STATE OF CALIFORNIA
BOARD OF EQUALIZATION

220.0047

In the Matter of the Petition for Redetermination State and Local Sales and Use Taxes	)	DECISION AND RECOMMENDATION OF HEARING OFFICER
L--- S--- EMPLOYEE PURCHASE PLAN, INC.	)	Account No. SN -- XX XXXXXX-010
Petitioner	)	

The above-entitled matter came on regularly for hearing on November 6, 1979, in Sacramento, California. H. L. Cohen, Hearing Officer.

Appearing for Petitioner: Ms. M--- P---
Manager, Domestic Tax

Mr. H--- M---
Tax Accountant

Appearing for the Board: Mr. Eugene Bush, Supervising Auditor
Out-of-State District

PROTEST

Petitioner protests liability asserted for collection of use tax on mail order sales to California customers. Liability was asserted on an audit covering the period from June 1, 1977 through March 31, 1979. A determination was issued on June 20, 1979. The amount upon which the protested liability is based is $486,152.

CONTENTIONS

Petitioner contends that:

1. Petitioner has no nexus with the state that would justify the imposition of the duty to collect use tax.

2. Even if petitioner is liable for collection of the tax, relief should be granted from the penalty for failure to file returns.

SUMMARY

1. Petitioner is a corporation wholly owned by L--- S--- & Co. It is in the business of selling L--- S--- products to L--- S--- employees. It was incorporated in 1977 in Arkansas but is not qualified to do business in California. It does not hold a seller's permit and has filed no sales and use tax returns. Prior to 1977 this activity was carried out by a division of another subsidiary of L--- S--- A---, Inc. [A], which reported and paid tax on similar sales to L--- S--- employees.

2. Petitioner maintains its offices and warehouse in --- ---, Arkansas. There are no employees or offices in California. Merchandise catalogs are purchased and then distributed in bulk to all L--- S--- manufacturing facilities including those in California. The catalogs are distributed unaddressed to employees by the inter-office mail distribution system of the manufacturing facility. Employees wishing to order merchandise must use postage paid order forms which are included in the catalogs and which are addressed to petitioner in [Arkansas]. All orders are shipped from the [Arkansas] warehouse by United Parcel Service or the United States mail. Petitioner owns no delivery vehicles. Orders are shipped directly to the address provided by the purchaser. All complaints, returns, and adjustments are handled by petitioner in [Arkansas]. Payment can be by check or bank charge card; there is no provision for payment by payroll deduction.

3. Petitioner purchases goods from L--- S--- just as any other retailer, paying the same wholesale price. L--- S--- ships goods to petitioner and never ships directly to petitioner's customers. Overstocks cannot be returned to L--- S--- just as overstocks of other retailers cannot be returned.

4. The auditor regarded L--- S--- as petitioner's sales agent in this state, and based its finding that petitioner had nexus with the state on this finding of nexus. The auditor calculated that 12.079% of the total sales of A--- during the period of July 1, 1976 through May 31, 1977, were sales to California consumers. That percentage was applied to petitioner's sales for the period from June 1, 1977 through December 31, 1978. Petitioner's actual sales to California consumers for the period January 1, 1979 through March 31, 1979, were also included in the measure of the tax asserted. Petitioner does not contest the measure.

5. Petitioner contends that the distribution of catalogs by L--- S--- is insufficient to make L--- S--- its agent. Petitioner also contends that if petitioner does have a presence in the state, this presence is so slight that there is not duty to collect tax.

6. Petitioner submitted a statement signed under penalty of perjury requesting relief from the penalty for failure to file returns.

ANALYSIS AND CONCLUSIONS

1. The sole issue here is whether petitioner has a sufficient connection with the state to justify the imposition of the duty to collect the use tax from its customers. Section 6203 of the Revenue and Taxation Code provides that every retailer engaged in business in this state and making sales of tangible personal property for storage, use or other consumption in this state shall collect the use tax from the purchaser. Clearly petitioner is a retailer making sales of tangible personal property for consumption in this state. The question is whether petitioner is engaged in business in this state within the meaning of the law. Section 6203 defines "retailer engaged in business in this state" to include any retailer maintaining an office or warehouse in this state either directly or through an agent, and any retailer having any representative, agent, salesman, or solicitor operating in this state for the purpose of selling, delivering, or taking of orders for tangible personal property. I conclude that the distribution of catalogs by L--- S--- results in L--- S--- being an agent of petitioner. This is consistent with prior Board decisions that the distribution of catalogs by airlines to passengers makes the airlines agents of the sellers of the goods in the catalogs. Since petitioner has an agent in California, it is required to collect the use tax. Section 6204 provides that the tax which a retailer is required to collect is a debt owed by the retailer to the Board. Petitioner is therefore liable for the amount of the tax that should have been collected.

2. Petitioner's request for relief from penalty should be submitted to the Board for approval.

RECOMMENDATION

Redetermine without adjustment.

Dec 12, 1979

H. L. COHEN, HEARING OFFICER Date