

**M e m o r a n d u m****185.0260**

**To :** Ms. Lauren Simpson  
Audit Evaluation and Planning Section  
MIC:40

**Date:** September 2, 1993

**From :** Elizabeth Abreu  
Tax Counsel

**Subject:** *K--- B--- & K--- L--- - B--- dba P--- F---*  
*SR -- XX-XXXXXX*

This is in response to your memorandum dated April 29, 1993 regarding the consignment transactions of the above-named taxpayers.

By memorandum dated July 21, 1992 to the Concord District Office, we concluded that the taxpayers were the retailers of the pianos they sold under consignment because the taxpayers were given authority to execute and conclude an agreement for sale of the piano, to sign the agreement on behalf of the owners, and to sign a bill of sale for such piano. Since we wrote that memorandum, the taxpayers changed the agreements. Your question is whether, under the revised agreements, the taxpayers are the retailers of the pianos given to them under consignment.

An owner of a piano who hires the taxpayers to sell the piano now signs an agreement entitled, "P--- F--- Exclusive Brokerage and Listing Agreement." Under the agreement, the taxpayers evaluate the piano, prepare a formal appraisal, list the piano in P--- F---'s computer listing, and use their best efforts to sell the piano.

The owner authorizes the taxpayers to sell the piano for the owner's account for not less than a specified amount. Title to the piano remains in the owner at all times, and no sale is deemed final until such time as the owner authorizes the release of the bill of sale to the buyer. The owner further authorizes the taxpayers to accept offers to purchase, receive moneys, pay off liens, disburse funds, and to act as the owner's authorized agent in all matters pertaining to the sale. Finally, the owner authorizes the taxpayers to make arrangements with the buyer to have the piano moved to the buyer's location upon receipt of the purchase money. The owner assumes all responsibility for the storage, insurance, and maintenance of the piano while the agreement is in effect.

A purchaser who wishes to purchase a piano held on consignment by the taxpayers must sign an agreement entitled "Piano Purchase Agreement."<sup>1/</sup> This agreement provides that the buyer shall purchase the piano from the owner and that the taxpayers shall establish an escrow account to effect the exchange of the purchase funds and transfer documents. The owner shall, by a specified date, deposit into escrow a bill of sale drawn in favor the buyer, and the buyer shall deliver into escrow the balance of the purchase price by cash or check made payable to the taxpayers as trustees. The funds will be placed in an escrow account but need not be segregated from other funds held by the taxpayers.

The purchase agreement further provides that the taxpayers act as brokers with respect to the transaction. The taxpayers shall exercise their best efforts to procure, but cannot guarantee, the owner's performance in closing. The buyer waives any claim against the owner or the taxpayers for the owner's refusal or failure to close. If the owner fails to complete the sale, the buyer's deposit shall be immediately returned. The buyer is entitled to take possession of the piano immediately upon the close of escrow.

Regulation 1569 provides:

"A person who has possession of property owned by another, and also the power to cause title to that property to be transferred to a third person without any further action on the part of its owner, and who exercises such power, is a retailer when the party to whom title is transferred is a consumer. Tax applies to his gross receipts from such a sale."

Annotation 185.0060 reads:

**"Bill of Sale.** Persons who have the power to transfer title to property, and exercise it, either by obtaining title to the property prior to its sale, by executing a bill of sale to the purchaser under power of attorney from the legal owner, or by obtaining a signed bill of sale from the legal owner and delivering it to the purchaser, are regarded as retailers, and the tax applies to the sales of such property by them. 12/15/52."

The backup letter to Annotation 185.0200 reads:

"[I]t has been determined that a yacht broker will not be regarded as the retailer on the basis that he signed a conditional sales contract as 'seller' provided he has retained a letter, telegram, or other writing sufficient to evidence that the buyer's

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<sup>1/</sup> There are actually two types of purchase agreements. The second type, entitled "As Is Piano Purchase Agreement," is similar to the other purchase agreement. The only difference is that under the "As Is" agreement, the buyer takes the piano "as is." Under the other agreement, the taxpayers provide a limited warranty for the repair work they perform.

offer was communicated to and accepted by the owner of the yacht or ship prior to execution of the conditional sales contract.

". . .

"Where the broker has authority to enter into a contract of sale as a sales agent, collects the price, and delivers or arranges delivery of the vessel, we remain of the opinion that he is a factor performing the acts necessary to vest ownership in the buyer and is making a consignment sale."

Under the revised agreements, the taxpayers do not have the power to transfer title at the time they enter into the listing agreement with the owner of the piano. After the taxpayers have found a buyer, the owner must deposit a bill of sale into the escrow set up by the taxpayers. At this time, the taxpayers still do not have authority to pass title. Once the taxpayers receive authorization from the owner, the taxpayers may pass title by delivering the bill of sale to the buyer. Presumably the authorization comes after the buyer deposits the balance of the purchase price into escrow.

Whether the taxpayers are the retailers under these transactions is a close question. At some point the taxpayers have the power to cause title to the property to be transferred to a third person. The critical question, however, is whether the taxpayers have such power "without any further action on the part of its owner." Under the revised agreements, the taxpayers do not have the authority to pass title until they receive a bill of sale and authorization from the owner. We conclude that because the taxpayers must receive authorization from the owner before they can deliver the bill of sale to the purchaser, the taxpayers do not have the power to cause title to be transferred without further action on the part of the owner of the property. This conclusion is consistent with the backup letter to Annotation 185.0200 since the taxpayers cannot complete the sale without acceptance of the purchaser's offer by the owner of the piano.

If you have further questions on this matter, please do not hesitate to call.

EA:cl

cc: Oakland District Administrator