CALIFORNIA STATE BOARD OF EQUALIZATION

SUMMARY DECISION UNDER REVENUE AND TAXATION CODE SECTION 40

In the Matter of the Claim for Refund Under the Insurance Tax Law of:	)	
California Insurance Company	)	Account Number IT STF 34-002366 Case ID 730385
Claimant	)	

Type of Business: Group insurance provider

Claim period: 01/01/04 – 12/31/05

Claim amount: $962,453.80

PROCEDURAL BACKGROUND

This claim for refund came before the Board on the nonappearance adjudicatory calendar at its September 10, 2013, meeting. At this meeting, with the State Deputy Controller not participating in accordance with Government Code section 7.9, the Board unanimously approved the denial of the claim for refund as recommended by staff. [1]

LEGAL ISSUE

Whether the insurance transactions at issue are subject to California's Tax on Insurers.

FINDINGS OF FACT AND RELATED CONTENTIONS

Claimant is a property and casualty insurance company that maintains an office in California. The subject transactions are group insurance policies claimant wrote in 2004 and 2005 for insurance of California employees through group accident and health (disability) insurance plans it issued to "employer-policyholders" located in Idaho. In 2005, claimant also covered California employers

[1] Previously, this same disputed issue was considered at a Board hearing held on June 27, 2012, in which the Board voted 4-0, with the Deputy State Controller not participating in accordance with Government Code section 7.9, to deny a petition for redetermination. Claimant-petitioner then filed a timely petition for rehearing. At its December 18, 2012, meeting, the State Controller not participating, the Board concluded it correctly decided this matter and that claimant-petitioner had not presented a basis for a rehearing. Therefore, on January 7, 2013, a Notice of Redetermination was issued based on the Board's denial of claimant-petitioner's petition for rehearing. Claimant then remitted payment and filed a timely claim for refund in the amount of $962,453.80 ($603,385.00 tax plus $359.068.80 interest) for calendar years 2004 and 2005. No new or additional issues were presented in the claim for refund. Because the Board has already considered the issues in this case and no additional contentions were presented in the claim for refund, this matter came before the Board as a nonappearance matter.

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through employment practices liability insurance. All insureds covered under the group policies were located in California, and, therefore, all the risk was located in California. Claimant sent certificates of insurance to the California insureds to confirm coverage. The California insureds were responsible to pay the premiums and did so through the Idaho policyholders. Claimant reported the full measure of the premiums on National Association of Insurance Commissioners forms and paid the premium taxes on the subject transactions to Idaho, not California, because Idaho is the "situs" of the group insurance policies and the Idaho employer-policyholders.

The California Department of Insurance (DOI) determined that claimant owed the premium taxes at issue to California. DOI's determination primarily relied on a risk allocation methodology to allocate the premiums in the Idaho-California transactions; it did not rely on the location of the policies or policyholders. DOI asserted that Idaho law did not require claimant to report and pay tax to Idaho and that Idaho's law is consistent with California's analysis.

Claimant contends that the location of the policy and employer-policyholder governs where the taxes are owed, not the location of the certificate holders (members) or the location of risk. According to claimant, it did not transact business in California, and its only act in California related to the policies was its issuance of certificates of insurance to the California insureds to confirm coverage. Claimant asserts that those certificates were not part of the policies, but were merely evidence of insurance. Claimant argues that to conclude it owes gross premium taxes to California when its only act (transaction) in California was to issue certificates of insurance would violate its federal due process rights. Further, claimant contends that, if Idaho and California are in conflict such that both states require payment, it is inequitable to require claimant to now pay premium taxes to California for the years 2004 and 2005, after it has already paid them to Idaho. Thus, claimant argues that it should receive a credit against the California tax for the amount of tax it paid to Idaho. As part of the equity analysis, claimant states that: (1) it is now paying these types of premium taxes to California, thus risking an Idaho tax action, (2) it paid more taxes to Idaho during the audit period than it would have had to pay to California, and (3) it cannot get a refund from Idaho for 2004 and 2005 because Idaho has a one-year statute of limitations on taxpayer refund requests.

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APPLICABLE LAW

The California Constitution and the California Tax on Insurers Law impose an annual tax, based upon adjusted gross premiums, on insurers doing business in California. (Cal. Const., art. XIII, § 28, subd. (b); Rev. & Tax. Code, § 12201.) California's annual tax on insurers is an excise or privilege tax for doing business in California, not a property tax. (See *Carpenter v. Peoples Mutual Life Insurance Co.* (1937) 10 Cal.2d 299, 301-303.) "In the case of an insurer not transacting title insurance in this State, the basis of the tax is, in respect to each year, the amount of gross premiums, less return premiums, received in such year by such insurer upon its *business done in this State*." (Rev. & Tax. Code, § 12221 [emphasis added].)

