

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Petition for Redetermination)
 4 Under the Sales and Use Tax Law of:)
 5 WERTHER INTERNATIONAL, INC.) Account Number: SR S OHC 30-673308
 6) Case ID 290751
 7 Petitioner) Houston, Texas

8 Type of Business: Seller of small compressors

9 Audit Period: 10/1/00 – 9/30/03

10 <u>Item</u>	<u>Amount in Dispute</u>
11 Disallowed Claimed Sales for Resale	\$103,944
12 Amnesty interest penalty	\$725
	<u>Tax</u>
14 As determined	\$10,289.13
15 Adjustment – Appeals Division	<u>- 1,942.93</u>
16 Proposed redetermination and protested	<u>\$ 8,346.20</u>
17 Proposed tax redetermination	\$8,346.20
18 Interest through 8/31/09	5,230.81
19 Amnesty interest penalty	<u>724.94</u>
20 Total tax, interest, and penalty	\$14,301.95
21 Payments	<u>-491.29</u>
22 Balance	<u>\$13,810.66</u>
23 Monthly interest beginning 9/1/09	<u>\$52.37</u>

21 This matter was originally scheduled for Board hearing on July 21, 2009, but was postponed
22 because petitioner’s representative has conflicting travel arrangements.

23 UNRESOLVED ISSUES

24 **Issue 1:** Whether petitioner was a retailer engaged in business in California for the audit period
25 October 1, 2000, through September 30, 2003. We conclude it was.

26 Petitioner manufactured and sold specialty air compressors and related items to the medical and
27 artistic industries. Petitioner’s business is located in Texas, and petitioner maintains no physical
28 locations in this state. Petitioner shipped its products into California via common carrier. Petitioner

1 has held a Certificate of Registration—Use Tax with the Board since 1986. During the audit period,
2 petitioner reported and paid use tax on some, but not all, of its California sales (i.e., it appears
3 petitioner collected and remitted use tax on sales it thought were properly subject to tax, and only those
4 sales for which the Department believes are taxable and petitioner did not are in dispute). Although
5 petitioner was registered with the Board and did report and pay tax with respect to some of its sales, it
6 disputes the Notice of Determination based on having no “nexus” with California.

7 Section 6203, subdivision (a) requires that a “retailer engaged in business in this state” collect
8 the applicable use tax from its California purchasers. Such amounts represent debts that the retailer
9 must pay to the Board. (Rev. & Tax. Code, § 6204.) As relevant here, “retailer engaged in business in
10 this state” is defined by subdivision (c)(2) of section 6203 to include:

11 Any retailer having any representative, agent, salesperson, canvasser,
12 independent contractor, or solicitor operating in this state under the
13 authority of the retailer or its subsidiary for the purpose of selling,
14 delivering, installing, assembling, or the taking of orders for any tangible
personal property.

15 The Department determined that petitioner was engaged in business in California and thus
16 required to collect and remit use tax in connection with its sales to California consumers. These sales
17 included sales to unregistered out-of-state retailers who sold the products to California retail
18 customers, where petitioner “drop shipped” the property to the California retail purchasers (i.e.,
19 shipped the goods directly to the retail purchasers in California on behalf of the retailers’ rather than
20 shipping the goods to its retailer customers who would have then had to re-ship the goods to their
21 purchasers). However, as explained in Issue 2, sales drop shipped to California retail customers were
22 removed from the deficiency where the customer held a valid California seller’s permit, consumer use
23 tax permit, Certificate of Registration – Use Tax, or use tax direct payment permit

24 Petitioner contends that it is no longer engaged in business in California. Petitioner indicated
25 that, at the time of its initial registration with the Board in 1986, it had sales representatives in
26 California on a regular basis. However, petitioner claims that it has not had a representative in this
27 state since 1994. Petitioner also claims that it tried to close out its permit a few years ago, but the
28 Board would not allow it to do so. Petitioner further believes that, with respect to a Board hearing on a

1 prior audit, the Board held petitioner did not have “nexus” with this state.

