175.0013

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
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January 19, 2010

REDACTED TEXT

Re: Tax Opinion Request 09-429
Unidentified
No Account Number

Dear REDACTED TEXT:

I am writing in response to your letter dated December 21, 2009, in which you ask for a legal ruling of counsel with regard to certain in-state activities involving unidentified out-of-state coin and bullion dealers (collectively, the dealers). Because the dealers are not specifically identified, this opinion does not provide a basis for relief under Revenue and Taxation Code section (Section) 6596. (See Cal. Code Regs., tit. 18, § (Regulation) 1705, subd. (b) [describing the circumstances under which relief from liability is available for reasonable reliance on written advice given by the Board].)

In relevant part, you state:

> This request concerns the applicability of Section 6203 of the Revenue & Taxation Code with respect to certain out-of-state coin and bullion dealers who participate in trade show activities in California. [The Board] has promulgated Regulation 1684 to interpret Section 6203, and we're now asking the Board for its interpretation of that regulation.
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> Background
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> …[A]n out-of-state retailer, for purposes of California's Sales and Use Tax Law, is not considered a retailer engaged in business in California with regard to sales of tangible personal property if the retailer's sole physical presence in California is to engage in not more than 15 days of "convention and trade show activities" in this state during any 12-month period and the retailer did not derive more than $100,000 of net income from such activities during the prior calendar year.

Issue

Several multi-day coin and bullion trade shows are held annually in California and they are very popular with out-of-state coin and bullion dealers. However, these dealers are concerned about their exposure under Section 6203 and, particularly, the meaning of "convention and trade show activities" with regard to the 15-day safe harbor statute. Because of the confusing interpretations of the scope of "activities" in Section 6203 that count toward the 15-day maximum, many out-of-state dealers have decided not to participate fully in some California trade shows.

One of the largest coin shows on the west coast is held three times a year in Long Beach, California. Each tri-annual show is open to the general public on a Thursday, Friday and Saturday. The afternoon of the Wednesday prior to the beginning of the public trade show is devoted primarily to dealers setting up for the next day. However, in some cases, dealers negotiate and transact some wholesale business between themselves on Wednesday afternoon. In effect, this is a private trade show, because the general public is excluded and no retail transactions occur.

Regulation 1684's application t our industry is unclear because it contains an open ended list of "any [activity of a kind] traditionally conducted at conventions." The activities specified in the regulation do not occur on the Wednesdays[;] however, occasional wholesale dealer-to-dealer sales do take place, leaving ambiguity in the law which creates uncertainty for our members who must ensure that they do not exceed 15 days presence in California.

In the Long Beach case, it appears that if a dealer transacts business with another dealer on the Wednesday set-up day, that day might count toward the 15-day maximum specified in Section 6203. However, if the dealer only used the time to set up for the next day's trade show and did not transact any business, it seems that that day should not count.

In addition to the three Long Beach shows, there are also two large two-day public coin shows annually in Santa Clara. There is also a half-day set-up day prior to each show, when some dealers may transact wholesale business.

Accordingly, assuming a dealer does not transact any business on any set-up day, and only does business on days the trade shows are open to the public, a dealer attending all of the Long Beach and Santa Clara shows may or may not violate the 15-day safe harbor rule, depending on whether the set-up days are counted. For example, if set-up days are counted, a dealer who did not transact any business would spend 18 days in California under Section 6203 if he or she attend[ed] all the Long Beach and Santa Clara shows. In contrast, if set-up days are not counted, the same dealer would only be deemed to have engaged in trade show activities

13 days. If set-up days are counted, it will have the effect of discouraging dealers from attending some of the trade shows, thus costing California both potential sales and income tax revenue.

Questions (all of which assume the dealer did not derive more than $100,000 in net income from California activities in the prior year.)

1. Assuming the facts outlined above, if a dealer attends the private trade show on the set-up day and only uses that opportunity to set up for the public trade show the next day, is it the Board's position that the set-up activity alone will count as a day toward the 15-day maximum? We hope your answer is "no."

