

M e m o r a n d u m

185.0010

To : Mr. David A. Michalek
(CHB) Concord Branch Office Supervisor

Date: July 21, 1992

From : Elizabeth Abreu
Tax Counsel

(916) 324-8208
ATSS 454-8208

Subject: K--- B--- & K--- L--- - B---
Consignee of Tangible Personal Property for Sale

SR – XX-XXXXXX

This is in response to your memorandum dated May 4, 1992, in which you request advice concerning a piano listing agreement.

The taxpayers entered into agreements entitled "P--- F--- Commission and Piano Listing Agreement" with owners who wished to sell their pianos. Each of these agreements provides that the taxpayers will (1) appraise an owner's piano for a \$45 fee (2) recommend a suggested selling price, (3) list the owner's piano in taxpayers' computer listing, and (4) use their best efforts to sell the piano. In addition, the taxpayers also agree to refund half of their commission if the owner located a buyer.

The sample agreement you enclosed also provides as follows:

"P--- F--- ... will perform the following services ...:

4. P--- F--- will notify owner of any offers made by potential buyers which are below the minimum sales price as stated below, and any other matters which will require owners consideration."

"THE OWNER:

1. While this agreement is in effect, owner authorizes P--- F--- to sell the piano for \$ ___ or more without consulting owners and without owner's approval of the buyer. If a low offer is made on the piano, owner shall have the choice of refusing or accepting the low offer by notifying P--- F--- by telephone.

3. Authorizes P--- F--- to enter into a sales agreement, receive moneys, pay off liens, disburse funds, and to act as owner's authorized agent in all matters pertaining to the sale. P--- F--- will accept payment from the buyer, deduct the 20% commission due P--

- f--- from the gross sales price of the piano, pay off any existing liens on the piano, ... and pay to the owner the balance of the money received from the buyer as soon as the sale transaction has been completed.

...

4. ... [W]ill provide a location for the piano to be seen by potential buyers and P--- F--- representatives."

...

8. Appoints P--- F--- as their authorized agents, as set forth in the attached Statement of Limited Authority for the purpose of effecting the sale of the piano pursuant to the terms of this agreement. On termination of this agreement the authority stated therein shall also terminate."

At the bottom of each agreement is a "Statement of Limited Authority" which reads:

"The above mentioned owner of the above mentioned piano hereby authorizes P--- F---, of P--- H---, California and appoints P--- F--- as my/our limited attorney in fact, for my/our use and benefit, to act as exclusive agents for the sale of the piano, to locate potential buyers for the piano, to negotiate with such buyers, receive offers from buyers and evaluate such offers, to execute and conclude an agreement for sale of the piano and sign on behalf of owners, to sign a bill of sale for such piano, all for and on behalf of owners, and to do all acts necessary to sell the piano consistent with the terms of the Commission and Sale Agreement on this same page, and to take all other actions permitted by the terms of that agreement."

Regulation 1569 reads:

"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...."

Two Attorney General Opinions also address this issue. The first, NS3582 issued August 14, 1941, concludes that where a yacht broker has neither the right to beneficial use of the boat nor the power by his own act to vest ownership in another, the broker is not transferring title to the purchaser and therefore has not made a retail sale. The second opinion, issued December 11, 1952, states that if the so-called "broker" actually has the power to transfer title and exercises it, then the broker is a seller within the meaning of section 6015.

The first issue that must be addressed in your audit is whether the taxpayers had possession of the pianos in each of these transactions. As shown above, the agreement states that the owner must

provide a location for the piano to be seen by potential buyers. This suggests to us that under some agreements, the buyer may not have turned over possession as required by the regulation. However, there is a handwritten notation at the bottom of the sample contract stating that P--- F--- will receive and store the piano at a particular location while it is for sale. You will need to determine if it was the taxpayers' practice to take possession of the pianos while holding them for sale.

The next issue is whether taxpayers had the power to cause title to a piano to be transferred to a third person without any further action on the part of its owner. With respect to those pianos which needed no repairs and for which taxpayers received a bid at or above the minimum amount, the answer is clearly yes. Under the listing agreement, the owner authorizes taxpayers to sell the piano for a minimum price without consulting the owner and without the owner's approval of the buyer. Taxpayers are also authorized to enter into a sales agreement, to receive moneys, to sign a bill of sale for the piano, and to act as owner's authorized agent in all matters pertaining to the sale.

The question is closer with respect to those sales in which the owner gives approval to a bid below the minimum price set in the agreement. However, in these transactions, once the taxpayers receive oral approval, under the listing agreement they have the same powers to execute a sales agreement with the buyer, to pass title to the buyer, to deliver possession of the piano to the buyer, and so forth as they would in a sales transaction at or above the minimum price.

In your memorandum you state that sales at the owner's asking price frequently required repairs as a condition prerequisite to the sale and that the taxpayers were required to get special authorization to execute these sales on behalf of the owner as per the terms of the agreement. We reviewed the sample agreement and did not find any reference in the printed matter to repairs. Although the taxpayers are given broad powers, we do not believe that the listing agreement gives the taxpayers the right to make repairs and adjust the selling price accordingly. If a purchaser wants repairs as a condition of the sale, he or she is asking for a benefit that is outside the scope of the listing agreement. Under these circumstances, the taxpayers will have to go to the owner to receive special authorization to enter into such a contract and to pass title. Therefore, where the taxpayers must, in order to make a sale, seek special approval from an owner on a matter that is outside the scope of the listing agreement, the taxpayers are acting as brokers.

If the listing agreement has a repair provision added, e.g., provides that the owners will pay taxpayers a certain amount to repair the piano, the parties have contemplated that the repairs will be including in the process of selling the piano. Since taxpayers will not have to get authorization to make the repairs, such repairs have no effect on the taxpayer's authority to sell the piano.

If you have further questions, please do not hesitate to call me.

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