STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

March 16, 1959

AIR MAIL

REDACTED TEXT

Account: REDACTED TEXT

Attention: Mr. REDACTED TEXT
President

Gentlemen:

First of all, we appreciate the courtesy which you, Mr. REDACTED TEXT and Mr. REDACTED TEXT, Mr. REDACTED TEXT, and Mr. REDACTED TEXT (of REDACTED TEXT) extended to us when we observed the operation at REDACTED TEXT Corporation in REDACTED TEXT.

We have made a thorough review of the detailed information which you have furnished us, but we remain of the opinion that the exemption expressed in Section 6363 of the California Sales and Use Tax Law does not apply to the operations at REDACTED TEXT Corporation in REDACTED TEXT. There is considerable similarity between the contract between REDACTED TEXT, Inc. and REDACTED TEXT, which is the subject of litigation, and the contract under which you are operating at REDACTED TEXT.

Furthermore, we have concluded that, irrespective of the conclusions stated in a written contract as to the relationship of the parties, where a caterer purchases food, prepares and serves it (whether with its own employees or through as manager directing those on the payroll of another), and participates in the retail cash sale, it is not realistic to conclude that this caterer is not engaged in a retailing activity. In short, we are of the opinion that such cost-plus-a-fee contractors are not servants, but are independent contractors making taxable retail cash sales pursuant to a contract with the employer.

It is entirely possible that there have been a few instances where previous rulings have not been wholly consistent with our present position.

In recent years, however, we have consistently regarded as taxable the type of contract and method of operation under which you are operating at REDACTED TEXT's location. This is evidenced by the very fact that the substantially similar contract to which we referred above, between

REDACTED TEXT and REDACTED TEXT is the subject of current litigation. In that contract, as you know, the contractor is referred to as an "operating manager," and the other contracting party also had considerable jurisdiction over the establishment of prices, the time of meal periods, location of canteens and feeding stations, feeding of shifts or groups, number of facilities to be operated, and other aspects.

We would not presently be administering the law uniformly if we were to presently regard your operations at the location as within the statutory exemption outlined in Section 6363.

We should like to point out that it is a well-established general rule in tax administration that, if a prior ruling is not supported by a basic statute, the State as a general rule is not bound thereby. The courts have repeatedly held that estoppel based upon erroneous construction of a statute by an administrative ruling will not lie against the government, particularly in tax matters. We specifically call to your attention Market Street Railway Company v. State Board of Equalization, 137 Cal. App. 2d 87, involving a change in a published ruling relied upon by the taxpayer.

Starting on page 100 of the Market Street Railway Company case, the Court said:

> "Obviously, a tax administrator should not be permitted by an erroneous ruling to exempt a taxpayer from the obligation to pay taxes."

On page 101, the Court specifically refers to another California decision, La Societe Francaise v. California Employment Commission, 56 Cal. App. 2d 534. The Court in the Market Street case quotes from page 553 of the La Societe Case:

> "It is the general rule that the government does not lose its revenues because of an erroneous ruling of an administrative official as to the meaning of a tax law. An administrative regulation which is in conflict with the statute is invalid and the government is not bound thereby. The duty of the tax officials is to collect tax imposed by law…it is generally no defense that taxes were not paid when due in reliance on an official ruling of nonliability. The taxpayer is deemed to act with knowledge that administrative officials cannot bind the government by their erroneous interpretation of tax statutes."

Furthermore, on page 103 of the Market Street Railway case, the Court refers to Crane Co. v. Arizona State Tax Commission, 63 Ariz. 426. In the Arizona case a seller failed to pass on the sales tax to the buyer in reliance upon an erroneous administrative regulation. In the Market Street Railway case, the Court in discussing the Arizona case says on page 103:

> "The seller urged that the state was estopped, and cited the La Societe Francaise case. In discussing that case the (Arizona) court said (p.662): 'In that case, the California court held that where the commission had informed the employer it was not subject to the unemployment insurance tax, and for that reason it collected to tax from its employees, the commission was estopped from collection that portion of the tax which, under law, the employer was required to collect from employees. The employer was merely a collecting agent for that part of the tax which the act contemplated should be borne by the employees…Here (in reference to the sales tax)

the appellant is in no sense the tax collector. It is the taxpayer. True, it has the right to pass on the taxes to the purchaser, but it is not under any statutory duty to do so.'"

Very truly yours,

Warren W. Mangels
Associate Tax Counsel

WWM:o'b

cc: Van Nuys – Administrator (CWT)
San Diego - Administrator