

REQUEST LETTER

November 15, 2004

04-024

NAME

CONTRACTING SERVICE

ADDRESS

Re: COMPANY (FEIN ##-#####)
Request for Nexus Determination Ruling

We wish to obtain a ruling on behalf of COMPANY regarding the interpretation of nexus requirements in the state of Utah as those requirements pertain to agency relationships. As such, we respectfully submit the following issue for your review and guidance:

Facts:

COMPANY is a STATE corporation engaged in the sale of nutritional supplements via a website accessible through the Internet. All sales are made via this website as COMPANY maintains no sales force.

The COMPANY website is maintained on a server located in 2ND STATE. All design, implementation, support, maintenance, and administrative services associated with the COMPANY website are performed in 2ND STATE.

COMPANY is considering entering into an Affiliate Agreement with various retailers who themselves maintain websites accessible through the Internet. One or more of these retailers has a physical presence in Utah by virtue of servers they themselves maintain in the state. (Affiliate retailers will be referred to as "Affiliate Partners" henceforth throughout this Ruling request.)

Under the proposed Affiliate Agreement, an internet "Link" will be established between the Affiliate Partner website and the COMPANY website. An Internet Link is a graphic or textual hyperlink. When placed on the Affiliate Partner website and "selected" by a user of the Affiliate Partner website COMPANY website. These links contain technology provided by COMPANY which allows COMPANY to track sales generated by the "Linked User" on the COMPANY website.

A "Linked User" is a user of the Affiliate Partner website who connects directly to the COMPANY website through a Link and, prior to terminating an active browsing session with the COMPANY website, makes a purchase using the checkout process located within the COMPANY website.

COMPANY will pay the Affiliate Partner a commission for purchases made on the COMPANY

website by Linked Users.

COMPANY will be solely responsible for approving and processing every order placed by a Linked User. In addition, COMPANY will be responsible for order entry, payment processing, shipping, cancellations, returns, and related customer service for such COMPANY product sales. Delivery will take place via the U.S. Postal Service. All of the activities indicated above will occur at an COMPANY warehouse and fulfillment facility in the state of 3RD STATE.

COMPANY has no physical presence in Utah aside from the relationship established via the proposed Affiliate Agreement described above.

Issue Statement:

It is our understanding that Affiliate Partners located in Utah may have nexus in Utah by virtue of the physical presence of the Affiliate Partners' computer servers maintained in the state. However, we are unclear as to COMPANY's status in this regard. We therefore request a Ruling on the following issues:

1. Does COMPANY achieve nexus in Utah for sales and use tax purposes by virtue of an agency relationship with Affiliate Partners?
2. Does COMPANY achieve nexus in Utah for income/franchise tax purposes by virtue of an agency relationship with Affiliate Partners?

If you require additional information or clarification of any part of this letter, please contact me directly at PHONE or via e-mail at [EMAIL ADDRESS](#).

Responses to this request may be sent via fax to FAX NUMBER, via e-mail to the e-mail address indicated above, or via mail to the following address:

CONTRACTING SERVICE
NAME
ADDRESS

Sincerely,

NAME

RESPONSE LETTER

February 10, 2006

CONTRACTING SERVICE
Attn: NAME
ADDRESS
Livermore, CA 94550

RE: Private Letter Ruling Request –

Dear NAME,

We received your request regarding sales tax issues relating to COMPANY, a STATE corporation, selling nutritional supplements via the Internet. You stated COMPANY is considering entering into Affiliate Agreements with persons located in the State of Utah.

You said COMPANY does not maintain a sales force. Rather, COMPANY makes all its sales via the Internet through affiliate retailers, called Affiliate Partners (Partners). COMPANY is considering contracting with affiliates in Utah. Some of the potential affiliates maintain servers in Utah.

Partners maintain websites with an Internet Link establishing a direct connection from the Affiliate Partner website to the COMPANY website. Partners with such websites are called Linked Users. If someone were to make a purchase through a website operated by a Linked User located in Utah, the website would have a link which customers would use to connect to the COMPANY server, which is located in 2ND STATE . Through the link, COMPANY can track sales generated by the Linked User.

