OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 20035912
HARBOR INDUSTRIES, INC.	)	CDTFA Case ID 366-988

OPINION

Representing the Parties:

For Appellant: Michael J. Roth, Varnum LLP

For Respondent: Amanda Jacobs, Tax Counsel III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Harbor Industries, Inc. (appellant) appeals a Decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's petition for redetermination of a Notice of Determination (NOD) issued on July 23, 2018. The NOD is for $36,283 in tax, plus applicable interest, for the period January 1, 2014, through December 31, 2016 (liability period).

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUE

Whether an adjustment is warranted to the measure of disallowed claimed nontaxable sales for resale.

FACTUAL FINDINGS

1. Appellant is a Michigan corporation that manufactures and sells retail displays, store fixtures, and digital media solutions in Michigan.

[1] Sales taxes were formerly administered by the State Board of Equalization (board). Effective July 1, 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) When this opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to its predecessor, the board, to the extent those acts, or events, would have been performed by CDTFA on and after July 1, 2017.

2. Appellant registered with the California Secretary of State's Office to transact business in California in 1981.
3. Appellant closed its California business location in 1993 but continued to use independent sales representatives to solicit business in California.
4. CDTFA converted appellant's seller's permit to a Certificate of Registration-Use Tax in 1993.
5. During the liability period, appellant did not maintain a business location or any inventory in California.
6. During the audit, CDTFA examined claimed nontaxable sales for resale and identified two customers, General Electric (GE) and Hill's Pet Nutrition, Inc., where appellant failed to provide any resale certificates or other supporting documentation showing that it was relieved of liability for the sales tax and the duty to collect the use tax from the two customers.
7. CDTFA determined that sales to the two customers constituted taxable sales and disallowed appellant's claimed nontaxable sales for resale totaling $441,541, and issued an NOD on July 23, 2018, which appellant petitioned.
8. Appellant conceded the disallowed claimed nontaxable sales for resale to Hill's Pet Nutrition, Inc., leaving the remaining $213,525 related to GE at issue.
9. CDTFA issued a Decision on January 31, 2020, finding no adjustments were warranted to the measure of disallowed claimed nontaxable sales for resale.
10. This timely appeal followed.

DISCUSSION

California imposes sales tax on a retailer for its retail sales in this state of tangible personal property, measured by the retailer's gross receipts, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, § 6051.) All gross receipts are presumed subject to tax, and the seller has the burden of proving the contrary unless it timely and in good faith takes from the purchaser a certificate that the property is purchased for resale. (R&TC, §§ 6091, 6092; Cal. Code Regs., tit. 18, § 1668(a).)

When sales tax does not apply, use tax is imposed measured by the sales price of tangible personal property purchased from a retailer for storage, use, or other consumption in California.

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(R&TC, §§ 6201, 6401.) Use tax applies unless such storage, use or other consumption is specifically exempt or excluded from taxation by statute. (R&TC, § 6201.)

Every person storing, using, or otherwise consuming in this state tangible personal property purchased from a retailer is liable for the tax, and the liability is not extinguished until the tax has been paid. (R&TC, § 6202(a).) Every retailer engaged in business in California and making sales of tangible personal property for storage, use, or other consumption in California, must, at the time of making the sales, or at the time the storage, use, or other consumption becomes taxable, collect the use tax from the purchaser and give to the purchaser a receipt for the tax reimbursement collected. (R&TC, § 6203(a).)

A retailer engaged in business in California as used in R&TC sections 6202 and 6203 means any retailer that has a substantial nexus with California for purposes of the commerce clause of the United States Constitution, and includes, as relevant here, any retailer having any representative, agent, salesperson, canvasser, independent contractor, or solicitor operating in California under the authority of the retailer or its subsidiary for the purpose of selling, delivering, installing, assembling, or taking of orders for any tangible personal property. (R&TC, § 6203(c).)

