STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	)	
	)	Account Number: SR OH 97-143740
PROPELLER PORTABLE COMPUTER PRODUCTS, INC.	)	Case ID 158412
	)	
Petitioner	)	Orem, Utah

Type of Business: Retailer of computer hardware and software

Audit period: 04/01/97 – 06/30/01

Item	Disputed Amount
Unreported taxable sales-2nd quarter 2007	$4,198,503

	Tax	Penalty
As determined:	$353,533.89	$34,565.76
Adjustment: Appeals Division	00.00	-34,565.76
Proposed redetermination	$353,533.89	$0.00
Less concurred	-7,876.38	
Balance, protested	$345,657.51	
Proposed tax redetermination	$353,533.89	
Interest through 7/31/10	420,143.60	
Total tax and interest	$773,677.49	
Payments	-69,500.00	
Balance Due	$704,177.49	
Monthly interest beginning 8/1/10	$1,656.86	

This matter was previously scheduled for Board hearing on January 27, 2004, but was postponed at petitioner's request because a new attorney had been retained. It was rescheduled for Board hearing on February 18, 2004, but was deferred at the direction of the Board Chairwoman's office. It was then rescheduled on April 18, 2006, but was postponed for settlement consideration. This matter was then rescheduled for Board hearing on May 26, 2010, but was again postponed because petitioner's representative needed additional to prepare an opening brief.

UNRESOLVED ISSUES

Issue 1: Whether petitioner was a retailer engaged in business in California during the second quarter of 1997. We find that it was.

Petitioner was a retailer of computer hardware and software located in Utah, which did not maintain a sales office or other place of business in California. Petitioner's business was discontinued, with no successor, and its seller's permit was closed out, as of September 30, 2004. At some point in 1997, petitioner sent an employee to engage in business activities in California. It is undisputed that, on or about July 4, 1997, one of petitioner's employees moved to California because petitioner's largest customer, Oracle Corporation, wanted a person on site to facilitate the ordering process. Petitioner obtained a seller's permit with an effective date of July 1, 1997, the date it believed it became obligated to report tax, as a result of the employee's move to California. The Sales and Use Tax Department found that, during the second quarter 1997, petitioner's employee traveled into California and that petitioner was therefore engaged in business in this state.

Petitioner does not dispute the amount of the tax but contends that it was not obligated to collect or report any sales or use tax on sales to purchasers in California prior to July 1, 1997. Based on the available evidence, we find that petitioner had an employee in California, taking sales orders, during the second quarter 1997. We therefore conclude that petitioner was engaged in business in California during the second quarter 1997 and was required to collect use tax from purchasers in California and remit that tax to the Board. (Rev. & Tax. Code § 6203, subd. (c)(2); Memorandum Opinions of *Borders Online, Inc.* (9/16/01) and *Barnes & Noble.com* (9/12/02).

Issue 2: Whether adjustments are warranted because the California purchasers are required to pay use tax. We recommend no adjustment.

As stated previously, petitioner's largest customer was Oracle Corporation. Petitioner asserts that Oracle should be the party to pay the use tax, and states that it has attempted to collect the tax from Oracle. Oracle has taken the position that the applicable tax is sales tax. Further, as stated in an email to petitioner, Oracle asserts that it has no liability for tax with respect to the sales in question. That position is legally incorrect. With respect to the sales at issue, use tax applies, and Oracle has not presented a valid receipt from petitioner indicating that tax has been paid. Oracle's liability for use tax is not extinguished until the tax has been paid to this state. At the same time, as a retailer engaged in business in California, petitioner was required to collect the use tax from the purchaser for the sales in question and remit the tax to the Board. Petitioner's liability for the use tax is a statutorily established

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debt to the state. Thus, the fact that Oracle is also liable for the use tax is not a basis for adjustment of petitioner's liability.

AMNESTY

The amnesty interest penalty is not applicable in this case because petitioner filed an application for amnesty and entered into a qualifying installment payment plan.

RESOLVED ISSUE

In the SD&R dated November 6, 2003, we conclude that petitioner had a good faith, though legally erroneous, belief that it was not required to report use tax for the second quarter 1997 because it had no employees who lived in California. Accordingly, we find that petitioner's failure to file a return for that quarter was due to reasonable cause, and the SD&R recommends that failure-to-file penalty be deleted.

OTHER DEVELOPMENTS

None.

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

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