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January 15, 1997

Mr. J--- C---, Jr.
 --- & --- LLP
 XX --- Street
 --- ---, California XXXXX-XXXX

Re: ---&--- S---, Inc.
 Permit No. SC --- XX-XXXXXX

Dear Mr. C---:

You have been in contact with our Out-of-State District office regarding your client, --- &--- S--- Inc. In a letter dated December 21, 1995, you set forth facts which you believe shows that one of your client's corporate divisions did not have sufficient contacts with California to support the imposition of a use tax collection duty. In a letter dated April 12, 1996, Supervising Tax Auditor Kurt W. Colin explained that your client is regarded as engaged in business in California. You question the accuracy of this conclusion and have requested that the Legal Division review the facts, which you explain in your December 21, 1995 letter as follows:

“---&--- S--- is the operating subsidiary of T---, Inc., a holding company. Both companies are located in ---, Minnesota. ---&--- S--- has two manufacturing divisions. The B--- Division manufactures artificial proteins, and research and clinical diagnostic kits which incorporate these proteins. The H--- Division manufactures various controls and calibrators used to test H--- instruments.

“In recent years, B--- has had a significantly greater number of sales than H---. B--- sales are more than double the number of the H--- sales. In 1991 and earlier years, the sales of B--- and H--- were approximately the same.

“The customers of B--- include basic research laboratories (primarily universities) and clinical researchers, including B--- and pharmaceutical companies; government research laboratories (such as the NIH); and private research laboratories. The majority of the B--- sales are to the end-user. Approximately 75 percent of H--- sales are to medical equipment manufacturers and are for resale. The remainder of its sales are to hospitals and clinics in the

United States, many of which are nonprofit. Both the B--- and the H--- Divisions also have international distribution.

“Both divisions of ---&--- S--- have traditionally marketed and sold their products by way of telemarketing, mail order, and advertising in medical and other technical journals. The telemarketing, sales, and advertising departments are located in M---. All sales for both divisions were handled out of the M--- location. No sales representatives traveled to other states [except as discussed below]. Until 1992, B--- handled all marketing out of the M--- location. H--- also handle[d] the vast majority of its marketing in M---, however it has had one marketing representative who traveled to other states. This marketing representative handled the entire U.S. and occasionally traveled into California.

“As you requested, please find attached a list of all contacts made by the H--- Division marketing representative within the state of California for the years 1989 through September 1992. There were a total of six visits to the state over this three year period, none of which were regularly scheduled or recurring.

“No product orders were taken or filled by the H--- marketing representative who visited California during these periods. In addition, no samples or sales brochures were left at any of the locations which were contacted. *The sole purpose of these brief visits was to meet both customers and non-customers of the H--- Division to conduct informal market surveys within California regarding the use of the R&D H--- products.* Specifically, the marketing representative visited with the contacts for approximately one hour to inquire as to whether they currently used the R&D H--- products or the products of competitors and the benefits/complications they had experienced with each. The purpose of these questions was to identify customer needs which the H--- Division could better serve. None of the visits involved attending or demonstrating any products at trade shows. The marketing representative only conducted surveys of the products of the H--- Division.

“The B--- Division had no sales or marketing representatives other than those working exclusively in Minnesota until September, 1992. The B--- Division hired a sales representative to work in the Western Region, including California, beginning in September 1992. The sales representative was responsible for repeated regular visits to California throughout the year, and frequently returned to the same customers.”

California’s nexus provision is set forth in Revenue and Taxation Code section 6203. A retailer engaged in business in California within the meaning of section 6203 must collect the applicable use tax from its California customers and remit that tax to the Board. The provision relevant here is subdivision (b) which defines “retailer engaged in business in this state” to include:

“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.”

I note that, if any division of R&D was regarded as engaged in business in California, then any and all corporate divisions and other parts of R&D constituting a single person under Revenue and Taxation Code section 6005 (i.e., part of the same corporate entity) would be regarded as engaged in business in California. Thus, since B--- and H--- are part of the same “person” for purposes of the Sales and Use Tax Law, if H--- is regarded as a retailer engaged in business in California by virtue of the activities in question, B--- would also be so regarded, as would any other part of R&D. It appears from your letter that you understand this.

You assert that the representative’s business trips into California on R&D’s behalf were not on a regularly scheduled or recurring basis, and you apparently believe that this is significant to the application of section 6203. My understanding is that you also assert that the representative coordinated these business trips into California with her vacation, and that it is unlikely that any person would have represented ---&--- (including its corporate divisions) inside California had this representative not enjoyed California and its climate.

The fact that a representative who enters California and engages in activities coming within subdivision (b) of section 6203 does not enter California as part of “regularly scheduled or recurring” visits is not relevant. If the retailer is physically present in California (e.g., through a representative) for a purpose related to selling tangible personal property, then that presence inside this state comes within section 6203. I note, however, that we disagree with your characterization of these trips. During the three-year period in question, the representative regularly entered California on the retailer’s behalf, once during the first half of each year and once during the last half of each year. These business trips into this state averaged over a week (i.e., more than five business days). The representative visited many hospitals and clinics during each of her business trips into this state. Even if the test required regular and recurring visits, the retailer’s activities in this state during the period in question would easily satisfy such test.

Nor is it relevant that, by happenstance, an out-of-state retailer has a representative whose circumstances make it easier to represent the retailer in California. Regardless of why the person is representing the retailer in California (e.g., the retailer decides to send the representative into California, one or more of the retailer’s customers ask to have the representative sent to California and the retailer does so, or the retailer decides to send the representative into California because the representative understandably enjoys our state), the only question is whether the person in California acts on the retailer’s behalf in California for a purpose coming within section 6203.

The activities of the representative in California prior to 1992 are clearly selling activities coming within section 6203. Identifying specific customer’s need and making personal contact with customers is clearly a selling activity. Contacting non-customers regarding the retailer’s products is also clearly a selling activity, regardless of how the contact is characterized. For

example, characterizing an activity as conducting “surveys” does not insulate a retailer who benefits from a physical presence in this state to maintain or enhance its market for sales of tangible personal property from the obligation to collect California's use tax. That is, when a retailer is physically present in California, whether through employee, agent, or other representative, for the purpose of contacting customers in connection with the retailer's goods for sale in a manner to maintain or enhance the retailer's market in this state, the retailer is engaged in business in California under section 6203. That physical presence in California related to maintaining or enhancing the retailer's market in California is the substantial nexus with California that supports this state's imposition of a use tax collection duty on the retailer. (See, generally, *Standard Pressed Steel Co. v. Washington Rev. Dept.* (1975) 419 U.S. 560; *Scripto v. Carson* (1960) 362 U.S. 207.)

For the reasons discussed above, we conclude that ---&--- S--- was a retailer engaged in business in California within the meaning of subdivision (b) of Revenue and Taxation Code section 6203 during the period in question, including any of its corporate divisions such as B--- and H---.

Sincerely,

David H. Levine
Supervising Tax Counsel

DHL/cmm

cc: Mr. Dennis Fox (MIC:92)
Mr. Jerry Cornelius (MIC:40)
Out-of-State District Administrator (OH)
Mr. Kurt Colin (OHA)