



STATE BOARD OF EQUALIZATION

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Executive Director

August 1, 1997

T--- R---
T--- R--- P---
XXXX --- ---
---, AZ XXXXX

Re: T--- R--- P---
No Account Number

Dear T--- R---:

I am responding to your communication dated June 1, 1997 to the Legal Division of the California State Board of Equalization. You ask about your responsibility to collect California sales or use tax in certain situations described below.

You write that you sold your printing company in California, and moved to Arizona. Since then, you have been contacted by former customers who have asked you to continue to produce colored hotel brochures for them. You state:

“I have been doing this as a printing broker, using a printing firm in Missouri. That firm ships the completed brochures direct to my customer in California. Therefore, I understand that I am not responsible to collect either California Sales or a Use Tax. Is this correct?

“Next: If I call a independent photographer in California to go to the hotel and take pictures and send to me, who is responsible for the tax?

“Another next; If I go to the Hotel myself and take the photographs and return to Arizona and have the film developed in Arizona to use in the brochure, am I then responsible for a Sales or Use tax of the photography? Or does this taking of the photographs make the entire job, design and printing come under a California Sales or Use tax?

“I have a customer in California who owns a Hotel and also happens to be a CPA. He says that I should not charge him a Sales or Use Tax because of being out of State. Therefore the reason for this request.” (Quoted as written.)

For purposes of this opinion letter, we assume that other than the “independent photographer,” referred to above, you have no business location, employees, agents, or representatives in California. We also assume that your California customers order brochures directly from you while you are not in the state of California, e.g., Arizona. We further assume that when you telephone an independent photographer in California to take and send you photographs which you will use in the production of the brochures, the photographer agrees, and actually does, take and sell to you the photographs. We assume the photographer then sends the photographs directly to you via the United States Postal Service or other common carrier. We also assume that thereafter the original photographs do not return to California. Lastly, we assume that the printer in Missouri invoices you for the printing and mailing of the brochures, i.e., you take title and are the owner of the brochures, and that you, in turn, sell the brochures to your California customers at a marked-up price to cover your production costs and profit.

Discussion

A retail sale of tangible personal property in California is subject to sales tax measured by the retailer’s gross receipts, unless the sale is specifically exempted or excluded from taxation by statute, e.g., sales made in interstate commerce. (Rev. & Tax. Code § 6051; see, e.g., Rev. & Tax. Code §§ 6352, 6396.) A sale at retail is a sale for any purpose other than resale in the regular course of business. (Rev. & Tax. Code § 6007.) When sales tax does not apply, use tax measured by the sales price applies to the use of tangible personal property purchased from a retailer for storage, use, or other consumption in California, unless the use is exempted or excluded from taxation by statute. (Rev. & Tax. Code §§ 6201, 6401.)

Although you state that you are a “printing broker,” you are actually buying and reselling brochures. Thus, you are the retailer of such brochures. Under the facts stated above, your sales occur outside of California. (See generally, Reg. 1620(a)(2)(B).) Thus, your sales of brochures to customers in California are not subject to California sales tax.

Since the sales tax does not apply, and your customers are purchasing their brochures for use in California, your purchasers are liable for California *use* tax measured by the sales price of the brochures. (Rev. & Tax. Code §§ 6201, 6401.) Generally, your customers in California, e.g., the CPA hotel owner, who purchase brochures from you are the persons responsible to report their purchases of the brochures for use in California on line 2 of their sales and use tax returns, and remit the use tax which is due to the state.

However, you should be aware that a retailer who comes within the definition of a “retailer engaged in business in this state [California],” as that term is defined in Revenue and Taxation Code section 6203, is required to collect the applicable California *use* tax with respect to its sales of tangible personal property to California consumers. Thus, if facts exist which cause you to be defined as a retailer engaged in business in this state, *you* would be required to collect and remit to this Board the California use tax owed by your California customers.

Based upon the facts which you have provided, a potentially relevant definition of retailer engaged in business in this state is set forth in subdivision (b) of section 6203:

“Any retailer having any representative, agent, salesperson, canvasser, independent contractor, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property.”

The mere hiring of an unrelated photographer to take photographs in this state, and then to send the photographs to you outside this state would not bring you within the definition, quoted above, of a retailer engaged in business in California. Likewise, if *you* are in California to take photographs and *your* activity in this state does not involve selling, delivering, or taking orders for brochures or any other tangible personal property, then you would not be a retailer engaged in business in this state and you would not be required to collect use tax from your California purchasers.

However, under subdivision (b), quoted above, you would be regarded as engaged in business in California if you, or any representative for you, engages in any selling activities within the state. We note that in our experience it would be unusual for a retailer, such as yourself, to visit the hotel of a customer to take photographs, and have *no* additional interaction and discussion which is related to the sale and purchase of the brochures. Therefore, please be advised that if you or any representative engage in any activities beyond photography which constitute selling activities, such as soliciting sales, taking orders for sales, or making contacts for future sales, you will be considered as engaged in business in this state within the meaning of subdivision (b), and required to collect and remit the California use tax from your California customers.

Lastly, we address your question concerning the taxation of the sales or use of photographs which you pay an independent photographer to take and ship, pursuant to an agreement between you and the photographer, to you in Arizona. Neither you nor the California photographer owes California sales or use tax on the sale or use of such original photographs which do not return to this state. (Reg. 1620(3)(B).) Please also note that if you come to California yourself and take the photographs, returning to Arizona where you have the film developed, you have not made a taxable sale or use of the finished photographs in this state. However, any supplies which you purchase in California for use in the photography, such as the film, are subject to tax at the time of your purchase or use of them in this state.

I hope this information is of assistance. Please write again if we may answer any other questions. If you do write again, please include a detailed description of any business activities of Tal Rice Productions, its representatives, or yourself in California.

Sincerely,

Sharon Jarvis
Senior Tax Counsel

SJ:rz

cc: Out-of-State District Administrator - (OH)