You explained that COMPANY is solely responsible for approving and processing every order placed by a Linked User. In addition, COMPANY is responsible for order entry, payment processing, shipping, cancellations, returns, and related customer service for such COMPANY product sales. Delivery is accomplished via the U.S. Postal Service. All of the activities indicated above occur at an COMPANY warehouse and fulfillment facility in the state of 3RD STATE. Sales completed through a Linked User's website result in a commission paid to the Linked User.

You asked two questions. First, you asked, "Does COMPANY achieve nexus in Utah for sales and use tax purposes by virtue of an agency relationship with Affiliate Partners?"

§59-12-107 (1)(a) of the Utah Code provides, in pertinent part,

Except as provided in Subsection (1)(e) or Sections 59-12-107.1 through 59-12-107.4 and subject to Subsection (1)(f), each seller shall pay or collect and remit the sales and use taxes imposed by this chapter if within this state the seller:

.....

(iii) regularly solicits orders, regardless of whether or not the orders are accepted in the state, unless the seller's only activity in the state is:

(A) advertising; or

(B) solicitation by:

- (I) direct mail;
- (II) electronic mail;
- (III) the Internet;
- (IV) telephone; or
- (V) a means similar to Subsection (1)(a)(iii)(A) or (B);

Utah Administrative Rule R865-6F-6 (A)(4)(a) defines solicitation as speech or conduct that explicitly or implicitly invites an order. It appears that the Partners are agents of COMPANY soliciting orders. Nexus for sales tax purposes is created when a seller has agents in the State of Utah regularly soliciting orders.

This is not a case where COMPANY's only "presence" in Utah is a website maintained outside of Utah that potential customers may access in order to make a purchase. Here the websites, and some servers, would be owned, operated, and maintained in Utah, and sales would be solicited by COMPANY's Utah Partners. It is the physical presence of the Partners in Utah that establishes nexus.

Based on the information you provided, we conclude the Affiliate Partners who are Linked Users located in Utah would be agents or independent contractors of COMPANY soliciting orders for COMPANY. This would create nexus for sales tax purposes.

Sales tax rates vary slightly depending on location. The applicable rate would be the rate imposed at the point of delivery.

Second, you asked, "Does COMPANY achieve nexus in Utah for income/franchise tax purposes by virtue of an agency relationship with Affiliate Partners?"

Based on your representations, COMPANY is a foreign corporation not qualified in Utah. It ships goods to customers in Utah from points outside of Utah in response to orders solicited but not accepted by Affiliate Partners in Utah. It maintains no office or stocks of goods in Utah and engages in no other activities in Utah.

Utah Administrative Rule R865-6F-6 (C)(1) and (2) states,

Foreign corporations not qualified in Utah which ship goods to customers in this state from points outside this state, pursuant to orders solicited but not accepted by agents or employees in this state, and which are not doing business in Utah are not taxable under the Utah Corporation Franchise Tax Act if:

1. they maintain no office nor stocks of goods in Utah, and
2. they engage in no other activities in Utah.

Under such circumstances, COMPANY would not be liable under the Utah Corporation Franchise Tax Act. This outcome could change if COMPANY's activities include activities, other than solicitations, above a *de minimis* level. R865-6F-6 (A)(2) defines *de minimis* activities those that "when taken together, establish only a trivial connection with the taxing state. An activity conducted within Utah on a regular or systematic basis or pursuant to company policy, whether or not in writing, shall not normally be considered trivial."

You stated that COMPANY was solely responsible "for order entry, payment processing, shipping, cancellations, returns, and related customer service for such COMPANY product sales." If COMPANY does more than solicit sales in Utah, nexus for corporate franchise tax would be created. For additional information on activities establishing nexus for corporate franchise tax, please review the enclosed copy of Publication 37.

Should the facts be different from those represented to us in this letter, our opinion may change accordingly. Thank you for your inquiry into this matter.

For the Commission,

Marc B. Johnson
Commissioner

MBJ/SR
04-024