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February 27, 1995

Mr. G--- D. H---
C--- W---
A Professional Corporation
XXX --- ---, Suite XXXX
---, MI XXXXX

Re: A--- N--- Association

Dear Mr. H---:

Your letter to the office of Honorable Ernest J. Dronenburg, Jr. has been referred to me for response. You inquire regarding the activities constituting nexus in California. I note that my response is limited to questions regarding the duty of out-of-state retailers to collect use tax from their California purchasers. Your questions regarding nexus requirements for California's franchise tax have been referred to the Franchise Tax Board, the agency that administers the franchise tax.

You are the General Counsel for the A--- N--- Association (ANA). ANA holds conventions, which you describe as primarily educational activities at which the general public may participate in all programs without paying an admission fee and without becoming a member of ANA. Each convention also has a bourse room at which ANA member dealers are charged bourse table fees to sell [tangible] material. Your questions relate to whether an ANA member who conducts a bourse table will be regarded as having nexus with California.

Initially, I note that in this context, "nexus" is a federal concept. If a person does not have nexus with a state for a particular purpose, then the state cannot impose its jurisdiction on that person, at least for the particular purpose for which nexus is lacking. However, as relates to use tax collection duties, the first question is whether the state's own laws extend those duties to a person.

California imposes use tax on the use of property purchased from a retailer for use in California, unless the use is specifically exempt from tax by statute. (Rev. & Tax. Code § 6201.) The use tax is imposed on the purchaser. (Rev. & Tax. Code § 6202.) However, if the retailer is engaged in business in California, then the retailer is required to collect the applicable use tax from the purchaser and remit it to the state. (Rev. & Tax. Code § 6203.) The tax that a retailer engaged in business in this state is required to collect from its purchasers constitutes a debt owed by the retailer to the state. (Rev. & Tax. Code § 6204.) The purchaser's liability is not extinguished until the tax has been paid to the state or has been paid to a retailer engaged in business in this state who gives the purchaser a receipt in the form set forth in Regulation 1686 showing that the tax has been paid. (Rev. & Tax. Code § 6202.)

Thus, when a California consumer purchases property from outside California for use in this state, that consumer owes use tax. The question relevant here is whether the out-of-state retailer, the ANA member dealer, is engaged in business in this state within the meaning of section 6203. If so, that dealer must collect the applicable use tax and remit it to this state. Section 6203 includes several definitions of "retailer engaged in business in this state." For purposes of this opinion, I assume that the only basis for regarding any of the ANA member dealers in question as engaged in business in this state is the definition of that term set forth in subdivision (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."

The clear wording of this statute is that a retailer is engaged in business in this state within the meaning of the Sales and Use Tax Law if it has <u>any</u> representative operating in this state under its authority for purposes related to selling tangible personal property. Thus, a dealer who purchases a bourse table in California for purposes related to selling [tangible] material or other tangible personal property will have a representative operating in this state for purposes related to selling tangible personal property. As such, that dealer would be a retailer engaged in business in California.

Please note that a dealer's participation in a convention in California is not the basis for regarding the dealer as engaged in business in California, but rather the dealer's selling activities in this state. Thus, if the dealer participates in the educational offerings of a convention, or the roundtables, seminars, and symposiums, that participation alone would not be a basis for regarding the dealer as engaged in business in this state. Furthermore, even if the dealer makes purchases of tangible personal property at the convention, that activity would not be a basis for regarding the dealer as engaged in business in this state. If, however, the dealer engages in selling activities in this state, e.g., by obtaining a bourse table for purposes related to selling tangible personal property, it will be regarded as engaged in business in this state within the

meaning of Revenue and Taxation Code section 6203. When such is the case, the dealer must register for collection of use tax and must collect that use tax with respect to all its retail sales into California, not just the ones related to its selling activities in California. (See Regs. 1684, 1686.)

I note that the Board is required by California Constitution Article III, section 3.5 to apply the Sales and Use Tax Law as adopted by the Legislature:

> "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> "(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it[s] being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> "(b) To declare a statute unconstitutional;
>
> "(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

Thus, without regard to decisions related to other statutes by courts of other states, or of federal courts, including the United States Supreme Court, the Board must continue to enforce subdivision (b) of Revenue and Taxation Code section 6203 as written unless and until an appellate court rules that its provisions are unconstitutional. Nevertheless, it may be helpful to you at this point if I explain why subdivision (b) of section 6203 as applied above remains valid and constitutional in light of recent events.

