *no* exemption from sales or use tax for sales of property to persons who consume that property in the performance of contracts with the United States (such persons are commonly referred to as United States contractors). When a seller sells tangible personal property in California to a person who will consume that property in the performance of the contract with the United States, that sale is subject to sales tax. (See, e.g., Rev. & Tax. Code §§ 6007.5, 6384.) In this instance K--- certified in writing (December 18, 1990, letter from the Potato Board) to E--- that the photographs were being purchased for use in the furtherance of the Potato Board's advertising, research and public relations activities on behalf of the United States' potato industry. Accordingly, if K--- used any of the photograph's prior to selling them to the Potato Board, the sale by E--- to K--- is a retail sale and assuming E--- had in good faith taken an exemption certificate from K---, K--- is responsible for paying tax on its use of these photographs. (Rev. & Tax. Code § 6421.)

On the other hand, even if K--- were not acting as the Potato Board's agent, if the contract between K--- and the Potato Board has a title clause which provides for title to pass to the Potato Board prior to the first use by K---, K--- could purchase the photographs ex-tax for resale from E---, by issuing to E--- a timely and valid resale certificate in the form prescribed in Regulation 1668. The sale by K--- to the Potato Board would be exempt from California sales or use tax.

You have indicated that K--- paid the invoice with a check drawn on their own corporate account. The fact that K--- paid the invoice with their own corporate checking account suggests that K--- purchased the photographs on their own account or for resale rather than as an agent of the Potato Board. As stated in Regulation 1614(a)(4), when the nonexempt party makes full payment and later seeks reimbursement, then that party and not the United States government is considered the actual purchaser of the property. As stated above, even if K--- is the retailer of the photographs rather than an agent of the United States government then, under these facts, E--- will be relieved from liability under section 6421, and we would look to K--- as the person liable for any tax due.

Other than changes in the law that have occurred since that time Mr. Ochsner's November 9, 1978, letter is still valid. If you have specific questions about the current applicability of a particular law that he discussed in that letter, please write again.

GM\md

cc: San Francisco - District Administrator
Out-of-State - District Administrator

Mr. Dario J. Romano

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G--- V. C---
Vice President, Corporate Operations
Western Region
K--- C---, Inc.
XX --- Street
--- ---, CA XXXXX