

**STATE BOARD OF EQUALIZATION**

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Executive Director

November 2, 1995

Ms. L--- A. S---
C--- S---, LLC
XXXX --- West Drive, Suite XXX
---, IN XXXXX-XXXX

Re: Unidentified Taxpayer

Dear Ms. S---:

This is in response to your letter dated July 20, 1995 regarding the application of tax to the activities of your client. You state:

- “1) Client is based in midwest with no offices or property within the state of California.
- “2) Client does not travel into the state of California to conduct business.
- “3) All work client performs is done in the midwest. Purchase orders are sent to our client in the midwest from an independent representative. Upon completion of the work, the product is shipped via common carrier fob shipping point, (midwest), to the California customer.
- “4) Client contracts with an independent representative to solicit sales. This contractor reps for various companies and is not an employee of our client. Per the contract between our client and the independent rep, the following duties have been agreed upon:
 - A) Representative will hold sales meetings with customers on a regular basis.
 - B) Call on customers a minimum of once a month.
 - C) Maintain an up-to-date supply of client catalogs, price sheets, etc.

D) Representative shall forward all orders to client.

“Upon review of the above facts, we respectfully request the state to issue a written opinion as to whether or not the above facts constitute our client having authority over the independent representative. If so, what section [of] the California code is that opinion based upon?”

DISCUSSION

Retail sales of tangible personal property in California are subject to sales tax, measured by gross receipts, unless specifically exempt by statute. (Rev. & Tax. Code § 6051.) When sales tax does not apply, such as when sales take place outside of California, the use tax, measured by the sales price of the property sold, applies to the use of property purchased from a retailer for storage, use, or other consumption in California, unless the use is specifically exempt from tax by statute. (Rev. & Tax. Code §§ 6201, 6401, Reg. 1620.) Although the purchaser owes the use tax, a retailer engaged in business in this state is required to collect the use tax from the purchaser and pay that tax to this state. (Rev. & Tax. Code § 6203.)

“Retailer engaged in business in this state” includes 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. (Rev. & Tax. Code § 6203(b).)

You state that your client contracts with an independent representative to solicit sales. You explain that this representative is not an employee of your client, and that the representative also “reps” for other companies. Please note that 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. This rule is consistent with the decision in Quill Corp. v. North Dakota (1992) 504 U.S. 298, in which the Supreme Court held that a retailer must have some physical presence in the taxing state in order for that state to impose a use tax collection duty on that retailer.

In a case in which the retailer’s only physical presence in a state was through the use of jobbers rather than employees to sell tangible personal property, the Supreme Court held that it was without constitutional significance that the retailer’s salespeople were not employees of that retailer. (Scripto, Inc. v. Carson (1960) 362 U.S. 207.) In Tyler Pipe Industries, Inc. v. Washington Department of Revenue (1987) 483 U.S. 232, the Supreme Court held that the showing of a retailer’s physical presence in a state cannot be defeated by the argument that the representative was properly characterized as an independent contractor. Therefore, it is not necessary for an individual to be your client’s employee, or to solicit sales exclusively for your client, in order for that individual to operate as your client’s representative within the meaning of

section 6203(b). (See Business Taxes Law Guide Annotations 220.0100 (11/30/64), 220.0230 (4/10/70).)

You ask whether your client's activities constitute your client's having authority over its independent representative. The phrase "under the authority of" in section 6203(b) refers to any relationship pursuant to which any power whatsoever is delegated by the out-of-state retailer to its California representative. (See Scholastic Book Clubs, Inc. v. State Board of Equalization (1989) 207 Cal.App.3d 734, BTLG Ann. 220.0020 (8/29/58.)) Your client is a retailer with a sales representative who is physically located in California when that person solicits sales of tangible personal property under power delegated to that person by your client; therefore, your client is a retailer engaged in business in this state under Revenue and Taxation Code section 6203(b). As such, your client must collect the applicable use tax from all of its California purchasers and pay that tax to this state, without regard to whether the purchases are made through your client's California solicitor, or entirely by mail or telephone.

As a retailer engaged in business in this state, your client must immediately register with this Board. (Rev. & Tax. Code §§ 6066, 6226.) For information regarding registering with this Board, please contact our Out-of-State District Office at 450 N. Street, P.O. Box 188268, Sacramento, CA 95818-0268, (916) 322-2010.

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

Sincerely,

Kelly W. Ching
Staff Counsel

KWC: cl

cc: Out-of-State District Administrator