



STATE BOARD OF EQUALIZATION
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001
TELEPHONE (916) 445-6450

March 25, 1970

Law Offices
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Suite XXX --- ---
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P--- B--- G---, Inc.

Attention: Mr. Richard D. Kirshberg

Gentlemen:

Your letter dated March 4, 1970, addressed to Mr. Thomas P. Putnam has been referred to me for reply.

P--- B--- G--- Inc. (PBG), a New York corporation whose principal place of business is [City 1], is engaged in the business of conducting retail sales at auction. To date, its only direct contacts with the State of California have been two auction sales, which it conducted here, one on May 29, 1968, and the other on June 23, 1969. However, PBG is currently considering the possibility of opening an office in [City 2], California, and staffing it with employees who may engage in one or more of the following activities.

1. The contacting of California residents who may be prospective sellers of art objects, and inviting them to include such objects in auction sales conducted by PBG in [City 1].
2. The contacting of California residents (personally or by advertisement) who may be prospective purchasers of art objects at PBG's [City 1] auction sales, and notifying them of the time and place such objects will be available for inspection. Information regarding such objects may also be provided, upon request.
3. The appraisal of art objects for insurance or probate purposes. These objects would not be sold at auction by PBG.

With the exception of these activities, PBG would have no employees, representatives, independent contractors, agents or other persons acting on its behalf in California. Relatively few of PBG's sales would be obtained as a result of solicitations made here by the California office. Similarly, relatively few of PBG's sales would be made to California residents, and of these sales, relatively few would be made to residents who became interested in the property sold as a result of the activities of the California office. Property sold by PBG to a California resident would be delivered by PBG to the resident at the place of auction or to a common carrier selected by the resident. Under these circumstances, some residents might not bring property they had purchased from PBG to California.

You ask whether PBG would be required to collect California use tax pursuant to section 6203 with respect to sales of property purchased for storage, use or other consumption in California which occur at its auctions conducted outside California, if its future activities were limited to those described above.

If PBG opens an office in California and if its employees solicit or take orders for art objects, it will be a retailer engaged in business in this state within the meaning of section 6203(a) and (b), and it will be required to collect California use tax on its sales of property purchased for storage, use or other consumption in California which occur at its auctions conducted outside California to the extent that it may constitutionally be required to do so, that is, to the extent the property sold is delivered within California. (Scripto v. Carson, 362 U.S. 207, 212; General Trading Co. v. Tax Comm., 322 U.S. 335, 338; Nelson v. Montgomery Ward, 312 U.S. 373, 376; Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 363-366; Felt and Tarrant Co. v. Gallagher, 306 U.S. 62, 66.) Thus, PBG will be required to collect California use tax on such sales where property purchased is delivered to residents in California via common carrier if it is required by the (auction) contract of sale to provide for delivery to California, regardless of whether the residents became interested in the property they purchased as a result of the activities of PBG's office or employees, and regardless of whether the sales attributable to PBG's office or employees are relatively few. Pursuant to Nelson v. Sears, Roebuck & Co., supra, a retailer engaged in business within a state must collect use tax on all property sold in interstate commerce, and it is our position that a state's power to require a retailer engaged in business therein to collect use tax upon its sales may not be denied on the ground that the sales attributable to such a retailer's office or employees are few in number.

In Montgomery Ward & Co. v. State Board of Equalization, 272 A.C.A. 823, the court held that California could not require a retailer to collect use tax on sales made in its retail stores located near, but outside, the boundaries of California, where the purchasers had charge accounts bearing California addresses but took delivery of their purchases at the time of purchase. As a result of this decision, PBG will not be required to collect California use tax on its sales of property purchased for storage, use or other consumption in California which occur at its auctions conducted outside California where property purchased is delivered to residents at the places of auction, to common carriers selected by residents where PBG is not required by the (auction) contract of sale to provide for delivery to California, or to residents at points outside California.

You also state that PBG is considering the possibility of conducting regular auctions in California by opening an auction gallery here. In order to evaluate this possibility, PBG may send one of its officers to California for the purpose of conducting a market survey. It is contemplated that his activities would include meetings with various art dealers and collectors, and the evaluation of existing California auction houses and practices. As part of the survey, PBG's may hold two pilot auction sales in California, one in 1970 and one in 1971.

In this regard, you ask the following questions:

1. If one of PBG's corporate officers were to enter California and conduct the market survey described above, but thereafter PBG did not conduct any auction sales here and limited its activities in California to those other activities of the California office described above, would PBG be required to collect California use tax pursuant to section 6203 with respect to sales of property purchased for storage, use or other consumption in California which occur at auctions conducted by it outside California?
2. Assuming the same facts as set forth in 1. except that PBG did conduct the two pilot auction sales described above, would the answer be the same?
3. Assuming that PBG were to conduct regular auction sales in California, would the answer be the same?

In answering these questions, we are assuming that PBG will not be required to collect California use tax on its sales of property purchased for storage, use or other consumption in California which occur at its auctions conducted outside California because the property purchased is either delivered to residents at the places of auction, to common carriers selected by residents where PBG is not required by the (auction) contract of sale to provide for delivery to California, or to residents at points outside California.

1. In view of *Montgomery Ward & Co. v. State Board of Equalization*, supra, PBG would not be required to collect California use tax on such sales because one of its officers enters California to conduct a market survey.
2. The answer would be the same, even if PBG did conduct pilot auction sales in California, assuming that these sales are not connected to the auction sales conducted by PBG outside California. Sales tax would apply to the taxable gross receipts from these sales.

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3. Again, the answer would be the same, assuming that these sales are not connected to the auction sales conducted by PBG outside California. Sales tax would similarly apply to the taxable gross receipts from the California auction sales.

Very truly yours,

J. Kenneth McManigal
Tax Counsel

JKM:smb