

UNRESOLVED ISSUE

Issue: Whether petitioner was required to collect and report use tax to the Board because it held a Certificate of Registration–Use Tax. We conclude that it was.

Petitioner, a corporation located in Utah, manufactured and sold computer-based information technology training products on computer storage media. Petitioner has no locations in California; it made sales through the Internet and in response to orders received by mail or by telephone. Based on its review of a questionnaire completed by petitioner, the Sales and Use Tax Department (Department) informed petitioner that it needed to hold a Certificate of Registration–Use Tax and sent petitioner an application. Petitioner’s president completed and signed the application and submitted it to the Department. The Board issued a Certificate of Registration–Use Tax to petitioner on March 12, 2003, effective April 1, 1999, the start date of the business.² The Department had conducted an audit of the period January 1, 1999, through December 31, 2002, that resulted in a deficiency assessment, but petitioner settled that determination with the Board prior to the holding of an appeals conference. For the current audit period, the Department examined petitioner’s recorded nontaxable sales for resale to California customers on an actual basis and disallowed sales for resale totaling \$674,239 that were not supported by resale certificates or other documentation, such as XYZ letters.³ The amount disallowed was reduced to \$627,341 in a reaudit, based on additional documentation. Petitioner does not dispute the amount of disallowed nontaxable sales for resale.

What petitioner does dispute is its obligation to collect and remit California use tax because, it contends, it was not a retailer engaged in business in this state during the audit period. Petitioner filed a claim for refund on the same grounds for the \$105,602 use tax it collected from its California customers and remitted to the Board for the audit period. Petitioner asserts that it was not required to obtain a Certificate of Registration–Use Tax because it did not maintain a business location in this state, it had no sales representatives soliciting sales in California, and it did not engage in any activities

² The registration was closed out, effective September 30, 2008, at petitioner’s request.

³ For some returns, petitioner reported gross sales and deducted claimed sales for resale (i.e., the proper method), and for other returns, petitioner netted recorded resales from its gross sales so that its reported gross sales were actually its gross sales *net* of recorded resales, without separately reporting the claimed resales. Therefore, the Department reviewed the recorded, rather than the claimed, amounts of nontaxable sales for resale.

that would render it a retailer engaged in business in this state pursuant to Revenue and Taxation Code section 6203. Although it acknowledges that it held the registration during the audit period, petitioner contends that it obtained the certificate involuntarily because “it was required to” do so by the Board. Petitioner notes that it submitted a letter on March 5, 2003, with its application, objecting to the Board’s position that it needed to hold a Certificate of Registration–Use Tax. Petitioner also submitted at least three other letters in 2002 and 2003 in which it strenuously disputed the Board’s jurisdiction over petitioner and its “concomitant obligation to collect taxes.” Further, in those letters, petitioner denies, both prospectively and historically, that “sufficient nexus between [petitioner] and California can be established so as to create an obligation to collect taxes.” Therefore, petitioner contends it did not voluntarily obtain the registration, but states that it filed the application because it was concerned that if it did not obtain a certificate and collect use tax from California customers, it might have been required to pay any tax liability from its own resources.

Petitioner is entirely correct that, had it not obtained the registration, it would not have been authorized to collect any California use tax from its California purchasers, and thus would have been at risk of being held liable for any use tax it was required to collect from its California consumers and remit to the Board. Furthermore, the Department now acknowledges there is no evidence that, during the current audit period, petitioner was a retailer engaged in business in this state. Thus, had petitioner not applied for the registration, or had petitioner affirmatively cancelled its registration (for periods after that cancellation), petitioner would not have been liable for tax in connection with sales for which it collected no tax from its customers. However, petitioner did obtain the registration, and despite its protestations that it was not required to do so, petitioner never cancelled that registration during the audit period. We accept that petitioner’s decision to apply for and retain the Certificate of Registration–Use Tax was based on its business determination that it was preferable to hold the certificate and collect and remit tax than to risk owing tax without having collected such amounts from its customers. However, that was still petitioner’s own decision and, for these purposes, clearly a voluntary decision. Of course, had petitioner requested cancellation of the registration and the Department refused, then, from that point, petitioner would have been regarded as holding the registration involuntarily. There is, however, no indication or allegation that petitioner ever requested

1 cancellation of the registration, and the Department has indicated that, had petitioner done so, the
2 registration would have been cancelled. Since petitioner did hold the registration, and obtained and
3 retained it voluntarily for these purposes, it was required to collect and remit California use tax on its
4 sales to California consumers. Thus, we conclude that the petition should be denied.

5 For the same reasons, we find no basis for granting the claim for refund. Furthermore, even if
6 petitioner had shown a basis for granting the petition, we would still find no basis for granting the
7 claim. For these transactions, petitioner collected California use tax that was actually due from its
8 California consumers, and remitted that tax to the Board. There is no evidence (or allegation) that the
9 tax was overpaid since the tax was actually due and was paid by the California consumers who actually
10 owed the tax. Furthermore, those consumers paid the tax to a retailer who was, at that time, registered
11 to collect that tax and who, presumably, provided them receipts excusing them from liability to the
12 Board for the taxes they paid to petitioner. (Rev. & Tax. Code, §§ 6202, subd. (a), 6203, subd. (a);
13 Cal. Code Regs., tit. 18, § 1686, subd. (a).) We find that the claim for refund must be denied.

14 **OTHER DEVELOPMENTS**

15 None.

16
17
18 Summary prepared by David H. Levine, Tax Counsel IV
19
20
21
22
23
24
25
26
27
28