STATE BOARD OF EQUALIZATION
LEGAL DIVISION (MIC:82)
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December 5, 1994

J--- T. L--- --- --- ---
XXX --- Avenue
--- ---, NY XXXXX

Dear Mr. L---:

This is in response to your letter to Mr. Gary J. Jugum, Assistant Chief Counsel, requesting a Private Letter Ruling concerning the factors necessary to create a sufficient nexus with California to permit California to impose, on an out-of-state retailer, a duty to collect use taxes. We apologize for the delay.

The State Board does not issue "letter rulings", but our legal section will give written opinions on most topics when a written request is received. If the request meets the requirements of Revenue and Taxation Code section 6596, the opinion may be relied upon to the extent provided in that section. Your letter does not meet those criteria, but I will give you my opinion as to the proper treatment of each hypothetical fact situation in your letter. (All further citations to section numbers will be to the California Revenue and Taxation Code unless otherwise indicated.)

CALIFORNIA STATUTES

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. (§ 6201.) The use tax is imposed on the purchaser. (§ 6202.) However, the retailer is required to collect the applicable use tax from the purchaser and remit it to the state if the retailer is "engaged in business" in California within the meaning of section 6203:

> "....
>
> "....
>
> "`Retailer engaged in business in this state' as used in this and the preceding section means and includes any of the following:

"(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

"(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.

"(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

"(d) Any retailer soliciting orders for tangible personal property by means of a telecommunication or television shopping system (which utilizes toll free numbers) which is intended by the retailer to be broadcast by cable television or other means of broadcasting, to consumers located in this state.

"(e) Any retailer who, pursuant to a contract with a broadcaster or publisher located in this state, solicits orders for tangible personal property by means of advertising which is disseminated primarily to consumers located in this state and only secondarily to bordering jurisdictions.

"...."

YOUR FACT SITUATIONS

You have posed an initial and four alternative fact situations, and request our opinion as to whether they create a sufficient nexus with California to allow California to require the out-of-state retailer to collect the California use tax.

In the initial fact situation, and also in each of the four alternative fact situations, the retailer is

"engaged primarily in the mail order sale of tangible personal property to persons throughout the country, some of whom are located in California. The Company relies on various media activities in select markets as its means of advertising its products. These include:

- Magazine advertising;
- Billboard advertising;
- Radio advertising; and
- Direct-mail advertising.

> "Customers place orders by calling the Company's "800" number which is answered at its office in another state, to place their orders. The products are shipped by common carrier directly to the buyer's designated location. The company sells almost all of its products directly to consumers. Some products may be sold to wholesalers located in California.
>
> "All of the Company's employees, personal and real property are located in the state in which its operations are located. No inventories have been or are maintained in California. No solicitation activities are conducted in California by the Company's employees, agents, independent contractors or representatives."

RESPONSE TO INITIAL FACTS

Since the "media activity" which you utilize includes a substantial amount of locally based advertising, as opposed to strictly national coverage, it is my opinion that under the initial fact situation, the company would be a retailer engaged in business in California and required to collect and remit use tax, within the meaning of subdivisions (d) and (e) of section 6203.

RESPONSE TO ALTERNATIVE FACTS

(1) Your first alternative set of facts adds the following to your initial set of facts:

"The Company's marketing representative (not a salesperson) will make one or two visits to radio stations in California each year to discuss the Company's commercial content and format."

It is my opinion that a "marketing representative" (who apparently restricts his work to the development of effective advertising for the retailer's product) is actively engaged in the business of selling the retailer's product. If the marketing representative is physically in California when that work is performed on behalf of the retailer, the retailer is engaged in business in this state within the meaning of subdivision (b) of section 6203, as well as under subdivisions (d) and (e).

(2) Your second alternative set of facts adds the following to your initial set of facts:

> "The Company would institute an expanded radio marketing campaign whereby a staff of marketing representatives (generally two or three people) make periodic visits (every four to six weeks) to discuss radio commercial content and scheduling of commercial time with radio station personnel located in California."

This second alternative set of facts merely adds more of what was being done in the first alternative set of facts. Our conclusion remains that the company is engaged in business in California within the meaning of subdivisions (b), (d), and (e) of section 6203.

(3) Your third alternative set of facts adds the following to your initial set of facts:

"The Company will send a promotional software listing of its products on a floppy diskette to its three largest customers in California. The Company will retain title to the licensed software."

If the floppy diskettes are a mere substitute for the more traditional products catalog, the diskettes would not, in themselves, cause the company to be engaged in business in California within the meaning of section 6203. Even if such is the case, the company is engaged in business in California within the meaning of subdivisions (d) and (e) of section 6203 as discussed in my response to your initial facts.

(4) Your forth alternative set of facts adds the following to your initial set of facts:

> "The Company's market representatives may visit wholesale vendors in California whose products the Company utilizes and incorporates in the manufacture of its products for eventual resale."

When the imposition of the duty to collect use tax depends on the retailer's employee or agent in California, section 6203 recognizes a distinction between the presence in California of an employee or agent that is engaged in an activity that promotes the sale of the retailer's product in California (§ 6203(b)), as opposed to the presence in California of an employee solely for other purposes. If the latter, a "place of business" within California would be necessary before a duty to collect the use tax would arise. (§ 6203(a).)

If the market representative is a mere buyer of product for the retailer, his or her California visit would not normally be one in which the retailer's product is being promoted in California. But when you label the visiting employee as a "market representative", it sounds as though some kind of sales promotion activity is involved with the visit. I would need more facts concerning the relationship between the retailer and the vendor, and the purpose of, and the activities conducted during, the market representative's visit to the California vendor, to determine whether this additional fact, alone, would cause the company to be regarded as engaged in business in California.

CONSTITUTIONAL ISSUES

Your question under "Issues Presented" requested that we address your fact situations under federal constitutional principles. The above discussions of your fact situations, and the conclusions reached, were made under the California statutes cited. The California Constitution (Art. III, § 3.5) forbids an administrative agency to declare a statute unenforceable, or refuse to enforce a statute, on the basis of unconstitutionality unless an appellate court has so determined. No appellate court has declared the cited statutes unconstitutional.

We are aware that many companies are taking a new look at their "nexus" activities in light of the United States Supreme Court case of Quill Corporation v. North Dakota, (1992) 504 US ___, 119 L Ed 2d 91. It should be noted that the only "safe harbor" contained in Quill is the one which the court restated from National Bellas Hess, Inc. v. Department of Revenue of Illinois, (1967) 386 U.S. 753:

> "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.' Under Bellas Hess, such vendors are free from state imposed duties to collect sales and use taxes.
>
> "Like other bright-line tests, the Bellas Hess rule appears artificial at its edges: whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office. Cf. National Geographic Society v. California Bd. of Equalization,430 U.S. 551 (1977); Scripto Inc. v. Carson, 362 U.S. 207 (1960)." (119 L Ed 2d 91, 108.)

I trust that this will assist you in your representation of your clients.

Sincerely yours,

Donald Fillman
Tax Counsel

DLF:wk

cc: Out-of-State District