STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
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November 26, 1985

Ms. N--- G. F---
Attorney at Law
W---, A---, H--- & L---
XXXX --- Street N.W.
---, --- XXXXX

Re: A--- A--- for the
A--- of S--- [no account number]
Engaged in business – editorial and
division activities

Dear Ms. F---:

In your August 28, 1985 letter to Mr. Gary Jugum, Assistant Chief Counsel for the Board, and in your telephone conversations with me, you request a determination from the Board's legal staff that your client, the A--- A--- for the A--- of S---, is not a retailer engaged in business in California within the meaning of Revenue and Taxation Code section 6203, and therefore has no obligation to collect use tax on its transactions with California consumers.

In summary, the fact you relate in your letter are that the A--- is a non-profit organization based in Washington, D.C., which, among other things, has relatively insubstantial mail order sales of products such as science books and posters, and the A--- also leases its mailing lists. All sales and leases are handled by the Washington, D.C. office. Some of the customers are located in California.

The A--- has engaged as the editor of its professional journal a professor at a California university. The editor performs editorial services for the journal (an exempt periodical under Revenue and Taxation Code section 6362) on a part-time basis, and retains his position as university professor. The editor performs no editing activities in California (according to our telephone conversation on October 25, 1985), but does perform other services for the A--- in California, such as correspondence and telephone calls. The editor also performs services for the A--- in its Washington, D.C. office.

To the extent the editor performs journal-related activities in California, the editor uses his faculty office. While the A--- has provided funding to the university in appreciation for the availability of the editor's office space, and for an assistant who is a university employee, the amount of the funding is not directly related to the value of the university's resources, and the amount was not negotiated between the university and the A---.

The A--- also has a western division which operates quasi-independently of the A---. The Division is comprised of several western states (including California) and two Canadian provinces. The Division has no officially designated office and no employees in California. The executive director of the Division and his administrative assistant, are the only individuals who regularly perform services for the Division. Both are employees of a California nonprofit organization who have been authorized to spend approximately one-half of their time on Division activities, and the A--- reimburses their employer for one-half of their salaries.

The executive director of the Division utilizes space in the nonprofit organization's building, and the Division pays no rent for the use of the space. The Division pays the organization $600 per year as a goodwill gesture, and the payment is not a prerequisite for the use of the space. The Division pays for postage and one telephone line, and all other services (e.g., mail handling, light, and heat) are provided by the organization, at no cost to the Division. Both the executive director and his assistant use the same space whether they are working on Division activities or their employer's activities.

The Division also owns some equipment located in the organization's building. Division activities consist primarily of arranging annual regional meetings and printing a newsletter. The Division also is the publisher of record of a series of books based on symposia presented at its annual meetings. The nonprofit organization finances the publications, handles the sales, collects sales taxes, and remits net receipts to the Division.

Neither the journal editor nor the Division has any role in the sales of the A---'s products or the leases of its mailing lists.

In summary, your contention is that, based on these facts, the A--- is not a retailer engaged in business in California under section 6203. You contend that subsection (a) inapplicable because the A--- does not maintain any place of business in the state. Neither the editor's use of his university office nor the Division's use of the nonprofit organization's facilities constitutes a place of business, since these offices are not owned, rented, or maintained by the A--- as specifically designated office of the A---.

You contrast this presence of the A--- in California with the facts in National Geographic Society v. State Board of Equalization (430 U.S. 551, in which the Society maintained two offices in California, staffed with employees, which produced approximately $1 million in annual advertising revenues. You also contrast the A---'s presence with the facts in Standard Pressed Steel Co. v. State of Washington Department of Revenue, 419 U.S. 560, in which a full-time employee in the state made possible the continuance of valuable contractual relations with a major customer.

You also contend subsection (b) of section 6203 is inapplicable because the A--- has no employees or agents in California who sell, deliver, or take orders for any tangible property. Finally, you contend subsection (c) of section 6203 in inapplicable because the rental of the A---'s mailing list to California residents could be subject to tax only if the A--- is otherwise a retailer engaged in business in California.

Opinion

Section 6203(b) does not apply to the A---.

Although the facts stated in your letter may not be complete with respect to the relationship between the Division and the nonprofit organization in the sale of books published by the Division and sold through the organization, I will assume for purposes of this opinion that the organization is the retailer of the books, not the Division.

If this is correct, then we agree with your view that section 6203(b) does not apply to this situation, for the reasons you mentioned. Since the A--- handles all sales and rentals through its Washington, D.C. office, there are no salesmen, representatives or agents operating in California for the purpose of selling, delivering or taking of orders for tangible property.

Section 6203(c) applies to the A---, but only with respect to rentals.