In 1987, North Dakota amended its use tax collection statute to extend its reach to certain out-of-state retailers. That provision was challenged by an out-of-state retailer, and was considered by the United States Supreme Court in Quill Corporation v. North Dakota (1992) 504 U.S. ___, 119 L.Ed.2d 91. Quill had no locations or employees in North Dakota; it solicited its business in that state through catalogs and flyers, advertisements in national periodicals, and by telephone. All property sold to North Dakotans was delivered to them by mail or common carrier.

The Court noted that previously, in National Bellas Hess, Inc. v. Department of Revenue of Illinois (1967) 386 U.S. 753, it had relied on both the Due Process Clause and the Commerce Clause. In Quill, the Court indicated that although these concepts are closely related, they are different. It held that due process was not offended by imposing use tax collection duties on Quill. (Id., 119 L.Ed.2d 104.) The Court then proceeded to conclude that, although a different conclusion might be reached today in a case of first impression, the conclusion in Bellas Hess is not inconsistent with the four-part test articulated in Complete Auto Transit, Inc. v. Brady (1977) 430 U.S. 274. The Court held that Bellas Hess "stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." (Quill, 119 L.Ed.2d 106.)

North Dakota argued that since the nexus requirements of the Due Process Clause and those of the Commerce Clause are equivalent and the nexus requirements of due process do not require physical presence, neither should the nexus requirements of the Commerce Clause require a physical presence. The Court stated that despite the similarity in phrasing:

> "the 'substantial-nexus' requirement is not, like due process' 'minimum-contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce. Accordingly, contrary to the State's suggestion, a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." (Id. at 107 (footnote omitted).)

The Court concluded that the rule will continue to be the same bright line test enunciated in Bellas Hess, which requires some physical presence in the taxing state before a retailer may be required to collect that state's use tax, even though the "rule appears artificial at its edges ...." (Id. at 108.)

Some have read Quill as increasing the physical presence required to impose a use tax collection duty. One example of this is a case you cite, Orvis Co. v. Tax Appeals Tribunal of the State of New York (1994) 612 N.Y.S.2d 503. This decision is a clear misreading of Quill. All that Quill did was to make it clear that the *conclusion* in Bellas Hess remains valid, even if not the entire analysis. That is, the *same* physical presence that would have been required under Bellas Hess is required now, under Quill.[1/] What Quill did in terms of the power of the states to impose use tax collection duties on out-of-state retailers in comparison to Bellas Hess can be summed up in a single word: nothing.

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[1/] Actually, the notion that the Court in Quill raised the bar to imposition of a duty to collect use tax borders on the absurd. One need only read the decision to know otherwise. For one thing, the Court made clear that the bar to imposition of use tax collection duties was *lowered* with respect to the Due Process Clause. The Court also made clear that its conclusion was based, in part, on the reliance of persons on the conclusion in Bellas Hess. Nowhere does the Court in Quill indicate that the bar was being raised beyond that imposed by Bellas Hess.

Thus, the safe harbor established in Bellas Hess remains in effect:

> "Bellas Hess ... created a safe harbor for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United States mail.'" (Quill, 119 L.Ed.2d at 108.)

The safe harbor of Bellas Hess, reaffirmed in Quill, applies only if the retailer has no physical presence in the taxing state. However, in California, a mere physical presence is insufficient to bring a retailer within the definition of retailer engaged in business in this state under our statutes. A retailer who sends representatives into this state for purposes unrelated to selling tangible personal property would have a physical presence in this state by virtue of those representatives in California, but that physical presence would not alone cause the retailer to be required to collect use tax from its California purchasers. Such non sales activities might include attending seminars or even making purchases of tangible personal property. However, if those representatives engage in selling activities in California, the physical presence in this state related to the selling activity is clearly substantial nexus as that term is used in Bellas Hess and Quill. (See also Standard Pressed Steel Co. v. Washington Rev. Dept. (1975) 419 U.S. 560; Scripto v. Carson (1960) 362 U.S. 207). That is, this is sufficient physical presence in California to impose a use tax collection duty on the retailer not only under California's statutes, but also under the United States Constitution.

