

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Administrative Protest)
 4 Under the Sales and Use Tax Law of:)
 5 ONLINE SOLAR, INC., dba Mr. Solar) Account Number SC OHB 100-695003
 6 Taxpayer) Case ID 528698
 7) Cockeysville, Maryland

8 Type of Business: Retailer of solar power systems

9 Audit period: 10/1/06 – 09/30/09

10 Item Disputed Amount

11 Unreported taxable sales \$635,212

12 Negligence penalty \$ 4,762

13 Tax

Penalty

14 As determined \$59,375.00 \$5,937.56

15 Finality penalty 5,937.50

16 Post-D&R adjustment -11,750.74 -2,350.22

17 Tax and penalty, as adjusted \$47,624.26 \$9,524.84

18 Tax, as adjusted \$47,624.26

19 Interest through 10/31/13 18,154.71

20 Negligence penalty 4,762.41

21 Finality penalty 4,762.43

22 Total tax, interest, and penalty \$75,303.81

23 Monthly interest beginning 11/01/13 \$ 238.12

24 This matter was scheduled for Board hearing in October 2012, but was deferred at the request
 25 of the Appeals Division in order to issue a supplemental D&R.

26 **UNRESOLVED ISSUES**

27 **Issue 1:** Whether adjustments are warranted to the unreported taxable sales. We find no further
 28 adjustment is warranted.

29 Taxpayer operates as a retailer of solar power systems in Cockeysville, Maryland. In February
 30 2006, taxpayer applied for and was issued a California Certificate of Registration – Use Tax. During
 31 the audit period, taxpayer filed returns reporting no sales.

1 The Sales and Use Tax Department (Department) received, from an anonymous informant, an
2 email from Brent Richey Atkins (taxpayer's president and sole corporate officer) stating that taxpayer
3 has a warehouse in Rancho Cucamonga, California and that merchandise is shipped to customers from
4 that warehouse. The Department talked with Mr. Atkins' wife, and she stated that their son sells and
5 installs solar power systems in the San Diego area. The Department concluded taxpayer is engaged in
6 business in California and thus required to collect and report California use tax.

7 Taxpayer provided no books and records during the audit, although the Department requested
8 records on several occasions. In the absence of records, the Department estimated taxpayer's taxable
9 sales in California at \$62,500 per quarter, or \$750,000 for the audit period, based on the Department's
10 review of the types of products sold through taxpayer's website. Taxpayer contends that the estimate
11 is excessive, arguing that California sales represented about 2 percent of its total sales, which it states
12 were \$1,225,000 for 2006, \$1,750,000 for 2007, and \$1,938,000 for 2008. Further, taxpayer states that
13 its sales to end users ranged from \$25 to \$75, its sales for resale ranged from \$35 to \$175, and its sales
14 to the U. S. Government ranged between \$5,000 and \$15,000.

15 After the appeals conference, taxpayer submitted a national customer listing, which apparently
16 represented about 60 percent of its customers. The listing showed each customer's name, telephone
17 number, city, state, and zip code, and taxpayer had made notations next to the California customers to
18 indicate whether the sale was to an end user, for resale, or to the U. S. Government. In the D&R, we
19 concluded that an analysis of the available records did not provide evidence to support adjustments but
20 instead offered some support for the audit findings.

21 After we contacted taxpayer in October 2012 to offer another opportunity to provide
22 information to support adjustments, taxpayer provided additional names and customer information, to
23 supplement the listing of its customers it had previously provided, and a summary of sales to each
24 customer for 2010.¹ Taxpayer explained that it assumed sales to individuals were sales to end users

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26 ¹ The second customer list taxpayer provided included customers with names beginning with the letters P through Z.
27 However, the second list was sorted using the customers' last names, while the original list had been sorted using the
28 customers' first names. Therefore, there are duplicates on the two lists, and it is probable that some customers are missing
from both lists.

1 and that sales to businesses were sales for resale. Taxpayer estimated that 12 percent of its sales were
2 to California customers, but it has not computed a percentage of those sales that it believes were made
3 to end users in California.

4 Taxpayer has not provided any sales invoices or other data regarding its sales, and the customer
5 list is of limited evidentiary value, particularly since it is incomplete. Further, taxpayer has provided
6 no evidence to support its assertion that some of its sales to California customers were not subject to
7 tax as sales for resale or to the U. S. Government. Nevertheless, the Department used the expanded
8 customer listing to establish that 683 of taxpayer's 4,416 customers had addresses in California. Then,
9 based on the customer names, the Department determined that 168 of the 683 California customers
10 may be in the business of selling solar products. Thus, the Department concluded that 515 of
11 taxpayer's 4,416 customers, or 11.66 percent, were end users in California. The Department computed
12 total sales using the gross receipts reported on taxpayer's federal income tax returns. The Department
13 then applied 11.66 percent to audited total sales to compute \$635,212 in taxable sales to consumers in
14 California, which is \$114,788 less than the amount established in the audit (\$750,000).

15 Although taxpayer disagrees with the amount of taxable sales established in the most recent
16 reaudit, it has not provided documentation, such as sales invoices and resale certificates, to support
17 additional sales for resale. We have reviewed the reaudit and have found no errors. In the absence of
18 supporting evidence, we recommend no further adjustments.

19 **Issue 2:** Whether taxpayer was negligent. We conclude that it was.

20 The Department imposed the negligence penalty because taxpayer presented no books and
21 records. Taxpayer disputes the penalty on the basis that it did not have a physical presence in
22 California and did not believe it was required to collect California tax. Further, taxpayer states that it
23 was unable to provide records because, in 2009, it installed a computer program that corrupted all
24 records for prior periods.

25 Over 15 percent of the customers on taxpayer's customer listing were located in California, and
26 taxpayer held a certificate of use tax registration. Thus, taxpayer knew it was making sales in
27 California, and it was knowledgeable enough to acquire a certificate of use tax registration.
28 Nevertheless, taxpayer did not report any use tax on its sales to California customers. Accordingly,

1 while there is some dispute regarding taxpayer's physical presence in California, we simply do not
2 accept that taxpayer had no idea that it was required to collect California tax.

3 Taxpayer did not provide any formal accounting records. Although taxpayer states that its
4 records were corrupted in 2009 when it installed a computer program, it has provided no supporting
5 documentation. We find it unlikely that taxpayer would have no paper copies of bank statements, sales
6 invoices or purchase invoices. Also, taxpayer did not provide records that it could have acquired from
7 third parties, such as bank statements or shipping records, even though such records were requested.
8 We find that taxpayer's failure to provide any accounting records whatsoever is evidence of negligence
9 and that the penalty was properly applied, even though taxpayer had not been audited previously.

10 **RESOLVED ISSUE**

11 Initially, taxpayer contended that it had no responsibility to collect or remit California tax
12 because it does not have a warehouse or any physical presence in California. However, it is
13 undisputed that taxpayer voluntarily held a Certificate of Registration –Use Tax during the audit
14 period. Moreover, through its representative in a telephone conversation on September 23, 2013,
15 taxpayer has stipulated that it had a tax collection obligation in connection with retail sales in this state.
16 Accordingly, this issue is no longer in dispute.

17 **OTHER MATTERS**

18 Since taxpayer did not timely pay the determination or file a petition for redetermination, a
19 finality penalty was applied. Although we explained to taxpayer that relief of the finality penalty could
20 be granted if the failure to timely pay the determination was due to reasonable cause, and provided a
21 form taxpayer could use to request relief, it has not done so. Thus, we have no basis to consider
22 recommending relief of the finality penalty.

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24 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III
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