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May 5, 1993

BURTON W. OLIVER
Executive Director

Ms. V--- L. C---
Attorney at Law
XXXX --- Way, Suite XX
---, CA XXXXX

Re: Sales Tax Responsibility - "Antique Malls"

Dear Ms. C---:

This office has received your letter dated February 27, 1993 in which you requested a legal opinion as to who is responsible for collecting and remitting sales taxes on sales made at antique malls.

You state in your letter that in the antique mall situation, the operator leases or owns a large space, which is divided into small booths and rented out to individual dealers. Each dealer sets up his/her wares and individually prices each item. All sales, however, are processed at one central location controlled by the mall operator. Individual sales receipts are remitted to the dealers on a regular basis.

The situation that you describe is subject to the provisions of California Revenue and Taxation Code sections 6073 and 6073.1 regulating swap meets, flea markets or special events. Revenue and Taxation Code section 6073(c) defines a "swap meet, flea market or special event" as:

"an activity involving a series of sales sufficient in number, scope and character to constitute a regular course of business, or any event at which two or more persons offer tangible personal property for sale or exchange and at which a fee is charged for the privilege of displaying such property for sale or exchange or at which a fee is charged to prospective buyers for admission to the area where such property is offered or displayed for sale or exchange."

Revenue and Taxation Code section 6073(a) states that:

"[w]hen the board determines it is necessary for the efficient administration of this part, the board may require the operator of a swap meet, flea market, or special event as a prerequisite to renting or leasing space on the premises owned or controlled by such operator to a person desiring to engage in or conduct business as a seller, to obtain evidence that the seller is the holder of a valid seller's permit issued pursuant to Section 6067, or a written statement from the seller that he or she is not offering for sale any item that is taxable under this part."

This subsection gives the Board the right in individual cases to require that all dealers who sell property subject to sales tax have a seller's permit before selling space is rented to them. The use of this subdivision is optional at the discretion of the Board.

Sale and Use Tax regulation 1569 states:

"A person who has possession of property owned by another, and also the power to cause title to that property to be transferred to a third person without any further action on the part of its owner, and who exercises such power, is a retailer when the party to whom title is transferred is a consumer."

Sales and Use Tax Annotation 185.0080, 2/16/59, states:

"When a yacht owner signs the bill of sale, and gives it to the broker authorizing him to sell at a stated price, the owner has invested the broker with power to create an ownership interest in the purchaser. The broker becomes liable for the sales tax upon the consummation of a sale through the exercise of such power."

See also Sales and Use Tax Annotation 185.0160, 5/2/57.

If an antique mall operator has a consistent policy of requiring all dealers on the premises to have all sales processed at the mall operator's central location, the operator is deemed to be the "retailer" of all sales at the mall. The operator transfers title to the customer only when the purchase price is paid to the operator and therefore is the "broker" of all such sales. Regulation 1569 governs this situation.

If the antique mall operator permits dealers to sell taxable goods directly to customers or the mall operator has a central sales location but its use is optional with the dealers, the mall operator will be subject to the provisions of Revenue and Taxation Code sections 6073 and 6073.1. The mall operator, in this situation, will be held liable for the tax due on sales processed by the dealers at their booths only if the dealers fail to report and pay the tax and the dealers

have not been issued individual seller's permits (Reg. 1699(c)). A copy of this regulation is enclosed with this letter.

If the mall operator has a central sales location, he or she is the "retailer" for all sales at that central location and must declare all such sales on his or her tax return. The sales tax must be paid directly to the Board and the sales tax reimbursement may not be turned over to the dealer on such sales.

If the mall operator permits dealers to make sales directly at the rented booths, seller's permits will be required of all dealers who make direct sales of taxable tangible personal property.

A mall operator who processes sales at a central location is a "retailer" pursuant to Regulation 1569. If the mall operator-retailer fails to make a return and remit the sales tax to the Board on those sales, the dealers are responsible for securing a permit, filing a return and paying the tax liability pursuant to Regulation 1699(c).

Sales are only reported on one tax return, either that of the mall operator or the dealer. If the mall operator requires that all sales be processed at the central location, only one tax return is submitted for all sales. The mall operator, as "retailer," files that return.

Any sales transacted at the dealer's location will appear on the dealer's tax return. The mall operator should not report such sales on his/her return. However, if a dealer fails to report taxable sales, the mall operator will be held liable for tax on those sales if the dealer has no seller's permit.

Very truly yours,

Thomas Cooke
Tax Counsel

TC:cl

Enclosure