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November 26, 1997

Mr. M--- A---
President
I--- A--- I---, Inc.
XXXXX --- Avenue
---, California XXXXX

Re: I--- A--- I---, Inc.
Account No. SR -- XX-XXXXXX

Dear Mr. A---:

Thank you for your letter dated August 10, 1997 which includes additional information concerning I--- Inc. (I---), doing business as "G---, G--- S---!", and copies of documents which we have not previously seen entitled "Auction Services Agreement," and "Memorandum of Sale." A review of these provides new facts which we did not know when I wrote our prior opinion letter of July 29, 1997 to you, and also contradicts the assumption which I made in our prior letter that I--- never obtains title to the property being auctioned.

Please note that our letter of today's date supersedes and replaces our prior letter dated July 29, 1997. You may not rely upon the advice given in that prior letter.

Description of I---

In your earlier letter of May 21, 1997, you explained that your I--- auction Web site would list and sell used laboratory equipment. You stated that an owner wishing to sell used lab equipment will contact I--- through the Web site and fill out a questionnaire. The owner will inform I--- of a minimal acceptable bid amount.

I--- will advertise and preview the item by picture and/or description for two weeks on its Web site. The item will then go up for bid on the Web site for a period of three days. During that period, the three top bids will be displayed on the Web site so that any interested party may bid above the preceding highest bid. At the end of the three days, the highest bidder (buyer) will be notified by I---. However, any bid below the minimal price set by the owner will be accepted only at the sole discretion of the owner.

I--- will contact both the owner and the buyer to insure the completion of the sale. The buyer may retract its bid if it was based upon any inaccurate or false information published in the description of the item on the Web site. Otherwise, once both buyer and owner verbally agree to the sale, the buyer will submit the bid amount to escrow (the escrow account will be with G--- C--- T--- Co.) where the funds will be held for 15 working days after the receipt of the item by the buyer. (The buyer has the right to return the item within the 15 day escrow if the item is faulty.)

I--- will notify the owner when the funds are deposited in escrow. If desired, I--- will assist the owner with shipping, packaging and insurance of the item through its subcontractor P--- P--- C--- (PPC). At the conclusion of the escrow period, I--- will receive its distribution from escrow, as will PPC.

Your August 10, 1997 letter states that you are setting up an online auction and provides information in addition to your earlier letter. You write, "Under [the] California Civil Code from my understanding, I am defined as an auctioneer and am thus, through the use of an auction services agreement and memorandum of sale...given the power of attorney (for a lack of better words) to sell the items listed on my I--- site."

The copy, which you included, of your agreement to sell property at auction specifies on page 4, at number 9, that the owner of the property "grants to the Auctioneer the right to convey...merchantable title to the successful buyer or buyers at the auction."

I further note that on page one of the agreement, the first statement under the subtitle "Recitals" reads, "I--- is engaged in the business of selling equipment via auction on the Internet. The Owner desires to engage the Auctioneer to sell at auction certain items of equipment...on the terms and conditions provided in this Agreement." Later the agreement, at page 3, states, "[I---] will prepare a memorandum of sale describing the item(s) sold, purchase price[,] terms of sale and names of buyer and seller [owner]. Buyer and seller [owner] must agree that [I---] shall have authority to bind both parties by this memorandum[.]" The copy of the "Memorandum of Sale" which you provided to us reiterates this, stating, "Prior to the commencement of the Auction, Seller [Owner] and Buyer agreed that Auctioneer, pursuant to California law, shall have authority to bind both parties of this Memorandum of Sale to document the item(s) sold, purchase price, terms of sale, and names of the Seller [Owner] and Buyer."

Your Web site also provides potential customers with information entitled "About Us?" (copy enclosed) which in pertinent part states:

"We are owned by I---, Inc. (I---)[.] Our parent company is involved with providing online auctions for an array of industries. I--- is bonded in the state of California as an auctioneer and is a member of the California State Auctioneers Association."

Discussion

For the privilege of selling tangible personal property at retail in this state, a sales tax is imposed on all retailers measured by the retailer's gross receipts from such sales, unless the sale is specifically exempted or excluded from taxation by statute. (Rev. & Tax. Code § 6051.) Retail sales of tangible personal property are exempted from the application of sales tax if the property is required by the contract of sale to be shipped, and is actually shipped, to a point outside of California by means of the facilities of the retailer or by delivery to a carrier (including a common carrier), customs broker, or forwarding agent for shipment to such out-of-state point. (Rev. & Tax. Code § 6396.)

When sales tax does not apply, *use* tax measured by the sales price applies to the use of tangible personal property purchased from a retailer for storage, use, or other consumption in California, unless the use is exempted or excluded from taxation by statute. (Rev. & Tax. Code §§ 6201, 6401.) Moreover, a retailer "engaged in business" in California who makes a sale of property subject to California use tax must collect the use tax from the purchaser and pay it to the state. (Rev. & Tax. Code § 6203.) A retailer who maintains an office in this state is considered engaged in business in California. (Rev. & Tax. Code § 6203(a).)