Accordingly, the resolution of this appeal turns upon whether claimant did business in this state when it issued the policies at issue for 2004 and 2005. Neither California's Constitution nor its statutes define "business done in this State." However, case law and other authorities describe the types of activities that generally qualify as business done in a state. Courts have looked to the sum total of the services furnished by the insurance company to the state's residents holding the insurance policies to determine whether the premiums received were for "business done" in the state. (See *Occidental Life Insurance Co. v. State Bd. of Equalization* (1956) 139 Cal.App.2d 468, 472.) An insurer's employment of agents within this state to perform administrative functions related to insurance policies it had issued to this state's residents is sufficient to justify a conclusion the insurer is doing business in this state. (See *Illinois Commercial Men's Assn. v. State Board of Equalization* (1983) 34 Cal.3d 839, 852.) With respect to an employer-provided insurance plan, courts have found that the insurer is doing business in the state where the employees insured by that plan are located, even if the employer who is the nominal policyholder is located in a different state. (See *Metropolitan Life Ins. Co. v. State Bd. of Equalization* (1982) 32 Cal.3d 649, 654-662.)

ANALYSIS & DISPOSITION

Here, all of the insureds under the subject policies resided in California, and thus there can be no question that California had a strong interest in protecting these residents. We give great weight to this factor, and we note that Idaho law likewise assesses a premium tax based upon the location of the

risk (see Idaho Code, § 41-402, subd. (1)(b)); since none of the subject insureds in this case resided in Idaho, the premiums paid for insuring them were not subject to Idaho's tax.

In addition, with regard to the disability insurance plans, the insureds paid the premiums via deductions from their paychecks and the policies specified that claimant's premiums were fully earned when deducted from the insureds' paychecks. Thus, while claimant may have actually received the premiums in Idaho (from the Idaho employer-policyholders that processed the payrolls for their employer-clients), the California employees were responsible for paying those premiums and in fact paid them, which is another of the factors that constitutes doing business in this state. (See *Metropolitan Life Ins. Co. v. State Bd. of Equalization*, *supra*, 32 Cal.3d at pp. 654, 661-662.) Thus, we find that the evidence demonstrates that claimant engaged in consistent activities in this state with regard to the subject insurance policies and that such activities support a conclusion that claimant was doing business in this state.

Next, it is undisputed that during 2004 and 2005 claimant maintained an administrative office in this state from which to administer the disability policies. Specifically, the Notice of Claim instructions under the Coverage Provisions for the subject policies instructs that "[n]otice can be given to us at our home office at San Francisco, California or to our agent." Claimant's maintenance of an office in this state in the course of performing its duties under the policies constitutes "doing business" in this state. (See *Illinois Commercial Men's Assn. v. State Board of Equalization*, *supra*, 34 Cal.3d 839, 852.)

We acknowledge that claimant is headquartered in Nebraska, issued the policies in Idaho and may have physically received premiums in Idaho from the Idaho employers, which is a factor consistent with doing business in Idaho; however, as discussed above, claimant was also doing business in California, and the relative weight we give those factors compels a conclusion that, for purposes of the policies at issue, claimant was doing business in California. Accordingly, we conclude that claimant was doing business in this state, rendering its premiums subject to California's gross premiums tax.

With regard to claimant's alternative argument that it should be given credit for the premiums tax it paid to Idaho, we note that, but for the expiration of Idaho's one-year statute of limitations (Idaho

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Code, § 41-402A), claimant could have claimed a refund of the tax paid to Idaho on these policies for 2004 and 2005. In any event, there is no California authority that allows us to grant claimant an allowance or credit against the tax liability owed to California based on claimant's erroneous payment of the tax to Idaho.

Finally, as for claimant's federal constitutional (due process) argument, it is undisputed that claimant maintained an office (i.e., physical presence) in this state, thereby availing itself of the benefit of California's laws and protections. Consequently, we find that, contrary to claimant's assertion otherwise, assessing the tax at issue here does not conflict with federal constitutional principles because claimant sought the benefits and protections of California law for the subject group accident and health insurance policies, rendering California's assessment of the premium tax consistent with federal due process principles. (See *Quill Corp. v. North Dakota* (1992) 504 U.S. 298, 308-311; see also *Illinois Commercial Men's Assn. v State Board of Equalization, supra*, 34 Cal.3d at p. 850 [holding that out-of-state insurer's independent investigation agents, using offices in California to investigate California insured's insurance claims, enjoyed "the protection and benefit" of California laws].)

ORDER

It is hereby ordered that the claim for refund be denied.

Adopted at Sacramento, California, on December 17, 2013.*

Jerome E. Horton, Chairman

Michelle Steel, Member

Betty T. Yee, Member

George Runner, Member

*The State Controller's Deputy, Marcy Jo Mandel, did not participate in this matter in accordance with Government Code section 7.9.

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