

**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--- (AMMA)  
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, AMMA, and P--- P--- H--- D--- (PPHD) which you assert establishes AMMA as PPHD's purchasing agent and not as a seller of tangible personal property.

AMMA is a corporation owned by Mr. and Mrs. John H---, who are also the majority stockholders of P--- H--- S---, Inc. (PHS). PPHD 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 PPHD's Supplies.

Section 3a states that AMMA will purchase supplies on behalf of PPHD, through group purchasing arrangements or otherwise. AMMA 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 PPHD, who takes title directly from the vendor, and that AMMA will not have title to the supplies. AMMA will pay vendors and will be responsible for any late charges, interest, or price changes arising from late payment as long as PPHD pays AMMA as required.

Section 2b provides that AMMA will warehouse all supplies at its facilities until these supplies are required at PPHD's facilities, and will mark and identify those supplies as for PPHD. AMMA will provide PPHD exchange carts pursuant to section 2h. Section 3b provides that PPHD will pay to AMMA the cost of the supplies from the vendor and will be invoiced for that cost upon delivery of the supplies to its facilities. Payment will be due no more than 26 days after the date of delivery to the PPHD facilities. Section 12 provides that AMMA bears the risk of loss to the supplies until they are actually delivered to the PPHD facilities. AMMA is required to maintain insurance for those supplies, naming PPHD as an additional insured. Section 4 provides that AMMA 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 acquisitions 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 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 client 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 AMMA and PPHD as a whole, we conclude that AMMA is not acting as PPHD's agent, but rather is purchasing tangible personal property for resale to PPHD. In order for AMMA to be acting as an agent for PPHD, it must bill PPHD 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 PPHD. This means that if the amount paid to the supplier is above the stated maximum amount, AMMA pays the difference and does not bill PPHD the same amount as paid to the supplier. Further, AMMA is responsible for paying the suppliers and is responsible for any late charges, interest, or price changes arising from AMMA's late payment. However, PPHD does not reimburse AMMA until up to 26 days after AMMA delivers the property to PPHD's facilities. Since property is warehoused in AMMA's facilities until required by PPHD without any specific time limit, the delay of PPHD's reimbursement to AMMA is indeterminate. For example, AMMA may have to pay the suppliers six months before PPHD pays AMMA. Since there are no provisions for interest to be paid to AMMA for the period which its funds are used to pay for the supplies for PPHD, AMMA is, in effect, financing PPHD's purchases without reimbursement. This means that PPHD is not being billed the same amount as paid to the suppliers because of the time value of money.

We also note that AMMA 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 AMMA clearly discloses to the supplier that it is purchasing specified property as agent for PPHD. That is, although section 3b provides that the supplies are purchased in the name of PPHD, who takes title directly from the vendor, the vendor must actually know that it is transferring title to specified property directly to PPHD. Otherwise we would regard the vendor as transferring title to AMMA. We also note that section 2b provides that AMMA will warehouse all supplies at its facilities, marked and identified as supplies for PPHD. However, such supplies cannot be merely "for" PPHD. Rather, in order for AMMA to be an agent with respect to these purchases, contractual language indicates that the supplies are merely designated as for, and not owned by, PPHD.

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

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

Finally, we wish to address the question of retroactivity. 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 formally 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

DHL:ss

bc: --- --- -- District Administrator