2. Could a dealer submit a declaration that he or she will not enter into dealer-to-dealer transactions on the "closed to the public" day and still comply with Regulation 1684 by not counting the closed to the public day toward the 15-day requirement?

Discussion

Section 6203, subdivision (e) provides that, when all applicable requirements are met, certain convention and trade show activities in California will not, by themselves, cause out-of-state retailers to become retailers engaged in business in this state with a concomitant use tax collection obligation. As relevant to your inquiry, out-of-state retailers who seek to take advantage of the safe harbor provided by Section 6203, subdivision (e) must not, among other things, engage in more than 15 days (in whole or in part) of convention and trade show activities in California during any 12-month period.

Regulation 1684, subdivision (b), which the Board promulgated to implement, interpret and make specific the 15-day safe harbor at issue, provides, in relevant part, that:

> …the term "convention and trade show activity" means any activity of a kind traditionally conducted at conventions, annual meetings, or trade shows, including, but not limited to, any activity one of the purposes of which is t attract persons in an industry generally (without regard to membership in the sponsoring organization) as well as members of the public to the show for the purpose of displaying industry products or to stimulate interest in, and demand for, industry products or services, or to educate persons engaged in the industry in the development of new products and services or new rules and regulations affect the industry. [Emphasis added.]

In other words, with respect to trade shows, Regulation 1684, subdivision (b) explains that it is the selling activities at trade shows, inclusive of any solicitation activities prior to trade shows performed to induce potential purchasers to attend the trade shows, that re the focus of the safe harbor analysis. In other words, mere set-up activities prior to the beginning of a trade show (i.e., non-solicitation activities that occur prior to and not "at" the trade show) are not the focus of the

15-day safe harbor provided by subdivision (e) of Section 6203. Nor would such mere set-up (or tear-down) activities, which are pendent to activities that are protected by the safe harbor, appear to (1) constitute a place of business or (2) be squarely within the type of "selling, delivering, installing, assembling or the taking of orders for any tangible personal property" activities that would cause an out-of-state retailer to have a use tax collection obligation under the more general provisions of paragraphs (c)(1) and (c)(2) of Section 6203.

Accordingly, it is our opinion that reasonable time spent merely setting up (or tearing down) a display at the site where a trade show is to occur (or has occurred) should not count toward the 15-day safe harbor and would not, by itself, cause a trade show participant (here, the dealers) to become a retailer engaged in business in this state under paragraphs (c)(1) and (c)(2) of Section 6203. However, if any of the dealers participate in dealer-to-dealer business activities during set-up (or tear down) days, these days would count toward the 15-day safe harbor because such dealers would be participating in a private trade show in advance of (or after) the public trade show. Of course, if the dealers conduct activities in California in addition to mere set-up (or tear-down) activities before (or after) trade shows that would cause them to become retailers engaged in business in this state, such retailers would have a California use tax collection obligation. (See Rev. & Tax. Code, § 6203, subds. (c), (e).)

Finally, we accept as reasonable your suggestion that the dealers could document that a set-up (or tear-down) day should not be counted toward the 15-day safe harbor by submitting a declaration when they register for a trade show that declares that they will not participate in dealer-to-dealer business activities on the set-up (or tear-down) day(s) in question. Dealers who choose to engage only in mere set-up (or tear-down) activities on "closed-to-the-public days" should keep copies of the declarations they submit to trade show organizers for audit purposes. Obviously, such declarations would be insufficient if persuasive evidence (e.g., a dealer's books and records) establishes that the dealer, contrary to the dealer's initial intent, did engage in dealer-to-dealer business activities on the set-up (or tear-down) day(s) in question.

I trust that is response provides the guidance you are seeking. If any question or concerns remain, please do not hesitate to write again.

Sincerely,

Randy Ferris
Assistant Chief Counsel

RF/yg

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