You have asked specific questions about some basic fact patterns. I will try to give you some guidance below; however, please note that these issues are particularly fact driven. Prior to reaching a final conclusion with respect to any particular retailer, we would have to have knowledge of all relevant facts, including the nature of the retailer's business and the particular facts regarding its presence and business activities in this state.

You ask whether a dealer will be obligated to collect use tax on all [material] subsequently shipped from the dealer's home state to California when the dealer conducts a bourse table at one convention and does not make sales at any other California convention or show. Under these facts, the dealer will be a retailer engaged in business in California, and will be required to collect tax on all its retail sales to California purchasers as long as that dealer is regarded as a retailer engaged in business in California, whether the property is delivered to the purchasers at the convention, by mail after the convention pursuant to orders taken at the convention, or by mail unrelated to sales made or orders taken at the convention. The harder question is how long such a dealer will be regarded as engaged in business in this state.

At least one other state has considered a two-year presumptive presence in its state once the retailer has a presence in that state. California has no such extended presumptive presence. If the dealer's only physical presence in California was the single convention, we would probably regard it as engaged in business in this state through the following reporting period. Thus, if the dealer's presence in California related to selling activities was in May 1995, we

would probably regard it as engaged in business in California through the end of September 1995. However, as noted above, this question is particularly fact driven, and the facts in a particular case could require a different conclusion.

If the dealer is engaged in selling activities in this state at more than one convention, it is more likely that the dealer will be regarded as engaged in business in this state continuously. For example, if a dealer plans to engage in selling activity at the same convention every year, that dealer will be regarded as continuously engaged in business in this state even though attending only one convention per year. Another example would be a dealer that engages in selling activities at two or three conventions during a year, and then ceases such selling activities in this state. The dealer would likely be regarded as engaged in business in this state for the entire year; however, its status as a retailer engaged in business in this state would not continue indefinitely. Depending on the actual facts, that status might terminate at the end of the reporting period following the reporting period in which the dealer last engaged in selling activities in this state. Again, the actual facts might dictate a different result.

I hope this information is useful. If you have further questions, feel free to write again.

Sincerely,

David H. Levine
Supervising Staff Counsel

DHL:cl

cc: Mr. Travis S. Fullwood
Mr. Glenn A. Bystrom
Principal Auditor
Ms. Margaret Shedd
--- --- District Administrator

STATE OF CALIFORNIA **220.0033**

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July 14, 1995

Mr. G--- D. H---
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Suite XXXX
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Dear Mr. H---:

This is in response to your letter dated June 22, 1995 regarding whether your members will be regarded as retailers engaged in business in California by virtue of their selling activities in this state.

I responded to a previous inquiry in connection with the A--- N--- Association in a letter dated September 29, 1994. I noted that the nexus issue is complex, and that specific questions should be directed to our Out-of-State District office. You thereafter sent a letter dated November 30, 1994 to the office of Honorable Ernest J. Dronenburg. That letter was referred to Supervising Staff Counsel David H. Levine who responded in a letter dated February 27, 1995. We have concluded that Mr. Levine's letter provided you an accurate and detailed analysis and explanation of California's position.

Your members are retailers who compete with each other for customers. When some members can make sales without having to collect tax while other members must pay or collect tax, the former have a competitive advantage over the latter. States originally adopted use tax laws in order to protect their in-state retailers from unfair competition resulting from a differential imposition of tax on sales by in-state retailers versus sales by out-of-state retailers. A person who purchases tangible personal property from an out-of-state retailer owes the use tax. (Rev. & Tax. Code §§ 6201, 6202.) When a retailer engaged in business in this state makes a sale to a California consumer, the retailer must collect the use tax from the purchaser and remit it to this state. (Rev. & Tax. Code § 6203.) In this way, such out-of-state retailers are put on equal footing with in-state competitors with respect to the amount of tax they must remit to this state in connection with their sales.

