STATE BOARD OF EQUALIZATION

July 9, 1959

D--- F--- Corporation
of I---
B---, Indiana

Your letter of January 29

Attention: Mr. C. W. R---
Comptroller

OS- - - XXXXXX
(now S- -- XX-XXXXXX)

Gentlemen:

Your letter of the above date has been referred to the legal staff for reply. We regret the delay; however, the problem raised therein concerning delivery by you with your own facilities into California pursuant to orders given to an out-of-state retailer not engaged in business in California has presented some difficulties involving much research and consideration.

As we understand the facts, it appears that using your own fleet of trucks you make deliveries into California pursuant to orders given you by retailers not engaged in business in California, who in turn receive orders for the merchandise from a California consumer. You state that you do not deliver the goods directly to the consumer but that you make the deliveries to a warehouse in California and that the out-of-state retailers in turn make arrangements to have the warehouse in California deliver the goods to the ultimate consumer.

Pursuant to the second paragraph of Section 6007 of the California Sales and Use Tax Law, which states:

> "The delivery in this State of tangible personal property by an owner or former owner thereof or by a factor, or agent of such owner; former owner or factor, if the delivery is to a consumer or person for redelivery to a consumer, pursuant to a retail sale made by a retailer not engaged in business in this State, is a retail sale in this State by the person making the delivery. He shall include the retail selling price of the property in his gross receipts."

It would appear that you are making a retail sale of these goods in this State since as an owner or former owner thereof you are making a delivery in this State of tangible personal property to a person for redelivery to a consumer pursuant to a retail sale made by a retail not engaged in business in this State. However, upon studying the United States Supreme Court cases which are pertinent to this problem, it is our opinion that the application of the second paragraph of Section 6007 should be applied only to a situation where the goods delivered were originally located in California, or where a local branch office of the owner or former owner of the goods aids in making the delivery. This doctrine has been expressed in the Board's Sales and Use Tax Ruling 55, copy enclosed (see Section A-1(a) thereof). Therefore, we are of the opinion that deliveries made by you into California under the above-described factual circumstances would not impose any liability on you under our Sales and Use Tax Law.

You have also inquired about items in your California showrooms which are "sold through a California dealer to a California customer". If the transaction is a sale by you to a California dealer, who in turn is purchasing the item for resale to a customer in the regular course of his business, you are not subject to any sales tax on the transaction. You should obtain from the California dealer a resale certificate substantially in the form prescribed by Sales and Use Tax Ruling 68, copy enclosed. If, however, the transaction is a direct sale by you to the consumer, you would be making a retail sale under the California Sales and Use Tax Law and, therefore, must include the sale price in your gross receipts reported on your sales and use tax return.

If we may be of any further assistance to you, do not hesitate to contact us.

Very truly yours,

Stanley G. Lerner
Assistant Counsel

SGL:fb

Enclosures

cc: West Los Angeles – Administrator
San Francisco – Administrator
Chicago – Administrator (CFH)

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001
TELEPHONE (916) 445-5550

April 5, 1990

Mr. W--- G---
Accounting Department
L---
XXXX --- -- XX
---, Missouri XXXXX

Re: S- -- XX-XXXXXX

Dear Mr. G---:

This is in response to your letter dated February 23, 1990 regarding your duties with respect to sales or use tax on your sales to purchasers outside California who have you ship the property sold to the purchaser's customers inside California. You state:

> "As an example, one of our customers in Texas (who has furnished us with a Texas resale permit) bought some wire cloth from us and had us ship the material direct to his customer in California. Is L--- liable for sales/use tax in this case and if not, what documentation is required to absolve us from liability?
>
> "In the past, our policy has been to charge tax unless our customer furnishes a California Sales Tax Exemption certificate. This has led to disputes with these customers who claim that they are purchasing the material for resale and that they can furnish us with a tax exemption certificate for the state in which they have their place of business."

As relevant here, Revenue and Taxation Code section 6007 states:

> "The delivery in this State of tangible personal property by an owner or former owner thereof or by a factor, or agent of such owner, former owner or factor, if the delivery is to a consumer or person for redelivery to a consumer, pursuant to a retail sale made by a retailer not engaged in business in this State, is a retail sale in this state by the person making the delivery. He shall include the retail selling price of the property in his gross receipts."

A seller who would otherwise be regarded as making a nontaxable sale for resale is defined by this provision as the retailer making a retail sale if: 1) the purchaser is a retailer not engaged in business in California; 2) the purchased property is delivered to a consumer in California; and 3) the sale occurs in California.

A retailer engaged in business in California must hold a California seller's permit or a certificate of registration for collection of use tax. (Rev. & Tax. Code §§ 6066, 6226.) If a purchaser is unable to issue you a resale certificate containing a valid California seller's permit or certificate of registration number, you should regard that purchaser as a retailer not engaged in business in California. Under the facts you state, you are selling the property to a retailer not engaged in business in California, and you are delivering that property to a consumer in California. If the sale occurs in California, you will be regarded under section 6007 as making a retail sale in California. For purposes of this opinion, I assume that your contract of sale does not provide for title passage prior to delivery.

