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August 25, 1994

REDACTED TEXT

Re: Seller's Permit Number - Unknown

Dear REDACTED TEXT:

This is a response to your letter received by us on August 1, 1994 regarding the application of tax to REDACTED TEXT's sales of vitamins to California residents. You state:

"We are a mail order company that sells vitamins. Until May 1991 we did not have a physical presence in your state, thus no nexus. Starting May 1991 we obtained a physical presence in your state establishing nexus, thereby, we started collecting sales tax and filing monthly returns.

"We have a program called REDACTED TEXT Continuity-Automatic Shipping Program which is a program where you can receive your reorders of vitamins automatically **without having to place a new order each month**. You place one order and you receive your vitamins automatically every six months or one year. For the next six or twelve months following the initial order, we mail the same order, automatically each month and charge the customer's credit card for the amount for that month's supply of vitamins.

"We actually took the initial Continuity orders in April 1991, prior to establishing nexus in your state. We started nexus in May of 1991."

You ask:

"Since the initial order was taken in April (a non-nexus period) and there is no reordering involved, would the next six months (May, June, July, August, September, and October) (now have nexus) of the Continuity order be taxable?"

Discussion

We assume that REDACTED TEXT ships its vitamins to its California customers from outside the state. Based on this assumption, California sales tax does not apply. (Rev. & Tax. Code § 6010.5, 6006(a); Cal. U. Com. Code § 2401.) Use tax does apply, however, to the

storage, use or consumption of property purchased from a retailer for use in California. (Rev. & Tax. Code §§ 6201, 6401.) This tax is imposed on the person actually storing, using or otherwise consuming the property within the state. (Rev. & Tax. Code § 6202.) A retailer engaged in business in this state is required to collect the applicable use tax from the purchaser at the time of the sale of property to be used inside the state. (Rev. & Tax. Code § 6203.) Thus, REDACTED TEXT's California customers owe use tax on their purchases. The question is whether REDACTED TEXT must collect this tax with respect to its shipments of vitamins to California customers after April 1991 pursuant to customer orders received before REDACTED TEXT became engaged in business in this state under Revenue and Taxation Code section 6203.

A sale takes place when there is a transfer of title or possession of property for a consideration. (Rev. & Tax. Code § 6006.) Generally, title passes when the seller completes its responsibilities with respect to physical delivery of the property. (See Cal. U. Com. Code § 2401.) When the property is shipped to the purchaser by common carrier, the seller completes its responsibilities with respect to physical delivery of the property upon tender of the property to the common carrier for shipment to the purchaser. (Id.)

You explain that REDACTED TEXT's automatic shipping program involves one customer order for either six or twelve monthly shipments of vitamins. Title to each shipment accordingly passes at the time HSN places each monthly shipment in the mail or delivers them to a common carrier for shipment. This means that a sale occurs each time REDACTED TEXT makes a monthly shipment of vitamins to its California customers. REDACTED TEXT's shipments in May 1991 and beyond thereby constitute sales to its California customers while REDACTED TEXT was a retailer engaged in business in this state. REDACTED TEXT is liable for any use tax it was required to collect from its California customers with respect to such sales. (Rev. & Tax. Code § 6204.)

We have been unable to ascertain your seller's permit number. Please advise us as to your seller's permit number as soon as possible so that we can place a copy of this letter in the appropriate file. If you have further questions, feel free to write again.

Sincerely,

Warren L. Astleford
Staff Counsel

WLA:plh