



175.0016

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

916-445-2242

December 8, 1987

REDACTED TEXT

Re: California Sales and Use Tax Law

Dear REDACTED TEXT:

This is in reply to your letter of September 23, 1987 addressed to Senior Tax Counsel Les Sorensen, of the Legal staff of the State Board of Equalization (Board). You have requested our opinion regarding the application of the Sales and Use Tax Law to certain hypothetical catalog sales situations posed by your client.

We note that the Board will not be bound by this opinion since your client was not identified in your letter. (Revenue and Taxation Code §6596.)

Our opinion in this matter is based upon the following information contained in your letter. An Oregon based company sells tangible personal property featured in a catalog directly to the public. The customers are located throughout the United States, including California. The customer can order the merchandise from the Oregon company by using a toll free number. The Oregon company now wishes to sell its goods on a wholesale basis to California retail stores in which it has no interest. In addition, plans to distribute the company's catalog through one of the California retail stores is being considered. The company is also planning to hire a marketing consultant based in California to help it select and develop catalog merchandise for sales throughout the United States. The marketing consultant would be an independent contractor and would perform all consulting work in Oregon.

You have asked three different questions in connection with the above scenario. We will answer each of your questions following a summary of the applicable rules and regulations that apply.

The California sales tax and use tax are two complementary taxes which effectively operate as a single tax because the use tax is never imposed as a duplicate tax along with the sales tax. The sales tax is imposed upon all retailers for the privilege of selling tangible personal property at retail in California. (Revenue and Taxation Code Section 6051.) The use tax is imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for storage, use, or other consumption in this state. (Revenue and Taxation Code Section 6201.)

The term "retailer", as used in Revenue and Taxation Code Sections 6051 and 6201, is defined to include every seller who makes any retail sale or sales of tangible personal property, and every person engaged in the business of making sales for storage, use, or other consumption. (Revenue and Taxation Code Section 6015(a) and (b).) A "retail sale" means a sale of tangible personal property for any purpose other than resale in the regular course of business. (Revenue and Taxation Code Section 6007.) A "sale" or "purchase" as used in Revenue and Taxation Code Section 6051 and 6201, respectively, is defined to mean any transfer of title or possession of tangible personal property for a consideration. (Revenue and Taxation Code §§ 6006(a), 6010(a).)

The place of sale or purchase is the place where the property is physically located at the time the act constituting the sale or purchase takes place. (Revenue and Taxation Code Section 6010.5.) Unless otherwise agreed to, title passes to the buyer at the time and place at which the seller completes their performance with reference to the physical delivery of the goods. (Cal. U. Com. Code Section 2401 (2); Cal. Admin. Code, tit. 18, Section 1628(b)(3)(D).)

The liability for the use tax is on the purchaser. (Revenue and Taxation Code Section 6202.) However, the collection of the use tax is the responsibility of every retailer engaged in business in California and making sales of tangible personal property for storage, use, or other consumption in this state. (Revenue and Taxation Code Section 6203; Cal. Admin. Code, tit. 18, Section 1684.) A "retailer engaged in business in this state" means in pertinent part:

"(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

"(b) Any retailer having any representative, agent, salesman, canvasser, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property."

(Revenue and Taxation Code Sections 6203(a) and (b).)

Effective January 1, 1988, the definition of a "retailer engaged in business in this state" will also include:

"(d) Any retailer soliciting orders for tangible personal property by means of a telecommunication or television shopping system (which utilizes toll free numbers) which is intended by the retailer to be broadcast by cable television or [sic] other means of broadcasting, to consumers located in this state.

"(e) Any retailer who, pursuant to a contract with a broadcaster or publisher located in this state, solicits orders for tangible personal property by means of advertising which is disseminated primarily to consumers located in this state and only secondarily to bordering jurisdictions.