We disagree with your interpretation of section 6203(c). This subsection makes any lessor of tangible personal property leased in California a retailer engaged in business in this state for purposes of collection of use tax from its lessees. However, this subsection does not require out-of-state lessors to collect use tax from California customers on their out-of-state sales.

We cannot tell from the facts you relate whether the A---'s rentals of its mailing lists are subject to use tax or not. In general, if the A--- does not provide the mailing lists to its lessees on magnetic tape or similar devices used to produce the names and addresses by electronic or mechanical means, and if the A--- by contract limits the lessee to use of the mailing list one time only, then the rentals are nontaxable. Otherwise, the rentals are taxable. Sales and Use Tax Regulation 1504(a).

However, even if the A---'s rentals of mailing lists are taxable, this fact by itself does not make the A--- liable for use tax collection on its sales of other tangible property to California customers.

Section 6203(a) applies to the A---'s sales.

Our opinion is that the A--- is engaged in business in California within the meaning of section 6203(a), by reason of its Division's activities and its editor's activities in this state.

As relevant to this situation, section 6203(a) defines a retailer engaged in business in this state to include "Any retailer…occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever named called, an office…." The broad reach of this subsection leads us to conclude that the A---, through its journal editor and its Division, uses offices in this state in the conduct of its activities, notwithstanding that the A--- does not own, lease, or maintain those offices.

Some of the facts which compel this conclusion are that through the use of those offices, the Division operates as the publisher of record of books, publishes a newsletter, organizes meetings, and handles telephone calls and related correspondence. Likewise, the journal editor uses his university office for correspondence and telephone calls related to the publication of the A---'s journal. Both the Division's executive director and his assistant, and the editor, use those offices for A--- - related activities with the approval and support of the nonprofit organization and the university, respectively, and those individuals are compensated for their A--- - related activities by the A---.

While the A---'s use of those offices may fairly be described as informal, lacking any formal rental arrangement with either the university or the nonprofit organization, we cannot agree with your characterization of these offices as not "officially designated." Certainly in the case of the Division, and possibly in the case of the editor, third parties wishing to contact the Division or the editor would undoubtedly be able to do so by writing or calling the Division or the editor at those offices. For example, it is difficult to imagine that the Division could publish books, publish a newsletter, and arrange meetings without using its California office as a designated location for correspondence and telephone calls related to those activities.

With respect to the U.S. Supreme Court decision in Standard Pressed Steel Co., supra, the issue in that case was whether the State of Washington could constitutionally impose its business and occupation tax on the gross receipts of the appellant. The court sustained the constitutionality of such a direct tax on the appellant because there were sufficient activities by the appellant within the state which were actually related to the production of those gross receipts.

By contrast, the tax in issue in this situation is a use tax imposed on California purchasers, not a sales tax imposed on the A---'s gross receipts. The only duty which section 6203 imposes on the A--- is an administrative duty to collect the use tax from those purchasers and to pay the tax so collected to the Board. In contrasting Standard Pressed Steel Co. and similar direct tax cases with the obligation imposed by section 6203, the U.S. Supreme Court in National Geographic Society pointed out, 430 U.S. at 558:

> The case for the validity of the imposition upon the out-of-state seller enjoying such services of a duty to collect a use tax is even stronger. See Norton Co. v. Illinois Rev. Dept. 340 US 534, 537, 95 L. Ed. 517, 71 S Ct 377 (1951). The out-of-state seller runs no risk of double taxation. The consumer's identification as a resident of the taxing State is self-evident. The out-of-state seller becomes liable for the tax only by failing or refusing to collect the

> tax from that resident consumer. Thus, the sole burden imposed upon the out-of-state seller by statutes like §§ 6203 and 6204 is the administrative cost of collecting it.

We do not necessarily disagree with your contention that the A---'s activities in California are less substantial than the in-state activities in National Geographic Society. However, our view is that the facts in National Geographic Society do not establish an outer limit past which the state cannot constitutionally impose use tax collection responsibility on out-of-state retailers.

National Geographic Society does, however, establish a constitutional test, that there must be "some definite link, some minimum connection" between the state and the person the state seeks to tax. National Geographic Society, 430 U.S. at 561, quoting with approval from Miller Bros v. Maryland, 346 U.S. at 344-345. In applying that test to this situation, our conclusion is that the activities of the A---'s Division and its journal editor in California are sufficient in scope to require the A--- to register with the Board as a retailer engaged in business in this state under section 6203(a), and to collect the use tax on its out-of-state sales to California purchasers.

I enclose a copy of Regulation 1504 for your information. Please feel free to contact me if you have any further questions or comments about this letter.

Very truly yours,

John Abbott
Tax Counsel

JA:ss
Encl.