220.0015

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001
TELEPHONE (916) 920 - 7445

November 14, 1994

Mr. D--- L. T---
--- --- & Co.
Suite XXXX, --- --- ---
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--- ---, CA XXXXX-XXXX

Re: Unidentified taxpayer

Dear Mr. T---:

As you know, your letter dated August 9, 1994 has been referred to the Legal Division for response. Your client is not currently registered to collect use tax from California purchasers. You state that your client has indicated a willingness to voluntarily register to collect California use tax on a prospective basis provided that California agrees to hold your client harmless for any liability incurred prior to the date of the agreement to register.

Initially I note that, if your client is liable under Revenue and Taxation Code section 6204 for the amount of tax it was required under Revenue and Taxation Code section 6203 to collect and remit to California, any agreement to "hold harmless" your client would have to be made through the settlement program authorized by Revenue and Taxation Code section 7093.5. I address only the question of whether your client was, and is, a retailer engaged in business in this state required to collect use tax from its California purchasers.

Your client makes sales by mail order, sending catalogs by U.S. mail throughout the United States and taking orders in another state via a toll free telephone number. Your client has no offices, warehouses, or mail addresses in California. However, it sometimes sends representatives (who are not California residents) into California locations to attend workshops and conferences. While in California, the representatives present exhibits of the products sold by your client. Although the general policy is that sales are not made at these conferences, an order may be taken and then forwarded to the out-of-state headquarters for processing.

Beginning March 1993, the branch manager of a Northwest plant that was closed began to make calls into California on a one-on-one basis. You note that this activity was beyond any activity that your client had previously engaged.

Discussion

You indicate your belief that the definition of "retailer" as set forth in Revenue and Taxation Code section 6019 is a basis for interpreting subdivision (b) of section 6203. This is incorrect. A retailer engaged in business in this state required to collect the use tax is defined by section 6203(b) to include:

> "(b) Any retailer having any representative, agent, salesperson, canvasser, independent contractor, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property."

There is no doubt that your client is a retailer within the meaning of the California Sales and Use Tax Law. That is, your client comes within the phrase "[a]ny retailer," and thus the only question remaining is whether it has any representative, etc., operating in this state under its authority related to its selling activity. If so, it is required to collect use tax. If not, and if it is not defined as a retailer engaged in business in this state under the other provisions of section 6203, then it is not required to collect the use tax. (Under the specific facts stated in your letter, it appears that the only basis that California would impose a use tax collection duty on your client would be subdivision (b) of section 6203.)

There is no doubt that your client had representatives in this state prior to March 1993 operating under its authority related to its selling activities in this state. This satisfies the specific requirements of section 6203(b). Furthermore, our understanding is that such representatives were sent into California for such purposes on a regular basis. Therefore, we conclude that your client was engaged in business in this state within the meaning of section 6203 and was required to collect the applicable use tax from California purchasers. It is liable for the taxes it was required to collect and remit to California. (Rev. & Tax. Code § 6204.)

Thus, we conclude that even prior to March 1993, your client was engaged in business in this state, was required to be registered to collect use tax, and owes the state the amount of tax it was required to collect. Beginning March 1993, your client even more clearly was engaged in business in this state, as you understand. We believe that your client would be well advised to voluntarily register with California. It is likely that the Board's audit and compliance staff will become aware of your client's presence in this state. When they do, they will be obligated to issue an assessment to your client for the amounts they owe. Since your client has not filed returns, the statute of limitations is eight years. (Rev. & Tax. Code § 6487.)

However, the Board sponsored the adoption of Revenue and Taxation Code section 6487.05. Section 6487.05 provides that, as of January 1, 1995, the limitations period for "qualifying retailers" is three years. A "qualifying retailer" within the meaning of this provision is an out-of-state retailer who has not been previously contacted by the Board regarding the provisions of section 6203, and who voluntarily registers with the Board. In addition, the retailer's failure to have registered previously must have been due to reasonable cause and not as a result of negligence or intentional disregard of the law. Thus, if your client has not yet been

contacted by the Board and if it comes forward and registers on or after January 1, 1995 (and before the Board becomes aware of its potential liability and contacts it), a determination issued by the Board for amounts due would not extend more than three years.

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

Sincerely,

David H. Levine
Supervising Tax Counsel

DHL:cl

cc: Out-of-State District Administrator
Mr. John Gibbs