

Memorandum

495.0843

To : Mr. Mark Noack, Supervising Tax Auditor
San Jose District Office (GH)

Date: December 7, 1995

From : Kelly W. Ching
Staff Counsel

Subject: *M--- C--- Company*
SX -- XX-XXXXXX

This is a follow-up to our memorandum to you dated April 29, 1994 regarding the application of tax to the transfer of firearms. It has been brought to my attention that the April 29, 1994 memorandum does not include an analysis of the second paragraph of Revenue and Taxation Code section 6007 as it applies to transfers of firearms through M--- C--- (M---) by out-of-state retailers to California customers. As such, this memorandum supersedes and replaces our memorandum to you of April 29, 1994.

It is our understanding that your inquiry related to transactions in which California residents order firearms from out-of-state retailers, and the retailers ship the firearms to M---, a retailer of automobiles and an authorized California firearms dealer. M--- C--- charges a fee to register each firearm in California.

As you know, a retailer owes sales tax on its sales of tangible personal property in California, measured by gross receipts, unless specifically exempt by statute. (Rev. & Tax. Code § 6051.) A retail sale is a sale for any purpose other than resale in the regular course of business. (Rev. & Tax. Code § 6007.) A retailer may collect reimbursement for its sales tax liability if its contracts of sale provide for such reimbursement. (Civ. Code § 1656.1.)

When sales tax does not apply, such as when sales take place outside of California, the use tax, measured by the sales price of the property sold, applies to the use of property purchased from a retailer for storage, use, or other consumption in California, unless such use is specifically exempt from tax by statute. (Rev. & Tax. Code §§ 6201, 6401, Reg. 1620.) Although the purchaser owes the use tax, a retailer engaged in business in this state is required to collect the use tax from the purchaser and pay it to this state. (Rev. & Tax. Code §§ 6202, 6203.) The measure of the sales or use tax is the total amount of the sale, which includes the charge for any services that are part of the sale of tangible personal property. (Rev. & Tax. Code §§ 6011, 6012.)

It is not clear whether or not M--- is the retailer of the firearms. If it is the retailer of the guns, it owes sales tax on its gross receipts from the sales of the firearms. The fee imposed by the Department of Justice for processing Dealer's Record of Sale of Revolver or Pistol (DROS) forms in accordance with section 12076 of the Penal Code is imposed directly on the firearms dealer. If a dealer chooses to pass that fee on to the purchaser, the fee is includable in that dealer's taxable gross receipts. (Business Taxes Law Guide Annotation 295.1243 (8/30/82).) Therefore, if M--- is the retailer, the sales tax it owes is measured by the total amount of the sale price of the gun, which includes the Department of Justice fee if passed on to the customer, and which also includes the registration service charge.

I note that Penal Code section 12082 requires each sale of a firearm to be made through a gun dealer licensed in California pursuant to Penal Code sections 12071 and 12072(d). Penal Code section 12082 permits the seller and the purchaser to complete the sale through a registered dealer, without first having to pass title to the dealer.

For situations in which private parties transfer firearms in California between themselves, and they do so through a dealer such as M---, with the dealer simply registering the firearm without taking title to it at any time, the dealer will not be regarded as the retailer of the firearm. Rather, the private party who sells the firearm is the party making the retail sale. Unless the sale is exempt from tax, the private party seller owes sales tax measured by the total amount of the sale price of the gun, which includes the Department of Justice fee and the service charge, as discussed above.

A different analysis applies where an out-of-state retailer transfers a gun through M--- to a California purchaser for use in this state. Revenue and Taxation Code section 6007 states, in part:

“When tangible personal property is delivered by an owner or former owner thereof, or by a factor or agent of that owner, former owner or factor to a consumer or to a person for redelivery to a consumer, pursuant to a retail sale made by a retailer not engaged in business in this state, the person making the delivery shall be deemed the retailer of that property. He or she shall include the retail selling price of the property in his or her gross receipts or sales price.”

Business Taxes Law Guide Annotation 495.0790 (8/19/80) explains:

“**Agent for Nonregistered Seller.** Until an out-of-state retailer with a representative/agent in California registers with the Board as a retailer engaged in business in this state, it may be assumed that the retailer is not engaged in business in this state for purposes of Section 6007. Therefore, all deliveries in this state made by the representative/agent will be assumed to be taxable retail sales by the representative/agent. The representative/agent has the burden of

overcoming the assumption by establishing to the satisfaction of the Board that the out-of-state retailer was engaged in business in this state within Section 6203. If the representative/agent satisfactorily overcomes the assumption, the deliveries by the representative/agent will not be considered taxable retail sales even though the out-of-state retailer has not registered with the Board as a retailer engaged in business in this state.

“To overcome the assumption, the representative/agent must establish to the satisfaction of the Board that the out-of-state retailer regularly sells to California consumers and has the tangible personal property delivered by in-state representative/agents. An infrequent sale through an in-state representative/agent will not suffice to overcome the assumption that an unregistered out-of-state retailer is not engaged in business in this state.

“If the representative/agent charges a service fee for completing the required paperwork, which fee the customer must pay to receive the tangible personal property, such fee is subject to tax. When the representative/agent must collect the tax, it should add the fee to the invoice price and collect tax on the total amount. When the out-of-state retailer must collect the tax, it should also collect tax on the invoice price plus the fee, even if the fee is paid directly to the representative/agent by the customer.”

Therefore, when M--- completes the registration paperwork and delivers a firearm to a California purchaser for an out-of-state retailer not registered with the Board as a retailer engaged in business in this state, it is presumed that M--- is the retailer of the firearm. In such a case, M--- would owe sales tax on the total amount of the sales price of the gun, including the Department of Justice fee if passed on to the customer, and including the service charge. M--- should request a copy of the out-of-state retailer's invoice for each sale so that it will know the amount to which tax applies.

If M--- establishes to the satisfaction of the Board that the out-of-state retailer was engaged in business in this state under section 6203, as discussed in the annotation quoted above, its deliveries for that retailer will not be considered taxable retail sales made by M---, even if the out-of-state retailer has not registered with the Board as a retailer engaged in business in this state. In such cases, as well as in situations in which the retailer is in fact registered as a retailer engaged in business in this state, the out-of-state retailer has the duty to collect the use tax under section 6203. That retailer should collect tax on the invoice price of the firearm, plus the service fee, even if the fee is paid directly to M--- by the customer. Again, the DROS fee passed on to the customer should be included in the measure of tax.

We apologize for any inconvenience our April 29, 1994 memorandum may have caused. If, based on the previous memorandum, you advised M--- that it would not be required to pay sales tax to the Board, please advise M--- upon your receipt of this memorandum that if it failed

to collect reimbursement from its customers and failed to pay sales tax in reasonable reliance on advice you gave based on our previous memorandum when it was otherwise obligated to do so, it will be relieved of liability for that amount of sales tax. As of the date of your follow-up advice, however, M--- is required to pay sales tax on its retail sales of firearms, as discussed above.

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

KWC:cl

cc: Out-of-State District Administrator