

M e m o r a n d u m**480.0193**

To: Mr. Glenn A. Bystrom

Date: October 11, 1989

From: John Abbott
Senior Tax CounselSubject: (no permit number)
Optometrists' buying group

In your August 7, 1989 memorandum to Mr. Les Sorensen, you relate that (referred to as O) has refused to obtain a seller's permit as requested by our Oakland District office. Instead, O 's attorney, , in a letter dated June 23, 1989 to Mr. Robert Leon of the Board's Oakland office, contends that O is not required to register as a retailer of optometric supplies to its member doctors. You enclosed a copy of Mr. letter and the exhibits attached to that letter with your memorandum to Mr. Sorensen.

You have reviewed the information which O submitted and found that its operations are nearly identical to , Inc., (). was the subject of a November 16, 1988 memorandum from Mr. Sorensen to Mr. Randy Rose in which Mr. Sorensen concluded that was a retailer, not merely a billing agent, in transactions among , the vendors of the optometric supplies, and the member doctors of .

You relate that while the overall method of operation of both of these buying groups is the same, there are some differences. First, O earns its income by adding a 2% administrative fee to the vendor's invoice, whereas earns its income by passing along less of a volume discount to the doctor than it receives from the vendor. Second, the O vendors calculated the discount on the face of the invoice sent to the doctor. But the vendors' invoices to the doctor did not include a discount; instead, the discount appeared on 's monthly billing to the doctor. Third, Mr. states in his letter: "In the event O fails to submit payment to the suppliers, the suppliers reserve the right to seek payment from the participating optometrist." By contrast, there was no indication that member doctors had any contractual liability for payment directly to the vendors.

You ask for our opinion whether the above differences in operation, or the position of Mr. in his June 23, 1989 letter, would cause the Board staff to consider O to not be a retailer of the optometric supplies.

Opinion

In our opinion, the Board must regard O as a billing agent, not a retailer, if all of the questions are answered in the affirmative:

1. Do the O vendors' invoices show the member doctors as the purchasers? The answer to this question appears to be yes. Mr. 's letter included sample invoices from one vendor, , Inc., , New Jersey, to two O member doctors, which show that the optometric supplies were sold to the member doctors, and billed to O . If this is consistently true of other invoices from different vendors to different member doctors, then we would regard this as an indication that all the parties treated the transactions as sales from the vendor to the doctor, not to O for resale to the doctor.

2. Does O have agreements with the vendors which provide that if O does not pay the vendor, the vendor has the right to seek payment for the supplies sold directly from the member doctor? This is asserted by Mr. in his June 23, 1989 letter. If his statement is correct, then we would expect that O could document the existence of those agreements. Such an agreement would be an additional indication that O was not acting as a retailer in the transactions, because otherwise O would remain liable to the vendors for the supplies purchased regardless of whether the member doctors paid O the amounts due.

3. Does O pay the vendors for the supplies ordered by a member doctor only after it receives payment from the member doctor? One of the enclosures with Mr. 's letter is a copy of the O group participation agreement between the doctor and O . The agreement does not contain any specific provision regarding whether O will pay vendors for the doctor's orders before it receives payment from the doctor. If O did so, however, this would indicate that O is acting as a retailer, not merely a billing agent, since there is nothing in the group participation agreement which indicates that O will advance money on behalf of the doctor in the event the doctor does not pay the amounts billed. Instead, if the doctor breaches the agreement, the agreement merely calls for termination of the agreement, loss of O membership, and forfeiture of the doctor's original \$100 deposit. If O can show that it does not pay the vendors before receiving payment from the doctor, this would indicate that O was not acting as a retailer.

If the answers to any of these questions are in the negative, then our opinion is that O is a retailer, not merely a billing agent, that the transactions are structured as sales by the vendor to O with immediate resale to the member doctors, and that the shipping arrangements are standard drop shipments from the vendor to O 's customer, not to the vendor's customer.

JA:jb