STATE BOARD OF EQUALIZATION

February 6, 1970

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Gentlemen:

Your letter dated December 16, 1969 addressed to Mr. T. F. Jordan, Sr. Tax Representative, has been referred to me for reply.

We understand that your client, "N", maintains a business office at San Francisco, California. According to your letter, this office is leased for two District Directors who are primarily engaged in counseling public officials, local safety councils and others engaged in safety activities throughout California, Nevada and Hawaii. The directors do not solicit orders for your client's program materials nor do they provide any services relating to your client's sales of materials, such as the transmission of orders or servicing of accounts. However, your client does make sales of tangible personal property in interstate commerce to various California purchasers for storage, use or other consumption here. Under these circumstances we have advised that your client is engaged in business in California within the meaning of Sales and Use Tax Law Section 6203 since it maintains an office here and has representatives here, and thus, that your client is required to collect California use tax on its sales to California consumers. It is your position that under the above-mentioned circumstances, your client is not a retailer engaged in business in California within the meaning of Section 6203 and that it is not required to collect use tax on such sales.

In Felt and Tarrant Mfg. Co. v. Gallagher (1938) 306 U.S. 62, the court confirmed that a foreign corporation which only transacted business interstate in character in California could be required to collect use tax which became due from California users without violating the commerce clause or due process clause of the 14th Amendment. At that time section 6 of the California Use Tax Law provided that a retailer making sales of tangible personal property for storage, use or other consumption in the state was required to collect use tax from the purchaser if he was maintaining a place of business in the state. Felt and Tarrant Mfg. Co. had leased offices for its California general agents and had paid the rent thereon. Although these agents were devoting their time and attention to soliciting orders for it, Felt and Tarrant Mfg. Co. was required to collect use tax under the statute not because of their agents' activities but because it maintained a place of business in California by leasing offices here in its name and by paying the rent thereon.

Section 6203 currently provides that any retailer engaged in business in this state and making sales of tangible personal property for storage, use or other consumption in this state shall collect use tax from the purchaser. "Retailer engaged in business in this state" means and includes any retailer maintaining, occupying or using an office in California. Since your client has an office in California, it is our position that it is a retailer engaged in business in this state within the meaning of Section 6203 (a), and that it is required to collect use tax on its sales to California consumers.

Although you acknowledge that Section 6203(a)* applies to any retailer maintaining an office in California, you assert that it was not intended to apply when the office bears no relationship to the retailer's selling activities, or, if it was intended to apply under such circumstances, that its application would not be constitutional. As we have advised your client, Section 6203(a) does not require that an office be used in selling activities. Thus, it is our position that the fact that the duties of the persons using the office are not directly relating to selling activities is not relevant. As to the constitutionality of this provision, we regard the section as constitutional until a court of competent jurisdiction says it is not. In this regard, we again refer to the fact that in Felt and Tarrant Mfg. Co. v. Gallagher, supra, Felt and Tarrant Mfg. Co. was required to collect California use tax because it was maintaining a place of business in California. [Now, see National Geographic v. SBE, 430 U.S. 551.]

Referring to Nelson v. Sears, Roebuck & Co., 312 U.S. 359, you assert that this is the furthest that the court has gone in requiring a company to collect state use tax on mail-order sales made in interstate commerce to customers in that state. Thus, you conclude that your client cannot be required to collect California use tax on its sales, because, unlike that case, here there is no relationship between the activities of your client's directors and its sales activities. In view of the Felt and Tarrant Mfg. Co. case, supra, we cannot agree. In addition, the contention that a person cannot be required to collect use tax if there is no relationship between its local activities and its mail-order sales activities was dismissed by the court in the Nelson case, supra, on page 364:

> "So the nub of the present controversy centers on the use of respondent as the collection agent for Iowa. The imposition of such a duty, however, was held not to be an unconstitutional burden on a foreign corporation in Monamotor Oil Co. v. Johnson and Felt and T. Mfg. Co. v. Gallagher. But respondent insists that these cases involved local activity by the foreign corporation as a result of which property was sold to its local customers, while in the instant case there is no local activity by respondent which generates or which relates to the mail orders here involved. Yet these orders are still a part of respondent's Iowa business ... They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts."

*Note that § 6206 has been re-ordered since this letter. Thus, references to subdivisions herein are subdivisions with different letters currently. SPJ 5/28/00

We would agree that your client is not a retailer engaged in business in this state within the meaning of Section 6203(b) if, as appears to be the case, its directors are not involved in any way in selling, delivering, or the taking of orders for any tangible personal property sold by it. Since your client is a retailer engaged in business within the meaning of Section 6203(a), however, we request that it complete the application previously forwarded to it and return it to us so that there will be no further delay in its proper registration.

Very truly yours,

J. Kenneth McManigal
Tax Counsel

JKM: smb [lb]