STATE BOARD OF EQUALIZATION
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Executive Director

February 9, 1996

Mr. A--- C---
N--- D---, ---, Inc.
X --- ---
--- ---, MO XXXXX

Re: Registration of N--- D---, ---, Inc.

Dear Mr. C---:

This is in response to your letters dated November 22, and December 21, 1995 to the Board's Out-of-State District Office. You contend that your company, N--- D---, ---, Inc. (hereafter "ND"), is not a retailer engaged in business in California and is therefore not required to register with this Board and collect use tax on the property it sells for use in California.

We understand from your letters that ND maintains a single business facility in Missouri. You state that California customers mail or fax orders to [city], Missouri for acceptance by your company. We assume that ND ships its goods to California via common carrier and that these sales occur outside this state such that California sales tax does not apply. You travel to California to visit customers and check on product performance at customer plants once or twice a year on a non-regular basis. You state that the purpose of these visits is to meet customer employees and to better understand customer technical needs so ND can provide better service.

California imposes a use tax on the sales price of tangible personal property purchased from a retailer for storage, use, or consumption in California. (Rev. & Tax. Code §§ 6201, 6401.) Use tax is imposed on the person actually storing, using, or otherwise consuming the property within this state. (Rev. & Tax. Code § 6202.) A retailer engaged in business in this state is required to collect the applicable use tax from the purchaser at the time of the sale of property to be used inside this state. (Rev. & Tax. Code § 6203.) The tax that a retailer engaged in business inside this state is required to collect from its purchasers constitutes a debt owed by the retailer to the state. (Rev. & Tax. Code § 6204.) Revenue and Taxation Code section 6203

defines when a retailer is engaged in business inside this state. As relevant to ND, subdivision (b) defines a retailer engaged in business in this state to include:

> "Any retailer having any representative, agent, salesperson, canvasser, independent contractor, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property."

This provision is consistent with the constitutional guidelines set forth by the United States Supreme Court in cases involving a state's taxing authority over out-of-state retailers.

In *Quill Corporation v. North Dakota* (1992) 504 U.S. 298, a retailer outside North Dakota challenged that state's amendment of its use tax collection statute which, as amended, reached the Quill Corporation. Quill maintained no locations or employees in North Dakota. Quill did, however, solicit business in that state through catalogs and flyers, advertisements in national periodicals, and by telephone. All property sold to persons in North Dakota was delivered to them by mail or common carrier.

The Court in *Quill* concluded that the rule for imposing a use tax collection duty on an out-of-state retailer would continue to be the same bright line test enunciated in *National Bellas Hess, Inc. v. Department of Revenue of Illinois* (1967) 386 U.S. 753. (*Quill, supra*, at p. 108.) That test requires some physical presence in the taxing state before a retailer may be required to collect a state's use tax, even though the "rule appears artificial at its edges ...." (*Id.*) This means that in the absence of specific Congressional legislation to the contrary, a state may not require an out-of-state retailer to collect use tax from its customers inside that state if that retailer has no physical presence within that state. California's Revenue and Taxation Code section 6203(b) is consistent with that rule since it requires actual physical presence inside the state before an out-of-state retailer is required to collect use tax from its California customers.

You state that ND's activities do not reach the standards set forth in *Quill* since ND sells to businesses and not individuals. The nature of ND's customers is not determinative in analyzing whether it has a duty to collect use tax. *Quill* related to the existence of some physical presence of a retailer in the taxing state and not the character of the retailer's customers. The constitutional limitation on a duty to collect use tax, as explained by *Bellas Hess* and *Quill*, relates to the requirement that the retailer have a physical presence in the taxing state. In your company's situation, ND sends persons into California on annual or bi-annual trips and is thereby physically present in this state. Since ND's contract with California is not limited solely to mail, telephone, and common carrier, it is not protected by the bright line lest of *Quill* and California is not prohibited from imposing a use tax collection duty on your company. The only remaining issue is whether ND's activities inside this state relate to "the purpose of selling, delivering, installing, assembling, or ... taking of orders for any tangible personal property" within the meaning of subdivision (b) of Revenue and Taxation Code section 6203.

The constitutionality of a state's taxing authority and the type of conduct necessary for a finding of sales activity inside a state by an out-of-state retailer was reviewed by the Supreme Court in *Standard Pressed Steel Co. v. Wash. Revenue Dept.* (1974) 419 U.S. 560. In *Standard Pressed Steel*, an out-of-state manufacturer of aerospace fasteners maintained a single employee inside the state of Washington for the purpose of consulting with its principal customer on

anticipated fastener needs and to follow-up with any difficulties incurred in the use of these fasteners after delivery. (*Id*. at p. 561.) The employee did **not** take orders from the customer. (*Id*.) Instead, orders were sent directly from the customer to the out-of-state company and were filled and shipped outside Washington by the out-of-state company. (*Id*.) The out-of-state retailer was assessed tax on its sales to the Washington customer based on a finding that the activities of the employee inside the state related to the sales activities of the out-of-state company. (*Id*.)

On appeal, the Court held that neither the Commerce nor Due Process Clauses of the federal Constitution precluded Washington's imposition of the tax on the out-of-state company. In reaching that conclusion, the Court also found that the employee's activities inside the state "made possible the realization and continuance of valuable contractual relations between [the out-of-state company] and [its customer]." (*Id*. at p. 562.) Those activities related to the sale of tangible personal property by the out-of-state company but did not involve the taking of orders for such property inside the taxing state.

ND's activities inside this state similarly relate to the sale of tangible personal property. You state that ND's trips to California are to "check on product performance" and to "meet employees and better understand customer technical needs so we can provide better service." Like the employee's activities in *Standard Pressed Steel*, ND's trips to California provide it with knowledge of anticipated customer needs through the evaluation of product performance. ND's trips to California also act to further establish its relationships with its California customers and make possible the realization and continuance of valuable contractual relations resulting in sales. ND's activities in California are therefore related to the sale of tangible personal property and make ND a retailer engaged in business inside this state within the meaning of Revenue and Taxation Code section 6203(b).

Based on the foregoing, ND is required to register with this Board and collect California use tax on its sales of property for use inside this state. You should contact District Principal Compliance Supervisor John Gibbs to facilitate ND's registration. If you have any questions in the meantime, please write again.

Sincerely,

Warren L. Astleford
Staff Counsel

WLA:rz

cc: Out-of-State District Administrator - OH
Mr. John Gibbs (Out-of-State District)