



STATE BOARD OF EQUALIZATION

LEGAL DIVISION (MIC:82)
450 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082)
Telephone: (916) 445-5550
FAX: (916) 323-3387

JOHAN KLEHS
First District, Hayward

DEAN F. ANDAL
Second District, Stockton

CLAUDE PARRISH
Third District, Torrance

JOHN CHIANG
Fourth District, Los Angeles

KATHLEEN CONNELL
Controller, Sacramento

E. L. SORENSEN, JR.
Executive Director

June 21, 1999

Mr. N--- E---
XXXX XXth Avenue SW
---, Washington XXXXX

Re: Unidentified Taxpayer

Dear Mr. E---:

This is in response to your letter dated June 7, 1999 in which you ask:

“If I telecommute from California while working for my ---, WA company, will that constitute a nexus, and thus make my company responsible for paying California sales tax?”

You explain your situation as follows:

“I work for a web-based retailer in ---, WA. We sell books, maps, videos and apparel worldwide from our S--- website. Currently, our online customers who live in California pay no sales tax, because my company has no physical presence in California. I am a website designer and work from home as a salaried employee. I am not involved directly in sales or marketing

“I want to continue to work from home, but move to Nevada County in California (to be close to my children). I would set up a computer with a common internet connection in a room of my home. I would not host any company web pages from California.”

You describe your job as follows:

“Job title: Senior Designer

“Job Description:

“Under supervision of the Creative Director, responsible for improving the quality of communication in the company’s websites--including our online stores--through the following activities: Graphic design, information design, interface design, usability testing and evaluation, documentation, special projects, teaching, consultation, and quality assurance.

“Detailed descriptions:

“• Graphic design: Define how the page looks-sizes, shapes, positions and colors of objects and text on the web page.

“• Information design: How the information in the website is organized; what order it is presented in, how its organization is conveyed.

“• Interface Design: How the website’s functionality is made available to the user-designing the buttons, links, pulldown menus, and forms that allow the customer to use the site, find what they want, and buy things.

“• Usability testing and evaluation: Carry out tests to see how to make our website easier to use.

“• Documentation: Maintain and improve the company’s intranet design resource, including the style guide, branding manifesto, image library, design reference, etc.

“• Special Projects: Collaborate to design and/or build new areas of our websites, or redesign/upgrade existing areas.

“• Teaching: Hold monthly classes for other company designers to help them make better and faster pages for our websites and collaborate more effectively by developing a shared understanding and language of design.

“• Consultation: Provide interface and information design consultation to projects in the proposal or specification phase.

“• Quality Assurance: Monitor our websites and make recommendations to the Creative Director to improve the user experience and branding.”

Initially, I note that the applicable tax is use tax, not sales tax. When the sales tax does not apply, the use tax applies to the use of property purchased from a retailer for use in

California. (Rev. & Tax. Code §§ 6201, 6401.) The most common circumstance where the use tax applies rather than the sales tax is when the sale of property occurs outside California, such as in the case of your employer's sales. The use tax is imposed on the purchaser. (Rev. & Tax. Code § 6202.) However, if a retailer is engaged in business in California as defined in Revenue and Taxation Code section 6203, it must collect the use tax from its California purchasers and remit that tax to the Board.

The two provisions relevant to your inquiry are included in subdivision (c) of section 6203 and require the following retailers to collect the applicable use tax from their California purchasers:

“(1) 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.

“(2) 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.”

You note that it is possible for you to work either as an employee or as a full-time independent contractor. Neither of the provisions quoted above is dependent upon your being an employee of your employer as opposed, for example, to an independent contractor. That is, your employer may be present in this state through an employee or through a representative. Accordingly, it does not appear that sales and use tax considerations should affect the decision as to your status with your employer as an employee or as independent contractor.

If your home were regarded as an office or other place of business of your employer, then your employer would have nexus for purposes of California's use tax and would be required to collect use tax from its California customers. We assume that the only business activities conducted at your home will be the telecommuting activities included in your job description quoted above, and that no portion of your home will in anyway be held out to be what could be called a business location of your employer (e.g., the placement of a sign out front, or the holding of the monthly classes at your home). It appears, then, that your employer would not come within subdivision (c)(1) of section 6203.

The remaining question is whether your employer would be regarded as having a representative in this state for a selling activity included in subdivision (c)(2) of section 6203. On the one hand, persons who actually process orders taken over a retailer's website come within this subdivision. If such persons are located in California, the retailer would have to collect California's use tax. On the other hand, the person who originally designed the website as a one-time project would not be regarded as having engaged in a selling activity coming

within subdivision (c)(2) of section 6203. A more difficult question arises when a person has a continuing involvement with a retailer's website on which orders are taken. Nevertheless, as long as the person is engaged solely in website design, that person's presence in California would not mean that the retailer was required to collect California's use tax.

We assume that you will have no contact or involvement with your employer's customers, and that you are not involved with the actual orders placed by customers. It thus appears that your residing in California would not bring your employer within section 6203.

If you have further questions, feel free to write again.

Sincerely,

Timothy W. Boyer
Chief Counsel

TWB/cmm

cc: Mr. James E. Speed (MIC:43)
Ms. Freda Orendt-Evans (MIC:92)
Out-of-State District Administrator (OH)