

**M e m o r a n d u m****325.1510**

To: Long Beach – Auditing (AMB)

Date: August 24, 1972

From: Headquarters – Legal Counsel (DJH)

Subject: L--- E--- Division  
T---, Inc.

S- -- XX XXXXXX

This is in regard to your memorandum of July 6, 1972 and our telephone conversation of August 21, 1972 concerning the status of the German Military Representative (GMR) for purposes of the “export” exemption.

As I related to you, our conference of May 15, 1972 with the Attorney General’s staff clarified the following points:

- 1) Sales to a foreign purchaser, where delivery is made in California to a separate legal entity set up by the foreign purchaser to act as an export packer, will qualify as exempt within Section 6387, provided the other requirements of that section are satisfied. To be considered an export packer within Section 6387 and Regulation 1620(a)(3)(1)(b), it is not necessary for a firm to hold itself out to the public as an export packer. It is sufficient if the purchaser and the packer are separate legal entities and the packer is engaged in the business of export packing for the purchaser.
- 2) A vendor qualifies as an export packer within Section 6387, if the vendor regularly packs and exports, not only goods he has sold to the foreign purchaser, but also goods sold to the foreign purchaser by other vendors.

In order to determine if the GMR is a separate legal entity within (1) above, it is necessary to enquire further than the statement in your July 6, 1972 memorandum that the GMR is an agent of the German Government. The question then becomes is the GMR an employee-agent, in which case his taking of delivery would be both for and by the German Government, or is he an independent contractor-agent, in which case his taking of delivery would be for, but not by, the German Government.

The important factor in distinguishing an employee from an independent contractor is the right of control by the employer. An independent contractor is one who renders service in the course of an independent employment or occupation, following his employer's desires only as to the results of the work, and not as to the means whereby it is to be accomplished.

Although the activities of the GMR were questioned in the L--- S---, Inc. (S- -- XX XXXXXX) preliminary hearing of February 11, 1970, we still have no clear picture of his operation. The following questions are relevant:

- 1) Who is the GMR? Name, address, etc.? Is a business name used for the purchasing and exporting operation? In what name are federal and state tax returns filed? Are any business licenses held by the operation; if so, in what name?
- 2) Does the GMR do the physical work of consolidation himself or are other persons hired to physically consolidate the purchases received in Burbank? If other persons are hired, who employs and pays them?
- 3) Does the GMR devote his full time to purchasing and exporting for the German Government or is this employment part time? Does he purchase and export for anyone else? It may be relevant here whether the GMR is in the U.S. specifically to purchase and export for Germany or is he merely hired to perform these functions? Was he hired because of prior experience in purchasing, consolidating, and exporting?
- 4) How is the GMR paid? A flat salary or commission?
- 5) Is the real property where consolidation takes place leased by the German Government or by the GMR as an individual?
- 6) Does the GMR have a written contract with the German Government describing their legal relationship?

As is apparent from the above, we still have only a hazy picture of the factual and legal entity referred to as the "German Military Representative." Any and all information you may develop as to the facts of the GMR's operation will be appreciated. As we have for some time considered delivery to the GMR as not negating the "export" exemption, we would require a sound factual basis to decide he is not a separate legal entity engaged in the business of export packing.

Feel free to telephone or write me if further clarification of the above questions is needed, telephone 485-4790.

DJH:dih