A retailer is engaged in business in this state if that retailer has ***any*** representative or agent in this state for an activity related to sales of tangible personal property. (Rev. & Tax. Code § 6203(b).) When one of your members who is a retailer of [tangible property] comes into this state to utilize a bourse table for selling activities in this state, that person clearly comes within the provisions of subdivision (b) of section 6203. The application of this statutory provision is not conditioned on a minimum number of visits into this state. Rather, when the retailer or its employees or representatives enter this state for the specific purpose of engaging in such selling activities, the explicit provisions of our statute require us to impose a use tax collection duty on such retailer.

I note also that not only is this conclusion required by our statute, it is also the most fair application of tax for your own membership as a whole. As noted above, any different result would disadvantage your California members who are in competition with your out-of-state members.

This result is also entirely consistent with the requirements of the United States Constitution. The basis for the use tax collection duty is the physical presence of the out-of-state retailers (or their representatives) in this state in connection with their selling activities. This satisfies the requirements of the United States Constitution for the imposition of such use tax collection duties. (See, e.g., *Quill Corporation v. North Dakota* (1992) 504 U.S. ____, 119 L.Ed.2d 91; *Standard Pressed Steel Co. v. Washington Rev. Dept.* (1975) 419 U.S. 560; *Scripto v. Carson* (1960) 362 U.S. 207.)

In your November 30, 1994 letter, you directed our attention to the case of *Orvis v. Tax Appeals Tribunal of the State of New York* (1994) 612 N.Y.S.2d 502, an opinion of the Appellate Division of the New York Supreme Court (the supreme court is New York's trial court). In that case, the court concluded that 12 trips into the state over a three-year period did not constitute the substantial nexus required by the United States Supreme Court in *Quill*. As Mr. Levine explained, the court in *Orvis* had misinterpreted the *Quill* decision, and its conclusion therefore has no persuasive weight in California. Since Mr. Levine's letter, New York's highest court, the Court of Appeal, has issued its decision overruling the lower court, stating:

> "We do not read *Quill Corp. v. North Dakota* to make a substantial physical presence of an out-of-State vendor in New York a prerequisite to imposing the duty upon the vendor to collect the use tax from its New York clientele. The Appellate Division erroneously applied that exacting standard ...." (*Orvis v. Tax Appeals Tribunal of the State of New York* (June 14, 1995) 1995 N.Y. Lexis 1140.)

The New York Court of Appeal explains, as did Mr. Levine in his letter to you, that the bright line test of *National Bellas Hess, Inc. v. Department of Revenue of Illinois* (1967) 386 U.S. 753 remains the correct statement of the law. A use tax collection duty may not be imposed on an out-of-state retailer whose ***only*** presence in the taxing state is by United States mail or by common carrier. When the out-of-state retailer does have some physical presence in the taxing state, the safe harbor set forth in *National Bellas Hess* and *Quill* does not apply. The Court of Appeal explains that "*Quill* simply cannot be read as equating a substantial physical presence of the vendor in the taxing State with the substantial nexus prong of the *Complete Auto* test ...." The court held that the vendor's physical presence in the taxing state need not be substantial, but rather may be manifested by the presence in the taxing state of the vendor's conduct of economic activities in the taxing state by the vendor's personnel or by others on its behalf.

In summary, our statute imposes a use tax collection duty on a retailer with ***any*** representative in this state engaged in selling activities on the retailer's behalf, such as making sales at a bourse table. (Rev. & Tax. Code § 6203(b).) This statute does not condition its application on any minimum number of visits, and we are required to enforce the provisions of this statute as written. (Cal.Const.Art.III, Sec. 3.5.) Furthermore, it appears clear that it is constitutionally permissible to impose the use tax collection duty required by section 6203 on your out-of-state members who make sales of tangible personal property or who take orders for such sales at bourse tables in California (and who probably obtain contacts for future and continuing sales of tangible personal property to residents of California).

I apologize for any confusion regarding the subject matter of this letter. If any of your members have questions regarding their specific circumstances, they should contact District Principal Compliance Supervisor John Gibbs of our Out-of-State District Office at 450 N Street, P. O. Box 188268, Sacramento, CA, 95818-0268, Telephone: (916)322-1871. If I may be of further assistance, please let me know.

Sincerely,

Margaret S. Shedd
Legislative Counsel

MSS:cl

cc: Mr. Burton W. Oliver
Mr. Richard S. Ledford
Mr. Travis S. Fullwood
Mr. E. L. Sorensen, Jr.
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