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July 9, 1992

Mr. P--- H---
XXXX --- --- ---
---, California XXXXX

Re: Retailer engaged in business in California

Dear Mr. H---:

As you know, your letter dated June 2, 1992 to Culver City District Principal Auditor David J. Slechta has been referred to the Legal Division for response. Mr. Slechta wrote you a letter dated March 19, 1990 regarding whether your unidentified client was a retailer engaged in business in California who was required to collect California use tax when making sales to California consumers. Mr. Slechta concluded that your client was engaged in business in California under subdivision (f) of Revenue and Taxation Code section 6203 and was therefore required to collect California use tax. You ask whether the recent Supreme Court decision changes that conclusion.

Mr. Slechta's letter included the following facts:

"[Y]our client ships all products from outside California by common carrier or postal service. There are no employees, inventory, or other assets in California. Orders are solicited by direct mail with a California firm providing telephone response. This firm is paid commissions on California sales. The out-of-state client approves all sales and payments are made to him. Orders may be placed as much as six months in advance of shipment. Sales are not restricted to any one county in California. Many sales are on a c.o.d. basis and a substantial number of these may be refused causing a sales cancellation.

"[Y]ou stated that your client will be selling income tax software packages. You explain that the California firm which provided telephone response was a California representative (agent) primarily during the selling season, which is income tax season. The agent will answer basic questions which a potential client might have about the software .... Any involved technical questions would be answered by the home office. The representative gets paid a commission only if a sale is made. He receives no other compensation. You state

that the California agent does not receive any of the sales orders. These are all mailed to the out-of-state home office."

Discussion

The decision to which you refer was one by the United States Supreme Court in the case of Quill Corporation v. North Dakota. In essence, the Court concluded that a state cannot impose a use tax collection duty on a retailer who has no physical presence in that state. That physical presence in the taxing state does not have to be related to the selling activity. (National Geographic Society v. State Board of Equalization (1977) 430 U.S. 551.) Revenue and Taxation Code section 6203 includes nine subdivisions which define "retailer engaged in business in California" for purposes of California use tax collection duties. As noted above, Mr. Slechta cited one of these subdivisions, (f), as a basis for regarding your client as engaged in business in California.

It is possible for a retailer with no physical presence in California to be covered by subdivision (f). For this reason, the Quill case is relevant to the validity of that subdivision. However, it is common for a retailer to be regarded as engaged in business in California under more than one subdivision. Once we have concluded that the retailer is engaged in business in California under any of the nine relevant subdivisions of section 6203, it is unnecessary to ascertain whether the retailer would also be regarded as engaged in business in California under any of the other eight subdivisions. Thus, before we can determine whether the Quill decision affects our conclusion, we must ascertain whether your client is a retailer engaged in business in California under any of the other eight relevant subdivisions of section 6203. Those subdivisions state:

"(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.

"(b) Any retailer having any representative, agent, salesman, canvasser, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

"(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

"(d) Any retailer soliciting orders for tangible personal property by means of a telecommunication or television shopping system (which utilizes toll free number) which is intended by the retailer to be broadcast by cable television or other means of broadcasting, to consumers located in this state.

> "(e) Any retailer who, pursuant to a contract with a broadcaster or publisher located in this state, solicits orders for tangible personal property by means of advertising which is disseminated primarily to consumers located in this state and only secondarily to bordering jurisdictions. . . .
>
> "(g) Any retailer owned or controlled by the same interests which own or control any retailer engaged in business in the same or a similar line of business in this state.
>
> "(h) Any retailer having a franchisee or licensee operating under its trade name if the franchisee or licensee is required to collect the tax under this section.
>
> "(i) Any retailer who, pursuant to a contract with a cable television operator located in this state, solicits orders for tangible personal property by means of advertising which is transmitted or distributed over a cable television system in this state. . . ."

Several of these subdivisions may be applicable to your client's business and you have not provided sufficient information to rule them out. However, we do have sufficient information to conclude that your client is a retailer engaged in business in California under subdivision (b) of section 6203. Your client clearly has representatives or agents in California for the purpose of selling tangible personal property. The agents provide information to potential customers, obviously with the goal of selling tangible personal property to those potential customers. There can be no doubt that the agents are operating under the authority of your client for the purpose of selling tangible personal property since those agents are only compensated if a sale is made.

We conclude that your client is a retailer engaged in business in California under subdivision (b) of Revenue and Taxation Code section 6203. Since that provision only applies to retailers who have a physical presence in California (representatives or agents in California for the purpose of selling, delivering, or taking orders), its validity is not affected by the Quill decision.

Sincerely,

David H. Levine
Senior Tax Counsel

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