STATE OF CALIFORNIA

220.0249

STATE BOARD OF EQUALIZATION
LEGAL DIVISION (MIC:82)
450 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082)
Telephone: (916) 445-5550
FAX: (916) 323-3387

December 15, 1995

Ms. N--- J. O---
C---, K---, O---
XXX East ---, Third Floor
---, --- XXXXX-XXXX

Re: Unidentified taxpayer

This is in response to your letter dated October 26, 1995 regarding whether your client is required to collect and remit to this state the applicable use tax due with respect to its sales of tangible personal property to California consumers. You state:

> "The company is in the business of software development and sales. Its only office is in ---, Washington. It has no employees, inventory, or other assets located in your state.
>
> "The company's only software product is a package which typically sells for an average of $7,000 to $20,000. To date, the company has made less than 10 total sales of the package, one of which was to a customer located in your state. All of the sales were generated through contacts made at industry trade shows or referrals of potential customers form the sales reps of other software vendors. The company does plan to begin advertising in various trade journals, but has not done so up to this point. All sales were delivered to the customers via common carrier.
>
> "As part of the software sale, the company sometimes sends an employee into the state where the customer is located to conduct a two day customer training seminar. This has been the company's only physical presence in your state."

A retailer who is engaged in business in this state is required to collect the applicable use tax from its California purchasers. (Rev. & Tax. Code § 6203.) As relevant here, subdivision (b) of section 6203 defines "retailer engaged in business in this state" to include:

> "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."

You state that the company's only physical presence in this state has been the two day training seminar it conducts as part of its sale of tangible personal property. This is a clear and definite physical presence in this state related to a specific sale of tangible personal property. Further, it appears that the company also attends trade shows in this state for purposes of making sales. This again would be a clear and definite physical presence in this state for purposes related to sales of tangible personal property. Thus, it appears that company is a retailer engaged in business in California within the meaning of section 6203(b). Furthermore, it appears that the company's presence in California satisfies the requirements set forth in the decision in *Quill Corp. v. North Dakota* (1992) 504 U.S. 298, in which the Supreme Court held that a retailer must have some physical presence in the taxing state in order for that state to impose a use tax collection duty on the retailer.

I note also that a retailer is engaged in business in this state under section 6203 if that retailer has any representative or agent in this state for an activity related to sales of tangible personal property, and this is consistent with the requirements set forth in *Quill*. For example, in a case in which the retailer's only physical presence in a state was through the use of jobbers, rather than employees, to sell tangible personal property, the Supreme Court held that it was without constitutional significance that the retailer's salespeople were not employees of that retailer. (*Scripto, Inc. v. Carson* (1960) 362 U.S. 207.) In *Tyler Pipe Industries, Inc. v. Washington Department of Revenue* (1987) 483 U.S. 232, the Supreme Court held that the showing of a retailer's physical presence in a state cannot be defeated by the argument that the representative was properly characterized as an independent contractor. Therefore, it is not necessary for an individual to be the company's employee, or to act exclusively on the company's behalf, in order for that individual to operate as the company's representative within the meaning of section 6203(b). (See Business Taxes Law Guide Annotations 220.0100 (11/30/64), 220.0230 (4/10/70).)

Depending on the actual circumstances, when other software vendors make referrals, they could be doing so as the company's agent or representative within the meaning of section 6203. For example, if they received any remuneration for the referral, they would almost always be regarded as acting as the company's agent or representative for purposes related to sales, and if they did so while in this state, the company would have a physical presence in this state related to sales and would be regarded as engaged in business in this state under section 6203. On the

other hand, if the referral was without consideration and the referring party has no relationship whatsoever with the company, the referring party would not be regarded as acting on behalf of the company when making the referral. Since you have not described the nature of the referral and surrounding facts, we are unable to determine whether that would be an independent basis for finding that the company is engaged in business in this state.

Based on the facts you have provided, it appears that the company would be regarded as engaged in business in California, and that it is required to register with this state to collect the applicable use tax from its California customers. It may do so by contacting our Out-of-State District office at 450 N Street, 19th Floor, P.O. Box 188268, Sacramento, California 95818-0268, or telephone (916) 322-2010. The Out-of-State District office will also be happy to explain the availability of temporary permits and the filing requirements applicable to your client. If you have further questions, feel free to write again.

Sincerely,

David H. Levine
Supervising Staff Counsel

DHL/cmm

cc: Out-of-State District Administrator (OH)