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

January 16, 1997

Mr. K--- M---
--- --- --- --- Incorporated
XXXX --- Road, Suite XXX
---, California XXXXX

Re: Unidentified Taxpayer

Dear Mr. M---:

This is in response to your letter dated January 6, 1997 regarding the application of Revenue and Taxation Code section 6203 where an out-of-state retailer sells tangible personal property to a California consumer by shipping the property from out of state and then also sending an employee from an out-of-state location into this state in order install the tangible personal property sold to the California consumer. You state:

> "It is our position that Section 6203 specifically excludes the term employee due to the fact that when an out-of-state retailer utilizes an actual employee in performance of those activities listed in Section 6203, the out-of-state retailer has established sufficient nexus to sustain the application of sales tax to the transaction.
>
> "Consequently, it is our opinion that transactions falling within the parameters of the above fact patterns are subject to sales tax and exempt from use tax. . . ."

We disagree. First, it is not possible for a sale to be subject to California sales tax unless the sale of the tangible personal property occurs inside California. (Rev. & Tax. Code § 6051.) Under the facts stated in your letter, it appears that the sale would occur outside California when the retailer ships the property to the California consumer. (UCC § 2401; Rev. & Tax. Code §§ 6006, 6010.5; Reg. 1628(b)(3)(D).) Thus, the retailer's sale is not subject to sales tax. Rather, the California consumer's use of the property is subject to use tax, which it must pay to the state unless it remitted such amounts to the retailer and the retailer was registered with the Board to collect such tax. (Rev. & Tax. Code § 6202; Reg. 1685.)

There is another reason that the transaction is subject to use tax and not sales tax in addition to that discussed in the previous paragraph. Even if the sale in question were to occur in California, the transaction would be subject to use tax, and not sales tax, when "there is no participation whatever in the transaction by any local branch, office, outlet or other place of business of the retailer or by any agent of the retailer having any connection with such branch, office, outlet, or place of business." (Reg. 1620(a)(2)(B).) That is, unless a retailer has some business location in California, it is not possible for it to incur sales tax on its sales. (Board opinion *In re the Petition for Redetermination of Long Beach Terminal, Inc.* (11/17/94).) Rather, the applicable tax with respect to such a retailer's sales would always be use tax owed by the purchaser. Furthermore, even if the retailer has a business location in California, if that location does not in any way participate in the sale, the applicable tax would be use tax owed by the purchaser.

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

Sincerely,

David H. Levine
Supervising Tax Counsel

DHL/cmm

cc: Mr. Dennis Fox (MIC:92)
Out-of-State District Administrator (OH)
Sacramento District Administrator (KH)