"(f) Any retailer soliciting orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any banking, financing, debt collection, telecommunication, or marketing activities occurring in this state or benefits from the location in this state of authorized installation, servicing, or repair facilities."

"(g) Any retailer owned or controlled by the same interests which own or control any retailer engaged in business in the same or a similar line of business in this state.

"(h) Any retailer having a franchise or licensee operating under its trade name if the franchisee or licensee is required to collect the tax under this section.

"(i) Any retailer who, pursuant to a contract with a cable television operator located in this state, solicits orders for tangible personal property by means of advertising which is transmitted or distributed over a cable television system in this state."

(Revenue and Taxation Code §6203, as amended by Stats. 1987, ch. 1145, §2.)

I assume in this opinion that all of the sales made by the Oregon company are delivered by means of the United States mail or delivered to a contract or common carrier in Oregon for delivery in California.

The sales tax does not apply in this case because the place of sale is in Oregon rather than California. That is, the act constituting the sale is the transfer of title. The transfer of title takes place when the Oregon company delivers the items to the post office in Oregon, or to the common carrier or contract carrier in Oregon. Thus, our answers to your questions concern only the use tax.

1. Does California use tax apply to the wholesale purchases by California retail stores?

The wholesale purchases by the California retail stores are not subject to use tax because the California stores are not purchasing the items for the purposes of storage, use, or other consumption in this state. Instead, the California retail stores intend to resell the goods to the final consumer. Therefore, the purchases from the Oregon company by the California retail stores for resale are not subject to any California use tax.

If there are any doubts as to whether the Oregon company is a "retailer engaged in business in this state", the better practice is for Oregon company to obtain resale certificates from all the California retailers who purchase tangible personal property from the Oregon company as proof of a sale for resale. A resale certificate relieves the seller from the duty of collecting the use tax if it is taken in good faith from a person who is engaged in the business of selling tangible personal property and who holds a valid seller's permit as provided for in Revenue and Taxation Code Section 6066. (Revenue and Taxation Code Section 6242; Cal. Admin. Code, tit. 18, Section 1668(a).) If, however, the Oregon company is sure that it does not have any contacts with California sufficient to make them a retailer engaged in business in this state, then no resale certificates are needed from the California retailers because the collection of the use tax cannot be imposed on the Oregon company.

2. If one of these California retail stores distributed copies of the Oregon company's catalog to its retail customers, would that make the Oregon company a retailer engaged in business in this state so as to require the company to collect the use tax?

If the Oregon company distributes its catalog through a non-affiliated California store that purchases items from the Oregon company for resale, the Board's staff would consider the Oregon company to be a "retailer engaged in business in this state" under Revenue and Taxation Code Section 6203(b). The store displaying the catalogs would be viewed as a representative of the Oregon company that is promoting the sale of the Oregon company's products. Accordingly, the Oregon company would be responsible for collecting the use tax from California purchasers.

For your information, we note that if the toll-free number service, used by the Oregon company's customers, is located in California, the company is again within the definition of a "retailer engaged in business in this state" under Revenue and Taxation Code Section 6203(b). (Sales and Use Tax Annotation 220.0260.) If such were the case, the Oregon company would be responsible for collecting the use tax.

3. Would the retention of the marketing consultant make the Oregon company a retailer engaged in business in this state so as to require the company to collect the use tax?

So long as the work to be performed by the California based marketing consultant is limited only to assisting in the selection and development of merchandise for a mail order catalog, it is our opinion that the Oregon company is not a retailer engaged in business in this state under Revenue and Taxation Code Section 6203. Accordingly, the Oregon company is not required under such circumstances to collect the use tax.

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I have enclosed a copy of Sales and Use Tax Annotation 220.0260, and Sales and Use Tax Regulations 1628, 1668, and 1684 for your reference. If you have any other questions concerning the California Sales and Use Tax Law, please do not hesitate to contact this office.

Very truly yours,

John S. Wong
Tax Counsel

JSW:jb
Enclosures