STATE OF CALIFORNIA

220.0117

STATE BOARD OF EQUALIZATION
450 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-2641

June 10, 1994

Mr. J--- F. K---, CPA
F--- & C---, P.C.
Certified Public Accountants
--- --- Square, Suite XXX
--- ---, PA XXXXX

Dear Mr. K---:

I am responding to your letter of April 21, 1994. You ask whether your client, an out-of-state retailer named S---, P---, Inc. ("S---"), is responsible for collecting use tax on merchandise sold into California.

California consumers can purchase S--- merchandise directly from its M--- mail-order division. Orders for such purchases are taken by telephone at the company's headquarters in Pennsylvania and the property is shipped directly to the consumer from Pennsylvania by UPS.

You state that with respect to M---, the company has no continuous or regular physical presence in California. I assume that by "company" you mean S---, inclusive of M---. You state that it has no employees, independent contractors, or other agents soliciting orders in California who receive commissions or other compensation from S---, nor does the company have any inventory or offices in California, owned or rented by it or any of its representatives. If a product sold by S--- requires repair covered by warranty, the work is performed in Pennsylvania (except with respect to engines whose manufacturer is responsible for the warranty repairs). S--- does not offer repair services for items it sells which are no longer covered by warranty. Such repairs are offered by authorized California dealers of its merchandise; S--- is not involved in such repairs.

California customers can also purchase S--- merchandise from authorized California dealers. S--- has a distribution network of wholesale distributors to whom it sells its merchandise. Those wholesale distributors in turn sell the merchandise to authorized

independent dealers. The dealers carry M---' brands as well as those of competitors. S--- has no direct contact with or any ownership interest in the dealers. You state that S---'s connection with the dealers (you also call them "distributors") can be severed at any time. You believe that S---'s connection with its dealers is so "loose" that it is basically nonexistent.

Discussion

Sales tax is imposed on the retail sale of tangible personal property in California. (Rev. & Tax Code § 6051.) When sales tax does not apply, use tax is imposed on the storage, use or other consumption of tangible personal property purchased from a retailer for use in California. (Rev. & Tax. Code §§ 6201, 6401). Although the use tax is imposed on the purchaser, if the retailer is engaged in business in this state, it is required to collect the applicable use tax from the consumer and pay it to the Board. (Rev. & Tax. Code §§ 6202, 6203, 6204.) As relevant here, "retailer engaged in business in California" is defined by subdivisions (a) and (b) of Revenue and Taxation Code section 6203 as follows:

> "(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."

You believe that the decision by the United States Supreme Court in the case of Quill Corporation v. North Dakota (1992) 504 US, 119 L.Ed 2d 91 applies here and that S--- is not required to collect California use tax because it does not have a physical presence in this state. The Court in Quill did conclude that a state could not impose a use tax collection duty on a retailer who had no physical presence in that state. However, please note that the physical presence required to impose a use tax collection duty does not have to relate only to the selling activity.

In National Geographic Society v. State Board of Equalization (1977) 430 US 551, the Court held that an office in a state for a purpose other than selling tangible personal property was sufficient physical presence upon which to base a duty to collect the state's use tax. Thus, S--- would be a retailer engaged in business in this state required to collect the use tax if it has a business location in this state for any purpose, even if that purpose were unrelated to the sale of tangible personal property. (Rev. & Tax. Code § 6203(a).) Furthermore, S--- would also be regarded as a retailer engaged in business in this state required to collect the use tax if it has any agents or representatives acting on its behalf in this state for the purpose of selling, delivering,

installing, assembling, or the taking of orders for any tangible personal property. (Rev. & Tax. Code § 6203(b).)

From the description you provide, it appears that the dealers are retailers who sell S---'s merchandise on their own behalf and not for S---. The facts as stated in your letter do not indicate that the dealers, or anyone else in California, acts as S---'s agent or representative for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property. Assuming that S--- has no agents or representatives in California acting on its behalf, and has no physical presence in this state, even a presence unrelated to the sale of tangible personal property, then we would agree that it is not a retailer engaged in business in California and thus is not liable to collect use tax on its mail order sales of merchandise to California consumers. Of course, the California consumers who purchase such property from S--- are liable for the applicable use tax.

If you have any questions, please do not hesitate to write again.

Sincerely yours,

Victor G. Matl
Tax Counsel

VGM:plh

cc: Out-of-state Sacramento District Administrator - OH