

**STATE BOARD OF EQUALIZATION**

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July 7, 1987

Mr. G--- A. V---
G--- V--- & Associates
XXX --- --- Center
--- ---, CA XXXXX

Dear Mr. V---:

This is in response to your letter dated May 4, 1987 to the State Board of Equalization's Legal Department (Board).

Our analysis is based upon the following facts which you outlined in your letter. G--- V--- & Associates (V---) will be starting a business in which customers throughout the United States will order merchandise from V--- with a credit card. These ordered items will be delivered as gifts to persons, who are located throughout the United States, as designated by the ordering customers. V--- will order and pay for the merchandise by check from the supplier closest in proximity to the intended recipient.

You have asked whether the California Sales and Use Tax law would apply to your transactions if V--- located the business in California.

For purposes of this analysis, we assume that V---'s mail order business is located in California and that the merchandise ordered by the ordering customer is being sent by United States Mail or common carrier as a gift to a non-ordering recipient.

There are two California taxes that may apply in the factual situation you present. They are: (1) the Sales Tax found in Revenue and Taxation Code Section 6051; and (2) the Use Tax found in Revenue and Taxation Code Section 6201.

Sales tax is imposed upon retailers for the privilege of selling tangible personal property at retail in California and is measured by the gross receipts from such sales. (Revenue and Taxation Code §6051.) The use tax is imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for storage, use, or other consumption in this state and is measured by the sales price of the property. (Revenue and Taxation Code §6201.)

The term “use” is defined to include the exercise of any right or power over tangible personal property incident to the ownership of that property except a sale of the property in the regular course of business. (Revenue and Taxation Code §6009.) A “retailer” includes every seller who makes any retail sale or sales of tangible personal property. (Revenue and Taxation Code §6015(a).) A “seller” includes every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax.”

The term “retail sale,” as used in Subdivision (a) of Revenue and Taxation Code §6015, means a sale of tangible personal property for any purpose other than resale in the regular course of business. (Revenue and Taxation Code §6007.) A “sale” is defined to mean any transfer of title or possession of tangible personal property for a consideration. (Revenue and Taxation Code §6006(a).) The place of sale is the place where the property is physically located at the time the act constituting the sale takes place. (Revenue and Taxation Code §6010.5.) Unless otherwise agreed to, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods. (Cal. U. com. Code §2401(2).)

The retailer, instead of the customer, is responsible for the payment of sales tax under Revenue and Taxation code Section 6051. However, the usual and customary business practice, and the practice authorized by law under Civil Code Section 1656.1, is for the retailer to obtain reimbursement of the sales tax from its customers. (Cal. Admin. Code, tit. 18, §1700.)

On the other hand, the liability for the use tax is on the purchaser. However, the collection of the use tax is the responsibility of every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state. (Revenue and Taxation Code §6203.) A “retailer engaged in business in this state” means and includes:

“(a) any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.”

(Revenue and Taxation Code §6203(a).) If the retailer does not collect the use tax, it will become a debt owed to this state by the retailer. (Revenue and Taxation Code §6204.)

But if pursuant to the sales contract the tangible personal property is required to be shipped and is shipped to a point outside this state by the retailer by means of facilities operated by the retailer or delivery by the retailer to a carrier, customs broker, or forwarding agent, no sales tax applies. (Revenue and Taxation Code §6396.) See also Subdivision (a) of Sales and Use Tax Regulation 1620, which interprets and applies Revenue and Taxation Code Section 6396.

In your proposed transaction, four parties are involved: (1) the ordering customer; (2) your company, which we view as a mail order house; (3) the suppliers of the merchandise; and (4) the intended gift recipient. If either the California sales tax or use tax applies, The Board would consider V--- to be the retailer of the merchandise responsible for payment of the tax to the Board. V--- would be the seller because V--- is transferring title to tangible personal property directly to the ordering customer, who furnishes consideration for such transfer through utilization of a credit card. Furthermore, V--- is a retailer engaged in business in this state and the sale by V--- to the ordering customer is considered a retail sale because the ordering customer is giving away the merchandise as a gift, which is a purpose other than resale in the regular course of the customer's business. Thus, any sales tax owed to the Board is imposed upon V---; and any use tax owed to the Board is the responsibility of V--- to collect.

The suppliers from whom you order the merchandise would not be considered retailers by the Board and would, therefore, not be liable for sales tax nor for collecting use tax because they are not making retail sales to the ordering customers. Instead, the suppliers are selling the merchandise to V--- for the purposes of resale. V---, in turn, resells the merchandise at retail to the ordering customers.