Revenue and Taxation Code section 6015(a)(1) & (2) define a retailer to include, "every person engaged in the business of making retail sales *at auction* of tangible personal property owned by the person or others...or in the business of making sales *at auction* of tangible personal property owned by the person or others for storage, use or other consumption." (Emphasis added.) (Revenue and Taxation Code section 6005 defines the term "person" as it is used in the Sales and Use Tax Law to include entities such as a firm, partnership, joint venture, limited liability company, or corporation, as well as an individual.)

Sales and Use Tax Regulation 1565 which explains and implements the Revenue and Taxation Code sections concerning Auctioneers reads,

“Persons engaged in the business of making retail sales at auction of tangible personal property owned by such persons or others are retailers, and are, therefore, required to hold sellers’ permits and pay tax measured by the gross receipts from such sales.

“The amount upon which tax is computed includes the amount charged for merchandise returned by a customer at an auction sale, if the sale is made under an agreement or understanding at the time of sale that the property will not be delivered or that any amount paid will be returned to the bidder.

“Sales tax does not apply, however, when an owner of property delivers it to an auctioneer for auction and bids in his own property at auction.”

Civil Code sections 1812.600 et seq. also apply to auctioneers and auction companies. Civil Code section 1812.601, in pertinent part, defines an auction to mean “a sale transaction conducted by means of oral or written exchanges between an auctioneer and the members of his or her audience, which exchanges consist of a series of invitations for offers for the purchase of goods made by the auctioneer and offers to purchase made by members of the audience and culminate in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience.” The section also defines an auctioneer to mean “any individual who is engaged in, or who by advertising[,] or otherwise[,] holds himself or herself out as being available to engage in, the calling for, the recognition of, and the acceptance of, offers for the purchase of goods at an auction.”

I--- states on its Web site that it is bonded as an auctioneer in California, and states in its contracts with the owners of the tangible personal property that I--- is in the business of selling equipment at auction. On its Web site I--- advertises and holds itself out as a person available to engage in the asking for, recognition of, and acceptance of offers to purchase laboratory equipment at an online auction. The auction is conducted by computer-generated exchanges between I--- and its audience, consisting of a two week preview period in which a picture and/or description of available laboratory equipment is displayed on I---’s Web site, followed by a three day bid period during which the three top bids are continuously displayed on the Web site and any interested viewer may bid above the preceding highest bid. At the end of three days, the highest bid is accepted. Under its contracts with the owner and buyer of the equipment, I--- has both the power to bind the owner and buyer of the property to the sale, and the power to transfer title to the property. Thus, I--- comes within the definition of an auctioneer conducting an auction pursuant to Civil Code section 1812.601.

Since auctioneers are retailers of tangible personal property for sales tax purposes under Revenue and Taxation Code section 6015, I--- is the retailer of tangible personal property sold by it at auction on the Internet. As such, I--- must report and pay *sales* tax to the state of California measured by the gross receipts from the retail sales it makes at auction in those instances in which the property is shipped from a California location of the owner of the equipment to a California location of the buyer of the equipment. Dependent upon the terms of the agreement of sale with the purchaser, I--- may add sales tax reimbursement to the sales price paid by the purchaser in those transactions. (Civil Code section 1656.1, copy enclosed.)

In regard to *use* tax, since I--- maintains an office in this state, it is a retailer engaged in business in California under Revenue and Taxation Code section 6203(a). As such, in those instances in which sales tax does not apply, I--- must collect and remit the use tax from California purchasers who make retail purchases at I--- auctions of items which are shipped from an out-of-state location of the owner to a California resident. In those instances in which the shipment is made from an out-of-state location of the owner to a buyer outside of this state, no California sales or use tax applies, unless the property is purchased for use in this state.

In summary, generally I--- must remit tax to the state of California measured by the proceeds from all of its sales of laboratory equipment made at auction to persons in California or made to persons for use in California. For your added information, since I note that your place of business is located in --- --- County where there are two special taxing districts, I am enclosing the Board's Pamphlets No. 71 "California City and County Sales and Use Tax Rates," and No. 44 "Tax Tips for District Taxes." Special taxing jurisdictions (districts) are funded by local transactions and use taxes (district taxes) which are administered by the State Board of Equalization. (Rev. & Tax. Code § 7251 et seq.) The enclosed pamphlets include information concerning special taxing jurisdiction taxes which you as a seller are required to report and pay.

I hope this information provides the clarification you were seeking. If you have further questions, please feel free to write again.

Sincerely,

Sharon Jarvis
Senior Tax Counsel

SPJ/cmm
Enclosures

cc: San Jose District Administrator - (GH)