2 Petitioner’s president regularly entered this state to visit customers in support of petitioner’s
3 sales activities, at least 14 times during the audit period. This clearly brings petitioner within the
4 definition of retailer engaged in business in this state under subdivision (c)(2) of section 6203.
5 Furthermore, petitioner held a Certificate of Registration - Use Tax during the audit period and actually
6 reported and paid use tax to the Board. Petitioner cannot pick and choose the transactions for which it
7 will collect and remit use tax. Rather, as a retailer registered to collect California use tax, it must
8 collect *all* applicable use tax and is liable under section 6204 to the extent it does not do so, and this is
9 true even if it held that registration on a voluntary basis. (Cal. Code Regs., tit. 18, § 1684, subd. (c)
10 (retailer who is not engaged in business in this state but who voluntarily applies for a certificate of
11 registration must collect and remit the applicable use tax in the same manner as retailers engaged in
12 business in this state).)

13 Petitioner’s argument that the Board concluded that petitioner did not have “nexus” with this
14 state for a prior audit period is irrelevant with respect to the current audit period in that the undisputed
15 facts show that petitioner had a physical presence in this state bringing it within the definition of
16 retailer engaged in business in this state (i.e., the president’s regular visits to customers in California in
17 support of sales activities). More fundamentally, however, is that the Board did not rule that petitioner
18 was not engaged in business in this state. Rather, the Board directed that the Department and
19 petitioner discuss the questioned transactions after the hearing, and after that discussion, which was off
20 the record, the *Department* conceded the disputed transactions and recommended that the petition be
21 granted. The Board adopted that recommendation.

22 As in the current audit period, during the prior audit period, petitioner was registered *and*
23 collected and remitted use tax. The dispute concerned transactions for which petitioner did not collect
24 use tax but for which the Department had (initially) concluded were taxable. Given that petitioner was
25 registered to collect use tax during the prior audit period *and* that it collected and remitted tax on some
26 transactions (i.e., presumably the transactions it thought were taxable), it is highly unlikely that the
27 basis of the Department’s concession was that petitioner had no “nexus” with California because even
28 if that were so, petitioner would have still been required to collect the use tax that was actually due.

1 (Cal. Code Regs., tit. 18, § 1684, subd. (c).) Rather, the more likely explanation is that, during their
2 off-the-record discussion, petitioner convinced the Department that the questioned transactions were
3 not taxable. In any event, the facts here show that petitioner was engaged in business in California
4 during the present audit period.

5 With respect to petitioner's argument that it attempted to cancel its registration, this would be
6 relevant only if petitioner were not required to hold the registration and the Department wrongfully
7 failed to cancel it. However, for the reasons explained above, we find that petitioner was engaged in
8 business in this state, so even if petitioner did request cancellation, denial of that request would have
9 been proper. In any event, petitioner has not established that it tried to cancel the registration or that
10 the Department wrongfully failed to cancel the registration.

11 **Issue 2:** Whether petitioner has provided sufficient evidence to prove that the remaining
12 disputed transactions were sales for resale. We find that petitioner has not.

13 At issue are disallowed claimed sales for resale and drop shipments to California consumers.
14 The disallowed claimed sales for resale represent questioned resales that were not supported by resale
15 certificates, Board registration records, or purchase invoices indicating "for resale." The drop
16 shipments represent transactions in which petitioner made a sale of its products to out-of-state retailers
17 not engaged in business in California, and, on behalf of those retailers, then shipped the property via
18 common carrier directly to consumers in this state.

19 In our first Supplemental Decision and Recommendation, we recommended a reaudit for the
20 Department to review, pursuant to Audit Manual section 0409.75, the drop shipments included in the
21 deficiency and remove those drop shipments where the customer held, at the time of the sale, a valid
22 California seller's permit, consumer use tax permit, Certificate of Registration – Use Tax, or use tax
23 direct payment permit. These transactions have been removed from the deficiency and petitioner has
24 not established that any of the sales remaining in the deficiency were sales for resale. Accordingly, we
25 find that no further adjustments are warranted.

26 AMNESTY

27 An amnesty interest penalty of \$724.94, imposed under 7074, subdivision (a), will be
28 applicable in this case when the liability is final. By letter dated August 30, 2006, we advised

1 petitioner that it may seek relief of the penalty pursuant to section 6592 by submitting a statement
2 under penalty of perjury setting forth the facts on which it bases its claim for relief. We also included
3 a Request for Relief From the Amnesty Penalty form, and a return envelope. Petitioner has not
4 submitted the required statement. We therefore have no basis to consider recommending relief of the
5 penalty.

6 **OTHER DEVELOPMENTS**

7 None.

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10 Summary prepared by Rey Obligacion, Business Taxes Specialist III.