STATE OF CALIFORNIA

220.0093.775

STATE BOARD OF EQUALIZATION
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June 19, 1996

Mr. L--- M. B---
B--- Law Office
XXXX North --- Road, Suite XXX
---, Arizona XXXXX-XXXX

Re: S--- P---, Inc.

Dear Mr. B---:

This is in response to your letters dated March 14, and March 25, 1996 to the Board's Out-of-State District Office. You contend that your client, S--- P---, Inc. (hereafter "SPI"), is not a retailer engaged in business in California and is therefore not required to register with this Board and collect use tax on the property it sells for use in California.

We understand from your letters that SPI maintains a single business facility in Arizona where it designs and fabricates art creations and displays for use in conventions, promotions and other public displays. We assume that SPI's sales of its goods to its California customers occur outside this state or are otherwise not subject to California sales tax. You state that SPI occasionally sends its employees to California to set-up or install its visual displays for its customers inside this state. You also state that on one occasion SPI's employees were present in California for a one week period in order to install a large display for one of its larger customers.

California imposes a use tax on the sales price of tangible personal property purchased from a retailer for use in California, unless the use is specifically exempt from taxation by statute. (Rev. & Tax. Code §§ 6201, 6401.[1]) Use tax is imposed on the person actually storing, using, or otherwise consuming the property within this state. (Rev. & Tax. Code § 6202.) A retailer engaged in business in this state is required to collect the applicable use tax from the purchaser at the time of the sale of property to be used inside this state. (Rev. & Tax. Code § 6203.) The tax that a retailer engaged in business inside 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.)

[1] Use tax does not apply where the retailer's sale of the tangible personal property is subject to California sales tax.

Revenue and Taxation Code section 6203 defines when a retailer is engaged in business inside this state. As relevant to SPI, subdivision (b) defines a retailer engaged in business in this state to include:

> "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 if it has *any* representative operating in this state under its authority for purposes relating to the selling, delivery, installation or assembly of tangible personal property. This provision is consistent with the constitutional guidelines set forth by the United States Supreme Court in cases involving a state's taxing authority over out-of-state retailers.

In *Quill Corporation v. North Dakota* (1992) 504 U.S. 298, a retailer outside North Dakota challenged that state's amendment of its use tax collection statute which, as amended, reached the Quill Corporation. Quill maintained no locations or employees in North Dakota. Quill did, however, solicit business in that state through catalogs and flyers, advertisements in national periodicals, and by telephone. All property sold to persons in North Dakota was delivered to them by mail or common carrier.

The Court in *Quill* concluded that the rule for imposing a use tax collection duty on an out-of-state retailer would continue to be the same bright line test enunciated in *National Bellas Hess, Inc. v. Department of Revenue of Illinois* (1967) 386 U.S. 753. (*Quill*, *supra*, at p. 108.) That test requires some physical presence in the taxing state before a retailer may be required to collect a state's use tax, even though the "rule appears artificial at its edges ...." (*Id*.) This means that in the absence of specific Congressional legislation to the contrary, a state may not require an out-of-state retailer to collect use tax from its customers inside that state if that retailer has no physical presence within that state. The finding of a physical presence is, however, easily met and may be achieved through the use of independent contractors (see *Scripto v. Carson* (1960) 362 U.S. 207), a single employee working inside a state for its out-of-state employer (see *Standard Pressed Steel Co. v. Wash. Revenue Dept.* (1974) 419 U.S. 560), or even an out-of-state retailer's business location inside the taxing state that is unrelated to the sale of tangible personal property (*National Geographic Society v. California Board of Equalization* (1977) 430 U.S. 551, 556). California's Revenue and Taxation Code section 6203(b) is consistent with the rules from these cases since it requires actual physical presence inside the state before an out-of-state retailer is required to collect use tax from its California customers.

You state that SPI sends employees or representatives into California to set-up or install its visual displays for its customers. This physical presence in California makes SPI a retailer engaged in business inside this state pursuant to Revenue and Taxation Code section 6203(b). Since SPI's contact with California is not limited solely to mail, telephone, and common carrier,

it is not protected by the bright line test of *Quill* and California is not prohibited from imposing a use tax collection duty on your client. SPI is therefore required to register with this Board and collect California use tax on its sales of property to its customers for use inside this state.

Finally, the cases you cite, *York Mfg. Co. v. Colley* (1918) 247 U.S. 21 and *Proctor & Schwartz v. Superior Court* (1950) 99 Cal.App.2d 376, do not address whether a state may constitutionally impose a duty on an out-of-state retailer to collect use tax for that state.[2] That is the issue facing SPI. In that regard, Revenue and Taxation Code section 6203(b) requires SPI to do so and is within the Constitutional parameters set forth by the U.S. Supreme Court.

Please contact the Out-of-State District Office to facilitate SPI's registration. If you have any questions in the meantime, please write again.

Sincerely,

Warren L. Astleford
Tax Counsel

WLA:rz

cc: Out-of-State District Administrator
Mr. Joe Escobar (Out-of-State District - OH)

[2] We note, however, that the attachment to your March 25, 1996 letter lists *Current, Inc. v. State Bd. of Equalization* (1994) 24 Cal.App.4th 382 as a case you reviewed. That case struck down the provisions of former section 6203(g) which imposed a collection duty on a person, even if it had no physical presence in this state if a related corporation had physical presence inside this state. The court held that nexus does not exist solely based on this type of relationship in the absence of an actual agency relationship where the corporation with nexus in California acted as the out-of-state corporation's agent in this state. That is, the court held that some physical presence of the retailer is required, whether that physical presence exists through the retailer's employees, agents, or representatives inside this state. We note that SPI's nexus with California is based on section 6203(b) which requires actual physical presence inside this state. As discussed above, the provisions of section 6203(b) are constitutionally consistent with *Quill* and *National Bellas Hess*.