

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Petition for Redetermination under the Sales and Use Tax Law of
Robert L. Reynolds and Donald R. Reynolds

Appearances:

Petitioner: Abe Golomb, Representative
Jason Harrel, Attorney

Sales and Use Tax Department: Robert Stipe, Tax Counsel IV

Appeals Division: David H. Levine, Tax Counsel IV

MEMORANDUM OPINION

This opinion considers the merits of a petition for redetermination issued for the period July 1, 1998, through June 30, 2001. Petitioner is a partnership of Robert Reynolds and Donald Reynolds, dba Rogue Valley Bin Company. Petitioner has facilities in Oregon at which it manufactures fruit bins. It commenced this business in 1993, applying for and receiving a seller's permit in September 1993. Petitioner held that permit and filed quarterly returns during the period at issue here, reporting tax due on two of the returns and no tax due on its other quarterly returns. Petitioner contends it was not engaged in business in this state within the meaning of Revenue and Taxation Code section 6203 and is thus not indebted for the amount of use tax it would otherwise have been required to collect from its California purchasers and remit to the Board. We find three different bases under which petitioner was required to collect and remit the applicable California use tax.

Section 6203, subdivision (a), requires that a "retailer engaged in business in this state" collect the applicable use tax from its California purchasers.¹ Such amounts constitute debts that the retailer must pay to the Board. (Rev. & Tax. Code, § 6204.) As relevant here, "retailer engaged in business in this state" is defined by subdivision (c) of section 6203 to include:

“(1) 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.

¹ The issue of whether a retailer is engaged in business in this state is often phrased as whether the retailer has "nexus" with California. The term "nexus" in this context is derived from constitutional jurisprudence on the question of whether the retailer has a sufficient connection (i.e., *nexus*) with the taxing state to support that state's imposition of a use tax collection duty. While there is certainly a connection between the concept of engaged in business in this state for purposes of section 6203 and nexus for federal constitutional purposes, each concept requires a separate analysis. To avoid confusion, we refer herein only to the statutory definition of a retailer engaged in business in California under section 6203. We do not refer to the constitutional concept of nexus except to note our conclusion that *any* retailer who is engaged in business in California under section 6203 has constitutional nexus with this state for purposes of use tax collection since section 6203 requires a sufficient physical presence in this state to satisfy the constitutional requirements for use tax collection nexus.

“(2) 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.”

If petitioner was engaged in business in California within the meaning of either, or both, of these definitions, then it is liable for the use tax it failed to collect from its customers and remit to the Board. Petitioner’s owners reside in California and own businesses located in this state, at least one of which, Reynolds Nailing (RN), is involved in this dispute. However, petitioner asserts that petitioner’s owners are absentee owners who do not participate in its business activities, and that petitioner is a separate legal entity from any of the related companies, including RN. Petitioner asserts that it has no physical location or other presence within California for purposes of section 6203.

There are two basic types of transactions included in the determination under consideration. One involved purchases by California consumers where petitioner shipped the property by common carrier from Oregon directly to the purchasers. These types of transactions, by themselves without more, would not be sufficient to find that petitioner had been engaged in business in California. However, petitioner also made sales to California purchasers where it shipped unassembled goods to RN in California, who completed assembly and effected delivery of the completed property to the purchaser (delivery was completed by RN’s releasing the property at its location either to a common carrier or to the purchaser itself). It is undisputed that a physical location within California was in some way involved in these transactions, raising the issue of whether this California involvement is sufficient to bring petitioner within section 6203.

Business Location in California

Under subdivision (c)(1) of section 6203, a retailer is engaged in business in this state if it is regarded as having a business location in California. RN, of course, had a business location in California and thus was engaged in business in this state. If petitioner and RN were the same legal entity, such as two divisions of the same corporation, then petitioner would also have been engaged in business in this state since RN and petitioner would have been the same person for purposes of the Sales and Use Tax Law (Rev. & Tax. Code, § 6005). We accept petitioner’s representation that the two were separate legal entities, so RN’s status as a retailer engaged in business in this state is not determinative of petitioner’s status. Rather, further analysis is required.

