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December 14, 1993

BURTON W. OLIVER  
*Executive Director*

Ms. D--- V---  
Controller  
E---  
XXX --- ---  
---, New York XXXXX

Dear Ms. V---:

This is in response to your letter of August 25, 1993, concerning the sales and use tax consequences of certain drop shipments. You have stated as follows:

“We are a New York corporation who occasionally does business in the state of California. We do not maintain an office in the state of California. We have a supplier, M--- E---, who has an office in the state of California, from which we purchase a large portion of our inventory. On occasion, we have requested M--- to drop ship our orders to customers in the state of California as opposed to shipping them to us in New York. M--- will accommodate us in drop shipping however they insist on charging us sales tax as we do not have a California sales tax/resale certificate. They are contending that they are doing business with us regardless of the fact that the product is being delivered into California. We have offered to provide M--- with the resale certificates of the companies they are drop shipping the product to as proof that tax should not be charged. They refuse to accept these resale certificates. They have informed me that it is against their policy and I do not understand the information provided to me by your department.”

If you are engaged in business in California, you must hold a California permit. You could then give your own California resale certificates. However, when you say that your company “occasionally does business in the state of California,” we assume that you do not mean that you are engaged in business in California within the meaning of the California Sales

and Use Tax Law. We assume that you mean that you occasionally sell tangible personal property to California customers, but that you do not have the required "nexus" to be required to register in California.

Sales and use taxes are imposed at the retail level. Sales tax is imposed on retailers for the privilege of selling at retail, and use tax is imposed on the storage, use, and other consumption in California of tangible personal property purchased at retail. (Rev. & Tax. Code §§ 6051, 6201.)

We assume that the reason M--- wants to collect a tax is because of the presumptions in California that a transaction is at retail. Revenue and Taxation Code section 6091 creates the presumption that "all gross receipts are subject to the [sales] tax until the contrary is established." Revenue and Taxation Code section 6241 provides a similar use tax presumption. Both presumptions that a transaction is at retail may be overcome by the seller's accepting timely and valid California resale certificates.

If the sales by you to your California customers were retail sales, M--- would be regarded as the retailer for sales and use tax purposes under the second paragraph of Revenue and Taxation Code section 6007:

"When tangible personal property is delivered by an owner or former owner thereof, or by a factor or agent of that owner, former owner or factor to a consumer or to a person for redelivery to a consumer, pursuant to a retail sale made by a retailer not engaged in business in this state, the person making the delivery shall be deemed the retailer of that property. He or she shall include the retail selling price of the property in his or her gross receipts or sales price." (Emphasis added.)

This means that if the delivery by M--- to the California customer were pursuant to a retail sale by you, who is not a retailer engaged in business in California, the transaction would be treated as a retail sale by M---. This puts the duty upon M--- to pay any sales tax or collect and remit any use tax that may be due.

Since you are not able to provide California resale certificates, it is acceptable for M--- to accept them from your customers, the persons in California to whom M--- makes the deliveries. They may be provided directly from your customers to M---, or they may be provided through you. In either case, the timely and good faith acceptance of valid California resale certificates will relieve M--- from liability for any sales or use taxes. We note, however, that M--- is not required to accept resale certificates, and may instead regard its sales as retail sales. If the California customer remits use tax or sales tax reimbursement and thereafter resells the property prior to any use, that person would be entitled to take a "tax-paid purchases resold" deduction. (Reg. 1701.)

If you have further questions, please contact me.

Sincerely yours,

Donald L. Fillman  
Tax Counsel

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