There are three basic methods by which you will deliver purchased property to California consumers: 1) from an out-of-state location to a common carrier outside California for delivery to the California consumer; 2) from an out-of-state location to the California consumer via your own facilities (e.g., in your own trucks); and 3) from a location in California to the California consumer, whether by common carrier or by your own facilities (I note that you apparently have at least one California facility in [city], California).

A sale occurs no later than at the time the seller completes its responsibilities with respect to physical delivery of the property. (UCC § 2401.) With respect to the first method of delivery listed above, that time occurs when you deliver the property to the common carrier outside California for delivery by the carrier into California. That is, the sale occurs outside California. This means that the provision from section 6007 quoted above does not apply. Although the purchaser owes use tax with respect to the transaction, you will have no responsibility to collect that tax. The establish this, you should retain documentation that the sale occurred outside California (e.g., shipping documents establishing that the property was delivered to a common carrier outside California). You must also establish that the sale was for resale (e.g., an out-of-state resale certificate together with proof that you invoice the out-of-state retailer for the sale and not the California consumer).

When you deliver the property by one of the other two methods, from a California location or via your own facilities, the sale occurs in California (when delivered via your own facilities, the sale occurs in California at the time you deliver the property to the California consumer) and you will be regarded as the retailer (under section 6007) with respect to the purchase by the California consumer. When you deliver the property from a California location, you owe sales tax on that retail sale, measured by the California consumer's purchase price (i.e., the amount your purchaser charges the California consumer). You may collect reimbursement for your sales tax liability as provided by Civil Code section 1656.1

When you deliver property from an out-of-state location in your own facilities, sales tax does not apply if there is no participation in the transaction whatsoever by any branch, office, outlet, or other place of business of yours in California. (Reg. 1620(1)(2)(B).) When there is no such participation, your retail sale of that property in California is subject to the use tax, which you must collect and pay to this state. (Rev. & tax. Code §§ 6007, 6201, 6203, Business Taxes Law Guide Annot. 175.0150 (12/23/75).)

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

Sincerely,

David H. Levine
Tax Counsel

DHL:wak
2046C

M e m o r a n d u m

495.0880

To: Mr. Gary J. Jugum Date: August 21, 1992

From: David H. Levine

Subject: Annotation 495.0880

This annotation regarding drop shipments has recently been revised based on a letter from me dated April 5, 1990. That letter is not the most recent opinion from us on this subject.

My April 5, 1990 letter was written to L---. I concluded that a person who drop shipped property from outside California into California in its own facilities pursuant to a retail sale made by a person not engaged in business in California would be regarded as the retailer under section 6007 provided there was some participation in the transaction by a California location of that person. I recommended the rule be annotated, and the revision to 495.0880 is substantially as I had recommended.

Out-of-State District Principal Auditor Jack Warner wrote a memorandum to Principal Auditor Glenn Bystrom disagreeing with my letter. Mr. Bystrom agreed with my letter and believed the rule should be extended further. He believed that, even if the property was delivered by common carrier, the person drop shipping (pursuant to a sale by a person not engaged in business in California) should be regarded as the retailer if title to the property passes to the consumer in California. In a memorandum to us dated June 27, 1990, Mr. Bystrom asked if we agreed.

Mr. Bystrom's memorandum implied that we should treat the situation covered in my April 5, 1990 letter (delivery in the seller's own facilities) the same as delivery by common carrier. Don Hennessy and I agreed with Mr. Bystrom that when property is delivered from outside California to a California consumer, with title passing in California and participation in the transaction by a California location of the seller, there should be no distinction for purposes of section 6007 between delivery in the seller's own facilities or delivery by common carrier. We therefore decided that we should either extend the rule as Mr. Bystrom suggested or reverse my letter to L---.

You concluded that we should not extend the rule as proposed by Mr. Bystrom. I therefore advised Mr. Bystrom in a memorandum dated October 17, 1990 that we did not believe the rule should be extended as he proposed and that we were reversing my previous letter on the subject. That reversal was sent by letter of the same date to L---. Copies of the two letters to L--- and the memorandum to Mr. Bystrom are attached.

The confusion in revising annotation 495.0880 may be due to the bc in my April letter recommending the rule stated therein be annotated. I suppose I could have included a bc note reversing my recommendation to annotate in my memorandum to Mr. Bystrom or in my reversal letter to L---, or in both, but it did not seem necessary. Nevertheless, the annotation cited above should be revised to clearly reflect the old rule, which is that section 6007 applies only when the property in question is delivered from a point in California to another point in California.

enc

cc: Mr. Donald Fillman