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December 11, 1990

Mr. T--- C. S---
H--- O--- L---, Inc.
XXXXX --- Road
---, MO XXXXX

RE: SS --- XX-XXXXXX

Dear Mr. S---:

I am writing in response to your October 1, 1990 request for legal advice regarding the application of California Sales and Use Tax to transactions of H--- O--- L---, Inc. (H---) in this state. Specifically, you have asked whether the following are subject to sales and use tax: shipping charges; handling charges; clothing items; and Bibles.

The facts, based on your letter and materials in the H--- file, are as follows. H--- sells toys, gifts, fireworks and other goods through a "home party plan". The home parties are held by a "Hostess" who demonstrates and sells the merchandise. The Hostess takes orders, collects payment, and then mails these in to the H--- home office in ---, Missouri. H--- ships the merchandise by common carrier to the Hostess who delivers it to the customers.

The payments collected by the Hostess include sales tax reimbursement (based on the applicable state and local rate) and a handling charge of \$1.65. H--- charges the Hostess a "shipping charge" for parties which sell under \$125.00 worth of merchandise, based on the size of the order. It is unclear whether or how this charge is divided among the customers.

H--- gives the Hostess a "minimum of \$50.00 in hostess-free-goods for having a paid and shipped party." Larger "bonuses" are given for larger parties. H--- expects the Hostess to pay sales tax on the "hostess-free-goods". However, H--- reports and remits sales tax reimbursement from its other retail sales.

Unless specifically excluded or exempted from taxation by statute, all gross receipts from retail sales or purchases for use within this state of tangible personal property are subject to either sales or use tax. (Rev. & Tax. Code § 6051.) Although the legal obligation to pay sales tax is on the retailer, Civil Code Section 1656.1 provides that the retailer may seek sales tax reimbursement from the purchaser.

The use tax is imposed upon the storage, use or other consumption in this state of tangible personal property purchased from any retailer. (Rev. & Tax. Code § 6201.) The legal obligation to pay use tax is on the purchaser rather than the retailer. However, the retailer is required to collect and remit the use tax provided that the retailer is engaged in business in this state. (Rev. & Tax. Code § 6203.)

HANDLING CHARGES

Initially, I would like to note that H--- has been given written advice by this agency regarding the applicability of sales tax to handling and shipping charges. The advice contained in this letter is identical to that which we have previously given H---.

The definition of “gross receipts” includes “any services that are a part of the sale” (Rev. & Tax. Code § 6012). The handling charge must be included in the taxable measure of gross receipts (whether or not separately stated) as it refers to a services which is part of a taxable sale. In short, there is no tax exemption for handling charges.

SHIPPING CHARGES

Generally, sales tax is imposed on retailers based upon the gross receipts of all retail sales of tangible personal property in California (Rev. & Tax. Code § 6051). However, Section 6011, which defines “sales price,” and Section 6012, which defines “gross receipts,” exclude separately stated charges for transportation from the measure of tax. Specifically, Revenue and Taxation Code Section 6012 provides at subsection (3)(7) as follows:

“Gross receipts’ do not include... separately stated charges for transportation from the retailer’s place of business or other point from which shipment is made directly to the purchaser, but the exclusion shall not exceed a reasonable charge for transportation by facilities of the retailer or the cost to the retailer of transportation by other than facilities of the retailer; provided, that if the transportation is by facilities of the retailer, or the property is sold for a delivered price, this exclusion shall be applicable solely with respect to transportation which occurs after the sale of the property is made to the purchaser.”

Transportation charges are regarded as separately stated only if they are separately set forth in the contract of sale or other document issued at the same time as the sale. (Sales and Use Tax Regulation 1628(a).) The charges must clearly be only for transportation. For example, if the charges are for “postage and handling,” only that part of the charge that is for postage will be excludable from the taxable gross receipts and then only if the actual amount of postage is indicated. (BTLG Annotation 557.0450. The annotations reflect the staff’s past practices.) Further, shipment must be directly to the purchaser. The place where the sale occurs is immaterial except when transportation is by facilities of the retailer or when the property is sold for a delivered price. (Regulation 1628(a).)

Although shipping charges are separately stated by H--- they do not qualify for the transportation sales tax exclusion. The shipments are made to H---'s representatives (Hostesses) and not "directly to the purchaser" as required. Further, the charge is based "on the party size" and does not reflect the actual amount of postage. (Annotation 557.0450.) Under the facts you have given, H---'s charge for shipping must be included in the amount of taxable gross receipts.

CLOTHING

California has no exemption or exclusion from sales and use tax for clothing of any kind. Sales of clothing are subject to tax.

BIBLES

California has no sales and use tax exemption or exclusion for Bibles. Sales of Bibles are subject to tax.

"HOSTESS – FREE – GOODS"

According to your letter, H--- Hostesses receive a sales commission in the form of merchandise. H--- expects the Hostesses to pay sales or use tax on this merchandise.

The definition of "gross receipts" includes "the total amount of the sale... whether received in money or otherwise..." (Rev. & Tax. Code § 6012). Here, H--- receives the sale price not in money, but rather in services performed by the Hostess. The measure of tax is in the value of these services performed in exchange for goods. Absent any express agreement to the contrary between H--- and the Hostess, the value of the services is equivalent to the retail value of the goods received. Thus, if a Hostess receives \$50 worth of merchandise for hosting a party, taxable gross receipts would equal \$50 plus other applicable charges, such as handling.

It follows from this discussion that H--- is obligated to pay sales tax or collect use tax on its sales to Hostesses in this state. Since H--- maintains no inventory in California, we would designate the tax obligation as one for use tax rather than sales tax.

Please feel free to contact us again if you have further questions.

Sincerely,

Stella Levy
Tax Counsel

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