



STATE BOARD OF EQUALIZATION

January 19, 1967

Gentlemen:

We have reviewed you letter of December 27, 1966 and offer the following comment.

You argue that the phrase, "...delivering...orders for any tangible personal property...." in Section 6203 of the California Sales and Use Tax Law, has reference to deliveries of merchandise "to the consumer." It is your contention, apparently, that the deliveries made in California by "F" are not made to the consumer even though they are made to the postal service or other carrier for transmission to the ultimate consumer. We have difficulty with this distinction. "F" has employees and vehicles in California for the purpose of at least participating in deliveries to California customers. This seems to us quite sufficient for purposes of Section 6203.

You state, and we do not disagree, that delivery to a California resident by post or carrier originating outside the state does not alone subject an out-of-state seller to liability to collect use tax. We also do not dispute your statement that the mere physical presence of an out-of-state seller's truck in California is insufficient to require use tax collection. You give the example of a truck present in California to pick up raw materials and transport them outside the state for processing, or a truck passing through California with merchandise destined for out-of-state customers. However, when the seller's employees and vehicles are in California for the purpose of making deliveries to California customers, or to other carriers in California for ultimate delivery to California customers, we feel that this is an activity sufficiently related to the transaction giving rise to tax liability to meet the test of "nexus", particularly when this is a regular recurring activity rather than the occasional type of activity held insufficient in Miller Bros. v. Maryland, 347 U.S. 340.

Another distinction which we believe weakens the force of Miller Bros. v. Maryland, is that in that case the customers were personally present at Miller's store in Delaware. As stated in Scripto v. Carson, 362 U.S. 207, 4 L.Ed. 2d 660:

"...the goods on which Maryland sought to force Miller to collect its tax were sold to residents of Maryland when personally present at Miller's store in Delaware. True, there was an 'occasional' delivery of such purchases by Miller into Maryland, and it did occasionally mail notices of special sales to former customers; but Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales...."

We also note your statement that "F" may load a batch of sealed unaddressed envelopes on a "F" truck for shipment to an independent contractor who supplies mailing lists to "F". You do not state where these independent contractors are located. If in California, the activities of these independent contractors would appear to constitute intrastate solicitation which may well be sufficient in itself to require use tax collection.

In summary, we are not convinced that the activities of "F"'s employees and representatives in California are so insufficiently related to tapping the California market that the requirement of use tax collection is not imposed upon the company by Section 6203.

We shall be glad to have you clarify the statement on page 4 of your letter with respect to the location of the independent contractors to which "F" sends batches of sealed unaddressed envelopes who supplies mailing lists to "F".

Very truly yours,

E. H. Stetson
Tax Counsel

EHS:fb [lb]