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*Taxation Application of ...
To Interstate Business*

36 M.R.S.A. § 1754

JOSEPH E. BRENNAN
ATTORNEY GENERAL



RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

October 11, 1977

Thomas S. Squires
Director, State Tax Division
Bureau of Taxation
State of Maine
Augusta, Maine 04333

Re: Effect of National Geographic Society v. California Board of Equalization on Maine Sales and Use Tax Law

Dear Mr. Squires:

This responds to your request for advice concerning the effect upon the Maine Sales and Use Tax Law of the recent U. S. Supreme Court decision in National Geographic Society v. California Board of Equalization, 45 USLW 4343 (April 4, 1977).

FACTS:

36 M.R.S.A. § 1754 provides, insofar as relevant:

In order to facilitate the enforcement of [the Sales and Use Tax Law], the following persons, other than casual sellers, shall register with the Tax Assessor:

1. Every seller of tangible personal property, whether or not at retail, maintaining within this State any office, place of manufacture, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.
2. Every seller of tangible personal property not maintaining such a place who makes retail sales within this State or who solicits orders by means of salesmen within the State for retail sales for use, storage or other consumption within the state.

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3. Every consignee or agent who makes retail sales in the State of tangible personal property on behalf of a principal who is without the State if the principal is not the holder of a valid registration certificate.

4. Every agent, representative, salesman, entrepreneur, solicitor, distributor or independent selling agent, when such person receives compensation by reason of sales of tangible personal property made outside the State by his principal for use, storage or other consumption in the State, and every salesman within the State of any seller subject to subsection 2, if said principal is not the holder of a valid registration certificate

QUESTIONS:

1. May a seller whose only Maine contact is the employment of a person who does not solicit sales constitutionally be required to collect use tax on its sales to Maine residents?

2. May a seller whose only Maine contact is solicitation by mail, by telephone, or by newspaper or television advertising constitutionally be required to collect use tax on its sales to Maine residents?

3. May a seller whose only Maine contact is delivery of merchandise into Maine constitutionally be required to collect use tax on its sales to Maine residents?

4. Does 36 M.R.S.A. § 1754 require registration by any of the sellers described in questions 1 through 3?

ANSWERS:

1. A seller whose only Maine contact is the employment of a person who does not solicit sales but who maintains a presence in the state for the benefit of his employer may constitutionally be required to collect use tax on its sales to Maine residents.

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2. A seller whose only Maine contact is solicitation by mail, by telephone, or by newspaper or television advertising may constitutionally be required to collect use tax on its sales to Maine residents only where such contact is specifically designed to appeal to Maine residents as opposed to the general public.

3. A seller whose only Maine contact is delivery of merchandise into Maine may constitutionally be required to collect use tax on its sales to Maine residents only where such delivery is regular or frequent and is done by the seller's own employees, agents or vehicles, not by common carriers or the postal service.

4. 36 M.R.S.A. § 1754 presently requires registration only by the seller described in answer 1.

REASONING:

Question 1. In National Geographic Society v. California Board of Equalization, 45 USLW 4343 (April 4, 1977), the U. S. Supreme Court upheld California's requirement of use tax collection by an out-of-state mail order seller whose only California activity was the solicitation of magazine advertising. However, the Court specifically rejected the California Supreme Court's conclusion that the "slightest presence" of the seller in California was sufficient nexus to require collection of the use tax in question. The Court upheld taxation because "the Society's two offices . . . had the advantage of the same municipal services . . . as they would have had if their activities . . . included assistance to the mail order operations that generated the use taxes." 45 USLW at 4345. Thus, the Court looked beyond mere contact to determine whether the seller was receiving a benefit for which the state could fairly require compensation.

Standard Pressed Steel Co. v. Department of Revenue of Washington, 419 U.S. 560 (1975), which held that the continuing presence of one non-soliciting employee in a state was sufficient nexus for imposition of a gross receipts tax on a foreign corporation's Washington sales where such activity "made possible the realization and continuance of valuable contractual relations," strongly suggests that collection of use tax could be required of a seller in the same circumstances. To this effect, the National Geographic court, in discussing Standard Pressed Steel, stated that "[t]he 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." 45 USLW at 4344. Thus, where an out-of-state seller receives a benefit from the provision of Maine services to its employee, the requisite nexus appears to exist, even where the employee is not engaged in the selling activity which leads to the taxable use.