Based on petitioner’s description of its business, petitioner did not have a permanent business location in this state in its own name. However, the business location requirement of subdivision (c)(1) is satisfied even where the retailer simply occupies or uses a place of distribution, warehouse, storage place, or other place of business in this state on a temporary basis, indirectly through an agent (regardless of characterization). The facts do not indicate that petitioner had an explicit agreement with RN that some portion of RN’s California facilities would be reserved and dedicated to the use of petitioner, bringing petitioner within subdivision (c)(1) on that basis. Nevertheless, even in the absence of such an explicit agreement, the facts indicate that there was sufficient of petitioner’s tangible personal property located at RN’s

California location and sufficient activity performed on petitioner's behalf that petitioner essentially had a place of business at RN's location in California.²

The present case does not come within the safe harbor situations discussed in the preceding footnote. Petitioner shipped goods to RN in California for assembly, and at the time of that shipment, it was known and intended that, upon completion of the in-state assembly, the goods would be transferred from RN's in-state location to California purchasers (directly or through common carriers). RN notified petitioner when assembly was completed, and then held petitioner's fully assembled goods until they were actually picked up by common carrier (hired by petitioner or its customer) or by the customer itself. Thus, for however long it took after assembly was completed, RN held petitioner's finished goods until the sale could be completed. Whether or not any prior storage by RN of petitioner's goods rose to the level of a storage place used by petitioner, we conclude that the storage of the finished products pending sale by petitioner constituted petitioner's use of a storage place for its stock of goods held on its behalf by its agent, within the meaning of subdivision (c)(1) of section 6203. We therefore conclude that petitioner was a retailer engaged in business in California on this basis, liable for the applicable use tax it failed to collect and remit to the Board.

Representative in California

Subdivision (c)(2) of section 6203 provides that a retailer is engaged in business in this state if it has any representative operating in this state under its authority "for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property." We first address the issue of authority. Petitioner contends that RN did nothing under the authority of petitioner. Besides the fact that RN and petitioner are related and share common ownership,³ where a retailer hires another person to perform some act on the retailer's behalf, that person necessarily acts under the retailer's authority to the extent it performs the requested act on the retailer's behalf. Here, regardless of their relationship, petitioner hired RN to assemble goods and perform other acts on its behalf. RN was obviously authorized by petitioner to perform those acts that petitioner hired RN to perform on its behalf. That is all this term as used in section 6203 means: it does not in any way require a specific form of relationship (e.g., agency). Rather, as long as the in-state person is doing something at the out-of-state retailer's specific or constructive⁴ request, the in-state person does so under the out-of-state retailer's authority, at least for purposes of section 6203.

² This issue can arise whenever property owned by an out-of-state retailer is processed through another person's California business location. We find that the mere flow of an out-of-state retailer's property through another person's California location is not alone sufficient to bring the out-of-state retailer within section 6203. For example, an out-of-state retailer would not be regarded as using a business location in California under section 6203 where, as part of the transport of the retailer's property, a common carrier moves such property through its California facility. Similarly, where an out-of-state retailer ships property by common carrier to an in-state fabricator solely for purposes of fabrication and the in-state fabricator ships the fabricated property back to the out-of-state retailer upon completion of fabrication, the out-of-state retailer would not generally be regarded as having a business location in this state as a result of the California fabrication. (Note that where the in-state fabricator maintains dedicated storage of the out-of-state retailer's uncommingled property at a California location, that dedicated storage might be regarded as a business location of the out-of-state retailer for purposes of section 6203, depending on the actual facts.)

³ It is difficult to fathom a circumstance where a business that shares common ownership with another would perform acts on the other's behalf without being authorized in some manner by its relative to do so.

⁴ See our memorandum decision in *Borders Online* (9/26/01) as well as the Court of Appeal decision in the same matter (*Borders Online v. State Bd. of Equalization* (2005) 129 Cal.App.4th 1179, 1189-90).

Next we address certain circumstances which are *not* sufficient to bring an out-of-state retailer within section 6203, subdivision (c)(2). The activities listed in subdivision (c)(2) include delivery and assembly. When an out-of-state retailer hires a common carrier to transport and deliver goods to a California purchaser, on first blush that may appear to bring the retailer within section 6203. Under such circumstances, the common carrier is certainly delivering the property under authority of the retailer, as explained above. Nevertheless, we have not interpreted the delivery element of subdivision (c)(2) as having been satisfied solely by common carrier delivery.⁵ Rather, the delivery must be tied to some other activity related to selling. Similarly, although assembly is listed as one of the activities in subdivision (c)(2), we have not regarded mere assembly, alone, as sufficient. That is, we have not regarded an out-of-state retailer as coming within section 6203 solely based on its hiring of a California fabricator to assemble goods that are then shipped back to the out-of-state retailer for its disposition of the assembled goods. However, when that assembly is tied to any additional activity in this state, we must determine whether the in-state fabricator is the out-of-state retailer's representative for purposes of assembly within the meaning of subdivision (c)(2).

