

**STATE BOARD OF EQUALIZATION**

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February 16, 1990

Mr. M--- -, M---
M---, P---, R--- & P---
Attorneys at Law
XXXXX West --- Boulevard
--- ---, California XXXXX

Dear Mr. M---:

This is in response to your letter December 21, 1989. Your client, which you call Hardware, Inc., is a California corporation doing business in California. It sells tangible personal property to wholesalers and retailers throughout the United States.

Hardware supplies display cabinets to its customers, and you state that for purposes of this opinion we should consider these cabinets to be marketing aids within the meaning of Regulation 1670. Therefore, Hardware is the consumer of these display cabinets. (Reg. 1670(b).) Your letter relates to display cabinets Hardware furnishes to its out-of-state customers.

Hardware purchases the display cabinets from C--- M---, Inc. C--- M--- manufactures the display cabinets in Mexico. It has an office and small warehouse in California and uses the warehouse for temporary storage prior to delivery of the goods to a common carrier for shipment to its customers. It has no other business activities in California.

Hardware is considering the following two alternatives for distribution of its display cabinets to its out-of-state customers:

“Alternative 1

“It is proposed that C--- M---, Inc. will sell the display cabinets to Hardware, Inc., and pursuant to its agreement with Hardware, Inc., C--- M---, Inc. will distribute the display cabinets directly to Hardware, Inc.’s customers outside the State of California. C--- M---, Inc. intends to send the completed display cabinets by Mexican common carriers to its warehouse in the --- --- area for temporary storage pending delivery to a common carrier for shipment to Hardware, Inc.’s out-of-state customers. Hardware, Inc. will not take possession of the display cabinets that go to out-of-state customers at any time. Hardware,

Inc. may have one or two employees on the premises of C--- M---, Inc. in Mexico periodically for quality control purposes, and Hardware, Inc. may assume financial responsibility for the display cabinets during transit until they reach the out-of-state customers. Title to the display cabinets will transfer to Hardware, Inc.'s customers at the point of destination outside the State of California.

“Alternative 2

“This alternative is exactly like Alternative 1 except that rather than shipping goods from its Mexico manufacturing facility to its warehouse in the --- area, C--- M---, Inc. will ship the display cabinets to Hardware, Inc.'s customers outside the State of California directly from its Mexico manufacturing facility. Deliveries will be made by the use of common carriers, and title to the display cabinets will transfer at the point of destination.”

Discussion

Initially, we note that C--- M--- is a retailer engaged in business in California by virtue of its office and storage facilities located in California. (Rev. & Tax. Code § 6203(a).) Thus, if C--- M--- makes a taxable retail sale in California, it must report and pay sales tax. (Rev. & Tax. Code § 6051.) If it makes a retail sale for use in California, it must collect use tax from its purchaser and report and pay that tax to this state. (Rev. & Tax. Code § 6201.)

With respect to Alternative 2, sales tax does not apply because the sale does not occur in California. Since the property will be delivered from Mexico to a location outside California to Hardware's out-of-state customer, the property is not purchased for use in California by the purchaser (Hardware) and use tax does not apply.

With respect to Alternative 1, the display cabinets will enter California and the sale from C--- M--- to Hardware occurs in California when C--- M--- delivers the property to the common carrier. (Commercial Code § 2401(1). See Regulation 1628(b)(3)(D).) However, the sale is exempt from sales tax because the contract of sale requires the property to be shipped, and the property will be shipped, to a point outside this state by C--- M--- by means of delivery to a common carrier for shipment to such out-of-state point. (Rev. & Tax. Code 6396, Reg. 1620(a)(3)(B).) As discussed above, use tax does not apply since the property is not purchased for use in California.

In your legal analysis, you cite Revenue and Taxation Code Section 6009.1. We note that this provision has no application to the facts you present. That provision excludes certain activities from the definition of use for purposes of application of the use tax. Under the facts you present, the tax that would apply, except for the application of Section 6396, is the sales tax and not the use tax. Further, the person storing the property, the activity you argue as excluded from the definition of use under Section 6009.1, is the seller, C--- M---. Under the facts you describe, the storage by C--- M--- is not a use which would be subject to use tax but for Section 6009.1. That storage is not

subject to tax because C--- M--- is not using the property, but rather is holding the property for resale in the regular course of its business. (See Rev. & Tax. Code § 6007.) We note also that if Hardware takes possession of the display cabinets in California and delivers those cabinets to a common carrier in California for redelivery to its out-of-state customers, Section 6009.1 would not apply. Rather, Hardware's exercise of control by giving the display cabinets in California (by delivery to a carrier) to the out-of-state customers would be a use in California subject to use tax. (See Parfums-Corday, Inc. v. State Board of Equalization (1986) 187 Cal.App.3d 630.)

As we discussed by telephone on February 13, 1990, since you have not identified your client, this letter does not constitute the written advice contemplated by Revenue and Taxation Code Section 6596. If you have further questions, feel free to write again.

Sincerely,

David H. Levine
Tax Counsel

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