MEMORANDUM

TO: Randy Miller, Executive Director
FROM: Daniel Manry, Bureau Chief, Tax Information and Assistance
RE: Memorandum from Bernard A. Barton, Jr., Attorney, Holland & Knight (8/12/87) re: Position Regarding Application of Affiliated Group Principles to Sales and Use Tax on Services (the H&K memo)

A copy of the above referenced memorandum is attached for your reference. Nothing novel or new is stated in the memorandum.

The first paragraph merely characterizes the Department's position as an overly expansive application of combined "or consolidated" reporting beyond the scope of existing statutory framework. The second paragraph misrepresents that the introductory paragraph to s. 212.059, F.S., "clearly states" that the tax being imposed on services is a tax on the sale of a service outside Florida, and on the use of services in Florida when there has been a retail sale of a service "in" [sic] Florida. The statute actually imposes a sales tax on sales at retail in this state, not those outside this state as represented in the H&K memo. Similarly, the use tax is actually imposed on the use of services in this state when the sale of any service is outside this state, not when there has been a retail sale of a service in Florida as represented in the second paragraph on page one of the H&K Memo.

Paragraph two of the H&K Memo inaccurately states that both ss. 212.059(1) and (2), F.S., "clearly indicate" that a tax is imposed on "each sale" or "each use" of a service. Actually, the term "each" is used only in s. 212.059(1), F.S., when referring to sales tax. Neither the term "each" nor any similar term appears in s. 212.059(2), F.S., when referring to the use tax.

The H&K Memo asserts that the term "each" prohibits an "amalgamation, combining or consolidation of a multitude of separate sales or uses of taxes in determining ultimate tax liability for a particular service." This assertion is consistent with that made by J. Hellerstein and addressed in my legal memorandum to you (the Miller Memo) at page 13. This assertion in both the H&K Memo and by J. Hellerstein has been belied.
by recent Supreme Court rulings in National Can Corporation, Inc. which held
that a gross receipts tax was unconstitutional because failure to apportion
the tax deprived the tax of its internal consistency, i.e., it resulted in
double taxation. It would be difficult for this Department to apportion
sales and use taxes as statutorily mandated in s. 212.0591(9)(b)4, F.S.,
without an amalgamation of separate transactions.

Paragraph four on page two of the H&K Memo correctly states that
nothing in s. 212.06, F.S. (defining dealers), alters the legal duty in s.
212.059(3)(b), F.S., of purchasers having Florida nexus to accrue and remit
any use tax due. The H&K Memo at lines 17 and 22 of paragraph four,
however, incorrectly asserts that the Department is taking the position that
a service "becomes taxable because the purchaser happens to be a
dealer...." To the contrary, the position of the Department is that a
service becomes taxable if it is used in this state, not because the
purchaser is a dealer. (See Miller Memo at page 5).

The last three lines of paragraph four in the H&K Memo also
misrepresent the language of s. 212.059(3)(b), F.S. Nowhere does that
section state that a service is not taxable under s. 212.059(3)(b) when the
purchaser has no tax nexus. The scope of that section does not even address
taxability. Instead, the section addresses only the legal obligation to
accrue and remit any use tax due when the purchaser has nexus. When the
purchaser does not have nexus, s. 212.059(3)(b), F.S., does not apply. If
the purchaser does not have tax nexus, the legal obligation to collect and
remit any use tax due is imposed in s. 212.059(3)(a), F.S., on dealers. A
service is taxable if used in this state and must be remitted by the user if
the user is a dealer.

Paragraph five on pages two and three of the H&K Memo implies that
the Department is attempting to impose the legal obligation to collect and
remit tax due on purchasers which lack nexus. That is not, and never has
been, the position of the Department. Instead, the Department imposes such
an obligation on dealers and purchasers with nexus pursuant to ss.
212.059(3), F.S.

Paragraph six on page three correctly states that "rules of
construction" in s. 212.059(9), F.S., do not establish tax liability for
sales or use taxes. Such liability, instead, is imposed under s.
212.059(3), F.S., while taxability is imposed by ss. 212.059(1) and (2),
F.S. The H&K Memo, however, asserts that subsection (9) requires the
Department to consider only purchases by purchasers with Florida nexus
because a tax cannot be imposed on "someone that does not have some presence
in the taxing state." At the risk of sounding repetitive, the tax is not
imposed on such a "someone." The use tax is imposed on the use of services
in this state pursuant to s. 212.059(2), F.S. The legal obligation to
collect and remit the tax is imposed on dealers if the purchaser has no
nexus with this state pursuant to s. 212.059(3)(a), F.S.
Paragraph seven on page four of the H&K Memo suggests that the Department should use combined or consolidated formulas established for the affiliated group but apportion only those purchases made by members which have nexus. If a combined apportionment factor is applied to purchases of only the members with nexus, the result would multiply a reduced apportionment fraction times a reduced apportionable base. Such a result would be absurd and lack external consistency because it would not accurately reflect benefit.

The penultimate paragraph on pages four and five of the H&K Memo asserts that only consolidated reporting was contemplated in s. 212.02(2), F.S., defining affiliated groups. The H&K Memo, however, fails to address the fact that the Department is prohibited in s. 212.0592(5), F.S., from requiring consolidated returns. Neither does the H & K Memo deal with the constitutionality of a state requiring an affirmative act in order to avoid jurisdiction by the state. Such a result would occur if the Department construed the statute as requiring consolidated returns.