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September 9, 1999

Ms. S--- C---
Senior Manager
State Tax Consulting Group
--- LLP
XXXX --- ---
--- ---, NY XXXXX-XXXX

Re: Request for Ruling

Dear Ms. C---:

I am responding to your letter dated June 15, 1999 in which you request a ruling concerning the sales and use tax implications of certain proposed business activities to be conducted in this state. I note, for your information, that Board staff does not issue rulings, although we are happy to give you our legal opinion. The only basis for relieving a person of liability from having relied upon advice from the Board is Revenue and Taxation Code section 6596. (Copy enclosed.) However, since you have not identified your client, this letter does not come within the provisions of section 6596.

Facts

You write that Company A is primarily engaged in the business of providing online electronic commerce services. The Company maintains a web-site that serves as a market place where online sellers and buyers can buy and sell tangible personal property using an online auction format. You write that, "Company A's web-site essentially offers a service that enhances, through automation, activities that have historically been conducted by and through a traditional newspaper classified ad."

Online sellers post a description of an item they wish to sell on the web-site. Generally, the company does not charge for a posted listing, but sellers who wish to highlight their merchandise may use the Company's premium listing services. You comment that, "These services are offered for a small fee and allow the seller to enhance their listing by having it placed on special pages, linked throughout the site, bolded on listing pages, or emphasized with special icons."

Buyers may search the web-site for merchandise of interest. The online seller sets the initial sales price and time period of item availability. Online buyers, at no charge, make offers on items through the web-site. The web-site serves as an electronic platform that automatically updates the listed price as offers are made on the posted items.

Sellers are automatically notified by electronic mail when another person has offered a higher price for an item. The person who has offered the highest price by the end of the allotted time is deemed the buyer and instructed how to contact the seller. The buyer and seller then coordinate with each other concerning how to exchange the consideration and the item sold.

You write that Company A is not a party to the transaction between online sellers and buyers, takes no responsibility for the availability or delivery of the items, and never takes possession of the merchandise.

Company A is incorporated outside of California; and its headquarters, employees, and computer servers are located outside of California. The Company proposes to move part of its business activities to California. It plans to open a California office and establish web-based activities in California by placing a computer server in this state.

Company A plans to establish a web-site on the California server which will function like the model described above, with the following changes. Company A will charge fees to online sellers who use the web-site. There will be an initial fixed and nonrefundable listing fee. For a larger fee, the seller may also choose various additional listing options designed to enhance the listing. Company A will also charge a percentage fee on the final sales price of the item offered for sale.

You write, "Company A's fees are not contingent on whether the individual seller and individual buyer complete the transaction by exchanging property and consideration. At the completion of the allotted time for the sale, fees will be charged to the seller unless there are no offers made on the listed property."

You reiterate that Company A will not be a party to the transaction between the seller and buyer, and further state:

"At no time will Company A take possession or title to any of the property being offered for sale. Company A will not participate in the consummation of the transaction between the buyer and seller. Company A will not collect consideration on behalf of the seller, nor will Company A assist the seller in delivering the property to the buyer. Company A will not provide insurance

service for the property being sold or escrow service for consideration being exchanged. Company A will only provide a web-site that provides listing services for sellers and an interactive online platform that is used to facilitate the sale of merchandise over the Internet by individual sellers and buyers.”

For purposes of this opinion letter, I assume that company A will not advertise itself as an “auctioneer”; that its contract with sellers does not state that Company A is an “auctioneer” or in the business of selling tangible personal property at auction; and that Company A will not be bonded as an “auctioneer.”

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. (Rev. & Tax. Code § 6051.) A sale of tangible personal property includes any transfer of title or possession of the property for consideration. (Rev. & Tax. Code § 6006.)

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.) Moreover, a retailer “engaged in business” in California who makes a sale of property subject to California use tax must collect the use tax from the purchaser and pay it to the state. (Rev. & Tax. Code § 6203.) A retailer who maintains an office in this state is considered engaged in business in California. (Rev. & Tax. Code § 6203(a).)

Revenue and Taxation Code section 6015(a)(1) & (2) define a retailer to include, “every person engaged in the business of making retail sales *at auction* of tangible personal property owned by the person or others . . . or in the business of making sales *at auction* of tangible personal property owned by the person or others for storage, use or other consumption.” (Emphasis added.) (Revenue and Taxation Code section 6005 defines the term “person” as it is used in the California Sales and Use Tax Law to include entities such as a firm, partnership, joint venture, limited liability company, or corporation, as well as an individual.)

Sales and Use Tax Regulation 1565 (copy included) which explains and implements the Revenue and Taxation Code sections concerning auctioneers reads:

“Persons engaged in the business of making retail sales at auction of tangible personal property owned by such persons or others are retailers, and are, therefore, required to hold sellers’ permits and pay tax measured by the gross receipts from such sales.

“The amount upon which tax is computed includes the amount charged for merchandise returned by a customer at an auction sale, if the sale is made under

an agreement or understanding at the time of sale that the property will not be delivered or that any amount paid will be returned to the bidder.

“Sales tax does not apply, however, when an owner of property delivers it to an auctioneer for auction and bids in his own property at auction.”

Civil Code sections 1812.600 et seq. also apply to auctioneers and auction companies. Civil Code section 1812.601, in pertinent part, defines an auction to mean “a sale transaction conducted by means of oral or written exchanges between an auctioneer and the members of his or her audience, which exchanges consist of a series of invitations for offers for the purchase of goods made by the auctioneer and offers to purchase made by members of the audience and culminate in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience.” The section also defines an auctioneer to mean “any individual who is engaged in, or who by advertising[,] or otherwise[,] holds himself or herself out as being available to engage in, the calling for, the recognition of, and the acceptance of, offers for the purchase of goods at an auction.”

However, since Company A will not advertise or otherwise hold itself out as an auctioneer, never will hold either title or possession of the advertised items, and will have neither the power to transfer title or possession of the items, nor the power to bind the seller and buyer to the sale, Company A will not be the retailer of the tangible personal property advertised on its California server’s web-site. Instead, Company A is providing a service only, which is not subject to California sales or use tax. (Reg. 1501.)

For your assistance, we are also including a copy of Regulation 1569 which concerns consignment sales. In pertinent part the regulation provides:

"A person [this includes a corporation] 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."

Under Regulation 1569 a consignment sale is a retail sale and the consignee is a retailer who must pay tax on the gross receipts from such sale. Thus, if Company A were to take possession of any item and had the power to transfer ownership of it to another, even if Company A was not deemed to be an auctioneer, Company A would be a consignee. As such, it would be a retail seller liable for payment of sales tax.

For your information, we further note that if in instances discussed in this opinion letter Company A is not the seller, e.g., non-consignment and non-auction sales, then the owner of the item(s) will be the seller. As such, the owner generally will be required to report and pay the sales tax. In instances where the owner is not required to report and pay sales tax, any California buyer will be required to report and pay the California use tax.

I hope this information is of assistance. Please write again if we may answer any further questions. Should you write again, please provide us with your client's name, samples of customer contracts and the rules for the auction format which will be posted on the web-site.

Sincerely,

Sharon Jarvis
Senior Tax Counsel

SJ:rz

Enclosures: copy of Revenue and Taxation Code section 6596, copy of Regulation 1565 and copy of Regulation 1569

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