September 18, 1987

Vicki Weber, Esq.
Staff Attorney
Finance and Tax Committee
202 House Office Building
Tallahassee, Florida 32399-1300

Dear Vicki:

In response to your inquiry, we have considered the matters raised and have set forth below our written opinion. You requested that we address the following question:

"The proper construction of the conjunction 'and' contained in the following phrase from § 212.02(2), F.S.

... to define its affiliated group in a manner which excludes any member who has no tax nexus in this state and any member whose business activities are unrelated to the business activities of other members of the group."

There are two plausible readings of the above quoted phrase. First, the phrase could be construed to permit the taxpayer to define its affiliated group to exclude any member who either lacks tax nexus with Florida or has business activities unrelated to the business activities of other members of the group. Second, the phrase could be construed to permit the taxpayer to define its affiliated group to exclude only members who have neither tax nexus with the state nor business activities related to the business activities of other members of the group. Although the former construction may be the more natural reading of the statutory language standing alone, we believe that the latter construction is the preferred reading in light of the purpose and structure of the sales tax on services.
The overriding purpose of the sales tax on services is to impose a tax on services whose benefit is enjoyed in Florida. When the place of enjoyment of services cannot be satisfactorily identified on a situs-specific basis, the statute provides that a business purchaser is presumed to enjoy services in Florida to the extent that it is doing business in the state. § 212.0591(9)(b)4, F.S. The extent of the purchaser's business in the state is measured by the corporate income tax apportionment formulas. Id.

In providing for apportionment of services that are not situs-specific, the legislature made the reasonable assumption that purchases by a member of a group of affiliated corporations generally benefit the entire group rather than merely the individual corporate purchaser. It therefore provided that apportionable services purchased by any member of an affiliated group of corporations should be deemed to be enjoyed where the entire group was doing business, based on the group's apportionment formula.

While presuming that non-situs-specific services purchased by any member of an affiliated group of corporations are generally enjoyed where the entire group is doing business, the legislature also recognized that there could be situations in which such a presumption would not accurately reflect the group's enjoyment of the service on a geographic basis. Such a situation would arise when a member of the group has no tax nexus with Florida and is not, in fact, engaged in a common economic enterprise with other members of the group who are engaged in Florida-related activities. Including within the apportionable tax base all non-situs specific purchases by all the members of such a group could raise questions about the constitutionality of the apportionment. The legislature therefore provided a taxpayer with an option to exclude a member with neither Florida tax nexus nor Florida-related business activity from the affiliated group. It did not compel taxpayers to exclude such a member, however, allowing taxpayers to include such a member in the group if the taxpayer determined that it was in its interest to do so.

We believe that the above described understanding of the affiliated group election is more consistent with the legislative purpose than the alternative construction. To permit taxpayers to exclude members of the affiliated group without Florida nexus even though they are engaged in a common economic enterprise with members of the group who have nexus with Florida would permit wholesale evasion of
the statute's purpose, except to the extent that such services would be taxed on a separate company basis. Taxpayers could simply direct members of their affiliated group without Florida nexus to purchase services enjoyed in Florida by members with Florida nexus, and at the same time to exclude such purchases from the service tax base. We do not believe that the legislature intended such a result. We do believe, however, that the Department of Revenue, as an administrative matter, may provide for the separate apportionment of purchases of non-situs specific services by members of an affiliated group with Florida tax nexus who are engaged in business activities in Florida unrelated to business activities carried on by other members of the affiliated group.

We hope that we have satisfactorily responded to the question raised in your inquiry. If there are matters which you feel need further clarification or elaboration, please let us know and we will do our best to accommodate you.

Sincerely,

MORRISON & FOERSTER

Walter Hellerstein

Steven S. Rosenthal