STATE BOARD OF EQUALIZATION
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Mr. M--- I. E---
B--- & I---
XXX --- Street
P.O. Box XXXX
---, --- XXXXX-XXXX

Re: L--- B---, Inc.

Dear Mr. E---:

This is in response to your letter dated December 13, 1996. You ask whether certain activities by your client L--- B--- will bring it within the provisions of Revenue and Taxation Code section 6203, California's nexus statute. You state:

> "L--- B--- would conduct in California between one and five photo shoots per year. The photo shoots would be of products and models with or without props, houses or other structures in photos. Models may or may not be L--- B--- employees, although they usually are not. The resulting photos would be included in L--- B---'s catalogs or other media. Each photo shoot would be from one to four weeks in length and involve L--- B--- employees, freelance contractors and other suppliers of services. There would be between one and twelve L--- B--- employees present for each shoot. Products and props owned by L--- B--- would be sent to a site in California for use at the photo shoot. The estimated value of the products and props would be anywhere from $5,000 to $50,000. Once the photo shoot is completed, the products and props would be removed from the State. Prior to the start of the photo shoot, L--- B--- employees would be in California for some days to set up the photo shoot and would be in the State at the end of the photo shoot to wrap up matters. L--- B--- employees would also conduct scouting trips to locate sites for the photo shoots prior to the shoots. The photo shoots would take place on public or private property or state or federal properties. L--- B--- would obtain permission of the owners of the property to use their properties for the photos and would negotiate a fee for use to be paid to the property owner. L--- B--- would obtain shoot permits for state or federal properties with the appropriate authorities. Any required fees would be paid to officials of the State or federal government by L--- B---."

This is your fifth letter on this subject, and my fifth response.[1] As discussed in my previous letters to you, any retailer who is defined to be engaged in business in California within the meaning of Revenue and Taxation Code section 6203 must collect the applicable use tax with respect to its sales of tangible personal property to California consumers. I previously mentioned subdivision (b) of section 6203 as appearing to be the definition relevant to the limited facts you had provided. With the additional facts quoted above, it appears that subdivision (a) may also be relevant. These provisions define a retailer as engaged in business in this state to include:

> "(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, 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."

Under subdivision (b), L--- B--- would be regarded as engaged in business in California if its employees, contractors, suppliers, or other representatives engage in any "selling activities" within California. We do not regard the taking of pictures for catalogs and other advertising

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[1]Your first letter included only a general description of the activities in question and did not disclose the identity of your client. My response dated December 14, 1995 invited you to write again if you needed further information and asked that, if you did so, you provide a complete description of the activity involved. You then sent a follow-up question. By letter dated January 16, 1996, I responded that your letter did not include adequate information for me to answer your question, and I reminded you that my previous letter had asked that, if you had further questions, "you provide us a complete description of the activity in question, and *fully describe* any entry into this state by your client's employees." I also asked "if you will be seeking a letter coming with Revenue and Taxation Code section 6596, please identify your client in your response to this letter." You did write again, but you did not identify your client. I answered your questions by letter dated April 4, 1996. You wrote again by letter dated August 13, 1996, this time identifying your client as L--- B---, asking whether L--- B--- would be regarded as engaged in business in California under the following circumstances: "L--- B--- also proposes to have a photo shoot conducted in California whereby pictures would be taken to be used in the L--- B--- catalog." Since you did not described the facts involved in the photo shoot transaction, I referred you to my previous correspondence on this issue. In the future, *please* provide all relevant information in your very first letter. If you fail to do so, our response will not be responsive to the issue of how tax applies to the real transaction in question. A follow-up letter that is required solely because you did not include all the relevant information not only detrimentally affects our efficiency in responding to all taxpayers' inquiries, it necessarily causes substantial delays in providing you the answer to your real question. Also, in the future, if you want a letter coming within section 6596, *please identify your client in your first letter* (and all subsequent letters). This is for your client's benefit as well as our own. Writing two letters when only one should have been necessary obviously has a deleterious effect on our efficiency. Furthermore, since a letter coming within section 6596 *never* has retroactive effect (section 6596 requires reasonable reliance on the qualifying letter, not on a previous letter regarding an unidentified taxpayer), your client will not obtain the protection it seeks until receiving the letter that replies to an inquiry that identifies the client and includes all relevant information. I assume that in your current letter, you have included *all* relevant information.

purposes as selling activities within the meaning of subdivision (b) of section 6203. L--- B--- would not be regarded as a retailer engaged in business in California under subdivision (b) based on the activities described in your letter. Of course, if any of L--- B---'s employees, contracts, suppliers, or other representative were to engage in any other activities on its behalf which constitute selling activities, such as soliciting sales, taking orders for sales, or making contacts for future sales, L--- B--- would be engaged in business in this state within the meaning of subdivision (b).[2]

The substantial nature of L--- B---'s presence in California described in your letter raises the question of whether it will have a location in this state. Subdivision (a) of section 6203 provides that a retailer is engaged in business in California if it has a location in this state, without regard to whether the retailer engages in any selling activities from that location. (See *National Geographic Society v. California Board of Equalization* (1977) 430 U.S. 551.) Thus, if L--- B--- is regarded as having a location in this state, it would be engaged in business in this state and it would be required to collect the applicable use tax from its California customers and remit such taxes to this state.

If L--- B--- were to arrange for a specific location for its employees to work out of to the exclusion of others, or if an area were identified as an L--- B--- area (e.g., by posting a sign), L--- B--- would generally be regarding as having a location in California within the meaning of subdivision (a). Similarly, if a photo site were secured through an agreement where L--- B--- and its employees and contractors had exclusive license, that site would be an L--- B--- location for purposes of subdivision (a). On the other hand, if the photo site were arranged through a non exclusive license where others had access to the photo site at the same time, then the site would not be regarded as an L--- B--- location for purposes of subdivision (a), even if L--- B--- paid a fee for the non exclusive license.

Sincerely,

David H. Levine
Supervising Tax Counsel

DHL/cmm

cc: Mr. Dennis Fox (MIC:92)
Out-of-State District Administrator (OH)
Mr. Robert Nunes (MIC:40)

[2]As you well know, nexus questions, whether interpretations of the United States Constitution or just interpretation of state statutes, such as here, often must be resolved by a case by case analysis. With that in mind, a rule of thumb might be that activities in creating the catalog would not bring a retailer within subdivision (b), while activities conducted on its behalf in California after the catalog is prepared would bring it within subdivision (b).

Ms. Pat Hart Jorgensen (MIC:82)