Keeping in mind the assumption we have made, we can envision eight different factual situations that might arise which would trigger the possible imposition of sales tax or use tax. Our discussion of whether either tax would apply follows each of the eight scenarios.

(1)

The ordering customer is from California. The customer orders an item from V--- as a gift to a California recipient. The closest supplier of this item is a California supplier who makes a drop shipment delivery of the item to the recipient.

Sales tax would apply. A retail sale of tangible personal property would occur in California between V--- and the California customer. (Revenue and Taxation Code §6006(a), 6007.) Therefore, sales tax would be imposed on V---'s gross receipts received from the California customer. (Revenue and Taxation Code §6051.) Even though the ordering customer makes a gift of the merchandise, tax still applies on the retail sale between V--- and the ordering customer. (Cal. Admin. Code, tit. 18, §1670(a).)

(2)

The ordering customer is from California. The customer orders an item from V--- as a gift to an out-of-state recipient. The closest supplier of this item is a California supplier who makes a drop shipment delivery of the item to the recipient.

Neither sales nor use tax would apply. Although a sale would take place in California, it would be exempt from sales tax under Revenue and Taxation Code §6396 as an interstate shipment because V--- is required, in the sales contract with the ordering customer, to send the item to an out-of-state recipient. (See Sales and Use Tax Annotations 280.0620 and 325.0020.) No use tax would apply because the item would not be stored, used, or otherwise consumed in California. (Revenue and Taxation Code §6201)

(3)

The ordering customer is from California. The customer orders an item from V--- as a gift to a California recipient. The closest supplier of this item, who is located outside California, makes a drop shipment delivery of the item to the recipient.

Neither sales tax nor use tax would apply in this situation. Title to the property would pass outside California when the out-of-state supplier delivers the item to the shipper for shipment into California. (Revenue and Taxation Code §6006(a); Cal. U. Com. Code §2401(2).) Therefore, no sales tax would apply because the sale would not take place in California. The use tax would not apply because the purchaser would not be storing, using or otherwise consuming the property in California. (Revenue and Taxation Code §6201.)

(4)

The ordering customer is from California. The customer orders an item from V--- as a gift to an out-of-state recipient. The closest supplier of this item, who is located outside California, makes a drip shipment delivery of the item to the recipient.

Neither sales tax nor use tax would apply. The place of the sale is the place where the item is physically located at the time the act constituting the sale takes place. (Revenue and Taxation Code §6010.5.) No sales tax would apply because the sale would take place outside California where the item is located. No use tax would apply because the item would not be stored, used, or otherwise consumed in California. (Revenue and Taxation Code §6201.)

(5)

The ordering customer is from outside California. The customer orders an item from V--- as a gift to a California recipient. The closest supplier of this item is a California supplier who makes a drip shipment delivery of the item to the California recipient.

Sales tax would apply. In this situation, title to the item would pass to the ordering customer in California at the time and place when the California supplier delivers the item to the shipper in California for shipment to the ordering customer in California for shipment to the California recipient. Thus, since title would pass to the ordering customer in California when the California supplier ships the item, a sale of tangible personal property would occur in California which would trigger the imposition of sales tax.

(6)

The ordering customer is from outside California. The customer orders an item from V--- as a gift to an out-of-state recipient. The closest supplier of this item is a California supplier who makes a drop shipment of the item to the recipient.

Neither sales tax nor use tax would apply for the reasons stated in our answer to (2).

(7)

The ordering customer is from outside California. The customer orders an item from V--- as a gift to a California recipient. The closest supplier of this item is an out-of-state supplier who makes a drop shipment delivery of the item to the recipient.

Neither sales tax nor use tax would apply in this situation for the reasons stated in our answer to (3).

(8)

The ordering customer is from outside California. The customer orders an item from V--- as a gift to an out-of-state recipient. The closest supplier of this item is an out-of-state supplier who makes a drop shipment delivery of the item to the recipient.

Neither sales tax nor use tax would apply for the reasons stated in our answer to (4).

I have enclosed copies of Sales and Use Tax Regulations 1620 and 1700, and Sales and Use Tax Annotations 280.0620 and 325.0020 for your reference. If you have any additional questions concerning the application of the California Sales and Use Tax law to your transactions, please do not hesitate to write us again.

Very truly yours,

John S. Wong
Tax Counsel

JSW:jb/594
Enclosures