Here, RN did not merely assemble petitioner's goods in this state and ship them back to petitioner for its disposition. Rather, RN was directly involved in the delivery of the goods to the California purchasers. Petitioner argued during its Board hearing that RN did nothing with petitioner's customers, who had no idea RN was involved, and specifically stated during the hearing that RN did not deliver the assembled goods to petitioner's California purchasers. However, in addition to information in the audit report regarding how delivery by RN was effected, petitioner itself stated, by letter from its attorney, that after RN notified petitioner that the bins were assembled, either the "customers or [petitioner] arranged for the delivery of the bins to the customers." Where the customer's arrangement for delivery was to pick up the goods from RN itself, then the customer necessarily had to know of RN's involvement, at least to the extent that the goods were in California at RN's location. Similarly, where the customer's arrangement for delivery was to hire a common carrier to pick up the goods from RN's location, the customer again had to at least know that the goods were in California at RN's location. When the customer or its common carrier picked up the goods, RN presumably ensured that an authorized person was accepting delivery of the fabricated goods RN held on petitioner's behalf.

To summarize the relevant facts, RN received petitioner's unassembled goods with ownership remaining with petitioner, RN assembled the goods, RN contacted petitioner upon completion, RN held petitioner's assembled goods until an authorized person arrived to accept possession, and RN then transferred possession of the goods, on petitioner's behalf, to a person who RN determined was authorized to accept such possession. We conclude that these facts are sufficient to regard RN as having acted under petitioner's authority as its California representative to assemble and deliver tangible personal property within the meaning of subdivision (c)(2) of section 6203. We therefore conclude that petitioner was a retailer engaged in business in California on this basis, liable for the applicable use tax it failed to collect and remit to the Board.

⁵ Nor would such an interpretation be constitutional. (*Quill Corp. v. North Dakota*, (1992) 504 U.S. 298; *National Bellas Hess, Inc. v. Department of Revenue of Ill.* (1967) 386 U.S. 753.) Nevertheless, if that is what the Legislature intended when adopting section 6203, we would be mandated to follow that meaning in the absence of an appellate court decision specifically stating that section 6203 as so interpreted is unconstitutional. (Cal. Const. Art. 3, section 3.5.) Fortunately, we are not faced with that troubling dilemma.

Holding of a Seller's Permit

As noted above, petitioner held a seller's permit. A person conducting business as a seller of tangible personal property of a kind whose retail sale is subject to tax, *and only a person actively so engaged*, is required to hold a seller's permit for each place of business in California at which transactions relating to sales are customarily negotiated. (Rev. & Tax. Code, § 6066, Cal. Code Regs., tit. 18, § 1699, subd. (a) (a person maintaining a stock of merchandise in this state for sale must hold at least one seller's permit, even if it does not have any location in this state at which negotiations are conducted).) That is, a retailer who properly holds a California seller's permit will always have a business location in this state, which means that a retailer who properly holds a California seller's permit will necessarily also come within the provisions of section 6203 as a retailer engaged in business in this state. (Rev. & Tax. Code, § 6203, subd. (c)(1).) If a retailer does not come within section 6203, it is not entitled to hold a seller's permit. Stated another way, a retailer's holding of a seller's permit is the retailer's representation that it is engaged in business in this state.

A retailer who has no business location in California should not hold a seller's permit even if it is required (or wishes) to collect use tax from its California purchasers. Rather, such a retailer should apply for a Certificate of Registration – Use Tax. This is the registration for a retailer engaged in business in this state who does not have a California location for which a seller's permit is required. A retailer holding such a certificate is required to collect the applicable use tax from its California purchasers and remit that tax to the Board, and must continue doing so as long as it holds the certificate. (Cal. Code Regs., tit. 18, § 1684, subd. (c).) This is true even if it had been a voluntary registrant or its activities changed such that it was no longer required to hold the certificate. (*B&D Litho* (BOE Memorandum Opinion issued 5/31/01).) There can be no lower standard for a person who applies for and holds a seller's permit, thereby representing to the Board that it is engaged in business in this state. Accordingly, we conclude that as long as such a retailer holds a seller's permit, it is required to comply with the requirements imposed on all holders of seller's permits, including the collecting and remitting of any applicable California use tax.

We note that the information included on petitioner's September 1993 application for seller's permit may have been sufficient to indicate petitioner should have been issued a Certificate of Registration – Use Tax rather than a seller's permit since there is no clear indication on the application that petitioner had any business location within California. In any event, our conclusion is the same: whether petitioner held a seller's permit under which it effectively represented that it was engaged in business in this state or it held a Certificate of Registration – Use Tax, petitioner is liable for the use tax it failed to collect and remit.

Adopted at Sacramento, California on May 31, 2007.

Betty T. Yee, Chairwoman

Judy Chu, Ph.D., Member

Marcy Jo Mandel, Member*

*For John Chiang, pursuant to Government Code section 7.9.