State of California **Board of Equalization**
Legal Department-MIC: 82

Memorandum

700.0270

To : Mr. Larry Micheli, Supervisor
Loc. Rev. Alloc. Sect. (MIC:27)

Date: April 8, 2003

From : John L. Waid
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Subject: [No Permit Number]
Out-of-State Retailers
In-state Sales Employees
Regulation 1802(c)(1) Threshold

I am answering your memorandum to me dated November 22, 2002. I apologize for the delay. You ask about apparent conflicts between two of my opinions regarding the allocation of local use tax when the sales negotiations are made through an in-state representative of the retailer and more recent oral interpretations. You attached copies of two memoranda dated December 28, 1999, to then-Assistant Chief Counsel Gary J. Jugum, and December 29, 1999, to then-Supervisor of the Allocation Group Robert Wils. In those memoranda, I concluded that when title passes out of state, use tax applies no matter the residence status of the in-state employee, and the $500,000 threshold in Regulation 1802(c)(1) applies to determine if the local use tax revenue is distributed directly to the location of use or through the medium of the county-wide pool.

1. Sales Tax v. Use Tax.

You indicate in your memorandum that in recent conversations we have concluded that if the employee negotiating the sale in California is domiciled here, then the order is not sent directly to an out-of-state office as required by the regulation. If, however, the employee is not a resident but merely travels through, then his activities would be attributed to the out-of-state office out of which he works.

In both of those paragraphs, my conclusion was that, no matter the residence status of the sales agent, if title passed out of state, use tax applied to the transaction. That is correct. Under Regulation 1620(a)(2)(A), if there is participation in the sales by an in-state office of the retailer and title passes in this state, then the transaction is subject to sales tax. If either of those elements is missing, the sale is subject to use tax. (Reg. 1620(b)(1).) Thus, whether or not there is some sort of in-state participation in the sale by an office of the retailer, if the title to the goods passes out of state, the transaction is subject to use tax.

2. $500,000 Threshold (Reg. 1802(c)(1).

In this portion of the discussion, we assume that title to the property passes out of state so that use tax applies to the transaction. Subdivision (c)(1) provides as follows:

> "When the order for the property is sent by the purchaser directly to the retailer at an out-of-state location and the property is shipped directly to the purchaser in this state from a point outside this state, the transaction is subject to the local use tax ordinance of the participating jurisdiction where the first functional use is made. Operative July 1, 1996, for transactions of $500,000 or more, except with respect to persons who register with the Board to collect use tax under Regulation 1684(b) (18 CCR 1684), the seller shall report the local use tax revenues derived therefrom directly to such participating jurisdiction."

The residence status of the sales agent was not an issue in either of the memoranda you cite. You are correct that we have concluded that here the residency status of the employee does affect the way the local use tax revenue is reported. If the person negotiating the sales is an employee of the retailer and is domiciled and routinely conducts sales negotiations here, the employee's residence would be considered an in-state place of business of the retailer under Regulation 1620(a)(2)(A). As a result, the order is not sent by the purchaser directly to the retailer's out-of-state office. As one of the criteria for direct allocation required by the regulation — the purchaser sending the order for the property to the retailer at an out-of-state location — is not satisfied in such situations, the local use tax must be reported to the place of first functional use through the medium of the county-wide pool.

If, however, the employee negotiating sales in state is not domiciled here, there is no local place of business of the retailer participating in the sale under Regulation 1620. The sale must then be subject to use tax under Scripto v. Carson (1960) 362 U.S. 207. Under Regulation 1802(a)(2), an employee's activities are attributed to the sales office out of which he works. Thus, it is entirely proper to regard, in this instance, the order as having been placed directly with the retailer's out-of-state office. If the other criteria of subdivision (c)(1) were met, then the local use tax would be reported directly to the location of the place of first functional use.

JLW:ljt

cc: Mr. Charles Gentry (MIC:39)