Retailers who are not engaged in business in California may apply for a Certificate of Registration-Use Tax, and holders of such certificates are required to collect tax from purchasers, give receipts, and pay the tax to CDTFA in the same manner as retailers engaged in business in this state. (Cal. Code Regs., tit. 18, § 1684(e).) A retailer who takes a use tax direct payment exemption certificate in good faith from a person holding a use tax direct payment permit is relieved from the duty of collecting use tax from the issuer on the sale for which the certificate is issued. (Cal. Code Regs., tit. 18, § 1684(f).)

Appellant argues that it was not responsible for collecting use tax on the sales to GE because the sale of the property occurred in Michigan, and GE was the party who shipped the property to California. However, appellant held a Certificate of Registration-Use Tax permit with CDTFA during the liability period.[2] The holder of a Certificate of Registration-Use Tax certificate is required to collect tax from purchasers, give receipts, and pay the tax to CDTFA, for sales of tangible personal property for storage, use, or other consumption in California. (R&TC, § 6203(a).) In *Appeal of B & D Litho, Inc.* (SBE Memo.) 2001 WL 1034733, the board

[2] The parties do not dispute the validity of the Certificate.

held that when an out-of-state retailer holds a certificate of use tax registration, it is irrelevant whether that retailer had sufficient activities in this state during the audit period. Furthermore, appellant is considered a retailer engaged in business in California pursuant to R&TC section 6203 because it had sales representatives in this state.

We reviewed a Bill of Lading, submitted by appellant, for a disputed transaction. The document lists a California address for the following field: "Consigned to destination, state & country." The document goes on to identify appellant as the shipper, and GE is identified under the box: "Third party billing address." Furthermore, despite appellant's contention, appellant's records indicate GE was purchasing the property for use in California because all of the disallowed transactions contained a "ship to" location in California, were recorded as California sales, and were reported on appellant's returns as "gross sales" in California. (See R&TC, § 6241.) As such, appellant was required to collect use tax from GE on sales of tangible personal property for storage, use, or other consumption in California, and to remit that tax to CDTFA. (Cal. Code Regs., tit. 18, § 1684(e).)

GE has a use tax direct payment permit effective on February 11, 2016, which is more than two years from the start of the liability period. However, appellant has not provided a use tax direct payment exemption certificate from GE. As such, appellant is not relieved of liability for failing to collect the tax.[3]

Appellant contends tax is inapplicable because the sale occurred outside this state and cites to CDTFA Annotation 325.0001 (June 15, 1982), which states "the transaction would not be subject to sales tax because the sale took place outside California." However, we are examining whether appellant was required to collect use tax, not its liability for sales tax. As stated by the annotation, "liability for use tax falls on the purchaser, the out-of-state printer is required to collect the tax and pay it to the Board." Therefore, the annotation does not support a conclusion that appellant was not required to collect use tax. Appellant contends that it had an agreement with GE stating that GE would directly pay any use tax liability to CDTFA. However, there is no provision in the Sales and Use Tax Law that would allow a taxpayer to

[3] In support of its position, appellant submits a resale certificate from GE dated November 8, 2017. However, the resale certificate is dated outside of the liability period. Furthermore, appellant cannot accept or rely on a resale certificate for property that appellant knew at the time of sale was being purchased for consumption by the purchaser in this state. We note it is also a crime in this state for a purchaser to issue a resale certificate to a seller for property for which the purchaser knows at the time of purchase will be used rather than resold in order to evade the payment of tax or tax reimbursement to the seller. (Cal. Code Regs., tit. 18, § 1668(d).)

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legally shift liability to CDTFA for unpaid taxes to another party. Accordingly, we find that no adjustments are warranted to the measure of disallowed claimed nontaxable sales for resale of $213,525.

HOLDING

No adjustment is warranted to the measure of disallowed claimed nontaxable sales for resale.

DISPOSITION

CDTFA's action in denying appellant's petition for redetermination is sustained.

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Josh Lambert
Administrative Law Judge

We concur:

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Administrative Law Judge

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Andrew J. Kwee
Administrative Law Judge

Date Issued: 3/23/2021