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Question 2. Under National Bellas Hess v. Illinois Dept. of Revenue, 386 U.S. 753 (1967), a seller cannot be required to collect use tax where his only contacts with the taxing state are solicitation from out-of-state by the mails or telephone and delivery by common carrier as part of a general interstate business. Also, under Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954), "spillover" of advertising in an out-of-state newspaper does not provide a sufficient nexus to require collection of use taxes from purchasers in the spillover state, at least where the advertising was not designed to appeal specifically to potential purchasers in the taxing state as opposed to the general market. See 347 U.S. at 349-350. Thus, the potential for requiring use tax collection when the seller conducts such direct solicitation or advertising from outside the taxing state appears to be limited to those situations in which the activity is specifically directed toward residents of the taxing state (e.g., when the seller advertises the fact that purchasers from the taxing state can avoid paying sales tax by buying out-of-state from the seller). See also Griffin, Inc. v. Tully, 404 F. Supp. 738, 748 (D. Vt. 1975), vacated on other grounds, 97 S.Ct. 219 (1976). In such situations, a reasonable probability appears to exist that the advertising approach would be construed to be sufficiently adverse to the interests of the taxing state as to be tantamount to active solicitation within that state.

Question 3. Miller Brothers, supra, held, in part, that "occasional" deliveries of merchandise into the taxing state by an out-of-state seller were not, by themselves, sufficient to establish a nexus for requiring the seller to collect the taxing state's use tax. The more recent National Bellas Hess decision, supra, has extended this protected status to include all deliveries by common carrier.

"Occasional" is generally defined as "irregular" or "infrequent." Words and Phrases, "Occasional." Consequently, it appears that deliveries by a seller's vehicle on a regular or frequent basis would be sufficient to establish the requisite nexus. What degree of regularity or frequency would be required is uncertain. The four dissenters in Miller Brothers felt that the seller's delivery of at least \$12,000 of merchandise in a 4 1/2 year period constituted a "course of conduct in which [Miller Brothers] . . . regularly effected deliveries within Maryland." 347 U.S. at 358. Consequently, imposition of the registration requirement upon an out-of-state seller making daily or even weekly deliveries by means of its own vehicle would appear to be well within reason.

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Question 4. Subsection 1 of § 1754 requires registration by a seller "maintaining within this State any office . . . or other place of business." Therefore, if the presence of a non-soliciting employee in Maine can be deemed the maintenance of a place of business, the out-of-state seller can be required to register. General Motors v. Washington, 377 U.S. 436 (1964) and Standard Pressed Steel, supra, suggest that an office in the home of such an employee may suffice for this purpose. The remaining provisions of § 1754 relate exclusively to sales functions and are not useful. Consequently, while an argument can be made, at least in certain circumstances, and strengthened by regulations that the presence of a non-soliciting employee constitutes maintenance of an office or other place of business, a more certain method would be the amendment of § 1754 to specifically reach non-soliciting employees who maintain a presence within the state.

Section 1754(2) requires registration by a seller who "solicits orders by means of salesmen within the State." Consequently, to the extent that out-of-state advertising directed specifically at potential Maine purchasers is construed to constitute solicitation in Maine, such solicitation would not fall within the statutory registration requirement. The defect could be remedied by deletion of the words "by means of salesmen" or by addition of language to specifically include solicitation by advertising. In either case, regulations expressly encompassing advertising originating out-of-state but directed specifically at the Maine market would be advisable.

In contrast to the Maryland statute involved in Miller Brothers, which reached "selling or delivering in this State or any activity . . . in connection with the selling or delivering in this state of tangible personal property," section 1754 does not contain language capable of construction to include delivery of tangible personal property by the seller's vehicle into Maine. To achieve such inclusion, amendment of section 1754 to include "sellers who make regular or frequent deliveries in Maine of tangible personal property by means of their own vehicles" or similar language and prescription of regulations to reasonably define "regular" and "frequent" are advisable.

In summary, while the total effect of National Geographic is not entirely predictable, we believe that the State may act as suggested above with a reasonable probability of success. Please contact us if we may provide further information on this topic.

Sincerely,


JOSEPH E. BRENNAN
Attorney General