STATE OF CALIFORNIA **465.1500**

**STATE BOARD OF EQUALIZATION**
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March 21, 1995

Mr. A--- D. F---
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P. O. Box XXXX
--- ---, CA XXXXX-XXXX

Dear Mr. F---:

This is in response to your letter dated January 31, 1995 regarding the interpretation of Revenue and Taxation Code section 6487.05. Under specified circumstances, this provision limits the otherwise applicable eight-year statute of limitations for assessment of tax deficiencies to three years.

Initially, I note that you request a ruling. As we have previously advised you (see, e.g., letter from me dated May 14, 1992 and letter from Staff Counsel Kelly Ching dated January 3, 1995), Revenue and Taxation Code section 6596 provides the only basis for relieving a person of liability for having relied on advice from the Board. You have not identified your client, and this letter therefore does not come within the provisions of section 6596, nor does it come within section 6596 for another reason. Section 6596 applies only with respect to written advice from the Board regarding whether or not a particular activity is subject to tax, and only when, in reasonable reliance on that written advice, the person did not charge or collect amounts designated as sales tax reimbursement or use tax from his or her customers or pay a use tax on the storage, use, or other consumption in this state of tangible personal property. Since your inquiry does not relate to whether an activity is taxable or not but instead relates to the length of the statute of limitations for periods that have already passed, this response does not come within the provisions of section 6596.

You characterize your client as "a retailer of tangible personal property located outside California." You state that all orders are approved at your client's out-of-state location and all property is shipped from the out-of-state location directly to customers via common carrier. You

note, however, that your client has maintained a sales office in California for several years, and has recently opened a second sales office. You also state:

> "The company's sales contracts include a provision (indemnification clause) that the buyer is responsible for the payment of any sales and use taxes that may be due as a result of the transaction. Not being familiar with California sales and use tax laws, the company has relied on the indemnification clause in its contracts and has not obtained a California seller's permit. We have recently explained that the company does have a California sales and use tax filing and collection responsibility due to its activities in the State. The client wants to make a good faith effort to come forward on a voluntary basis in order to comply with California statutes."

Except in cases of fraud, when the seller has not filed returns the statute of limitations for the assessment of a sales or use tax deficiency is eight years from the due date of the return. Revenue and Taxation Code section 6487.05, which became operative January 1, 1995, limits the statute of limitations to three years with respect to certain specified out-of-state retailers who would otherwise be subject to the eight-year statute of limitations. There are five condition for qualification under section 6487.05. Your inquiry relates only to the first requirement that the retailer be located outside this state.

You argue that your client is "located outside this state" since it is headquartered outside California and its principle business activities are conducted outside California. This is not sufficient to constitute "located outside this state" within the meaning of section 6487.05. For example, companies such as Sears and WalMart are headquartered outside California and their principle business activities are conducted outside California. Thus, under your interpretation, these retailers would be located outside California within the meaning of section 6487.05. However, this provision was not intended to extend to such retailers, even if they had not previously registered with the Board and they satisfied the other four requirements of section 6487.05.

If a retailer has a business location in this state, as does your client, it is engaged in business in this state, and it is required to collect the applicable use tax from its California purchasers. (Rev. & Tax. Code § 6203.) It is possible that such retailer could be regarded as located in this state because of its business location in this state. If that location in this state is involved in the retailer's selling activities in this state, an even stronger argument can be made that the retailer is located in this state for purposes of section 6487.05.

Section 6487.05 was adopted to encourage retailers who have been engaged in business in this state, and who have potential liability for failing to collect and remit use tax to the Board, to voluntarily come forward to register and pay the use tax owing and to collect and remit the appropriate use tax on an ongoing basis. Underlying this intent was the understanding that this

provision would apply to retailers whose only liability was for failing to collect and remit use tax. We believe that this factor is the touchstone for interpreting the term "located outside this state" under circumstances such as those presented in your letter. We conclude that under the facts you present, if the retailer's only liability incurred under the Sales and Tax Law is under sections 6203 (collection of use tax) and 6204 (tax required to be collected by the retailer under section 6203 is a debt of the retailer), the retailer should be regarded as located outside this state for purposes of section 6487.05.

However, if any of the retailer's liability under the Sales and Use Tax Law is for sales tax under section 6051, then the retailer cannot be regarded as located outside this state for purposes of section 6487.05. For the retailer to owe sales tax under the circumstances you present, the sale to the customer would have to occur in this state (i.e., title passage in this state), and there must be participation in the transaction by any local branch, office, outlet or other place of business of the retailer in this state or by any agent of the retailer having any connection with such branch, office, outlet, or place of business. (Reg. 1620(a)(2).) We do not believe that the legislation enacting section 6487.05 was intended to regard a retailer as "located outside this state" when the participation of a business location of the retailer in this state forms the basis of sales tax liability owed by the retailer. Section 6487.05 was clearly not intended to shorten the limitations period when the retailer owes sales tax.

You state that all property is shipped from your client's out-of-state location directly to customers via common carrier. If this is accurate, then all sales made by your client to California customers occurred outside California, and it would not owe any sales tax. Thus, under the facts stated in your letter, we would regard your client as located outside this state for purposes of section 6487.05. Please note, however, that if it had incurred any sales tax liability, then we would not regard it as located outside this state for purposes of section 6487.05, and it would not qualify for the shortened statute of limitations period provided by that provision. If you have further questions, feel free to write again.

Sincerely,

David H. Levine
Supervising Staff Counsel

DHL:cl

cc: Mr. Glenn A. Bystrom
Mr. Ramon Hirsig
Out-of-State District Administrator