OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20025866
	) CDTFA Case ID 173-696
DOORS ON-LINE, INC.	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: Dan A. Francis, Owner, President

For Respondent: Amanda Jacobs, Tax Counsel III

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Doors On-Line, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's petition for redetermination of the Notice of Determination (NOD) dated April 30, 2018. The NOD is for $22,983.95 in tax, and applicable interest, for the period January 1, 2015, through September 30, 2017 (liability period). The NOD was based on a February 23, 2018, audit report that determined a total measure of $298,400, consisting of the following audit items: (1) sales where appellant failed to collect use tax from California purchasers, measured by $107,773; (2) ex-tax[2] materials consumed on construction contracts and subject to use tax, measured by $9,019, and; (3) additional disallowed ex-tax sales subject to use tax, measured by $181,608.[3]

[1] Sales taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of BOE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when referring to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to BOE

[2] Ex-tax refers to the purchase of property without the payment of tax or tax reimbursement.

[3] It appears from the audit work papers that audit item 1 consists of disallowed ex-tax sales for which appellant provided documents, and audit item 3 consists of ex-tax sales for which appellant provided no documents. Appellant does not dispute the determined measures of tax. Rather, it argues that it does not owe any tax because it was not engaged in business in California and had no substantial nexus with the state when the sales occurred. Therefore, for purposes of analysis we discuss audit items 1 and 3 as a single issue. On appeal, appellant does not dispute audit item 2; therefore, we do not discuss it further.

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

ISSUE

Whether appellant was required to collect and pay California's use tax and remit that tax to CDTFA.

FACTUAL FINDINGS

1. Appellant is an online retailer of commercial and residential garage doors located in Russia, Ohio.
2. During the liability period at issue, appellant made online sales of doors and optional installation services to California consumers. The doors were delivered to the consumer by the manufacturer who also arranged for the installation, which was billed to the customer by appellant.
3. For sales of doors which included installation, the installation was performed by sub-contractors located in California.
4. On February 4, 2011, appellant submitted an Application for a Certificate of Registration – Use Tax (Certificate), signed by its president and owner, D. Francis.
5. On February 8, 2011, CDTFA issued a Certificate to appellant. The Certificate remained active throughout the liability period.
6. CDTFA conducted an audit of appellant for the liability period. CDTFA examined appellant's sales and purchases on an actual basis using sales and purchase reports and invoices provided by appellant.
7. CDTFA determined that although appellant did not have a physical presence in California, appellant had substantial nexus with California for purposes of imposing an obligation to collect California use tax from purchasers because appellant was the general construction contractor for the installation of garage doors. CDTFA further determined that that because appellant held the Certificate at the time it made sales to California customers, appellant was required to collect use tax and remit that tax to CDTFA.
8. CDTFA issued the NOD to appellant on April 30, 2018, for $22,983.95 tax, plus applicable interest.

9. Appellant filed a timely petition for redetermination. After an appeals conference, CDTFA issued its February 26, 2020 Decision, which denied the petition. This timely appeal followed.

DISCUSSION

California imposes sales tax on a retailer's retail sales of tangible personal property (TPP) in this state, unless the sale is exempt or excluded from tax. (R&TC, § 6051.) When sales tax does not apply, use tax applies to the storage, use, or other consumption of TPP purchased from any retailer for storage, use, or other consumption in this state, measured by the sales price, unless that use is specifically exempted or excluded by statute. (R&TC, §§ 6201.) Generally, use tax is owed by the person who purchases the property for storage, use, or consumption in this state. (R&TC, § 6202(a).) However, out-of-state retailers who are engaged in business in this state have an obligation to collect and remit use tax from the purchaser on sales of TPP for use, storage, or consumption in this state. (R&TC, § 6203(a).)

A retailer is "engaged in business" in this state if it has a substantial nexus with the state. (R&TC, § 6203(c).) According to R&TC section 6203(c)(2), substantial nexus can be established by proof that the retailer has in this state agents or other representatives who sell, deliver, assemble, or install any TPP. In addition, holders of Certificates are also required to collect and remit use tax in the same manner as retailers engaged in business in this state, even if the Certificate holders are not otherwise so engaged. (Cal. Code Regs., tit. 18, § 1684(e)(2); see also *Appeal of B & D Litho, Inc.* (SBE Memo.) 2001 WL 1034733.)

There is a rebuttable presumption that a retailer is engaged in business in this state as defined in section 6203 of the R&TC if the retailer has any physical presence in California. (Cal. Code Regs., tit. 18, § 1684 (b)(2).) Further, California Code of Regulations, title 18, (Regulation) section 1684(c) provides a non-exhaustive list of examples of retailers engaged in business in this state, including a retailer that has a person operating in California under the authority of the retailer for the purpose of installing TPP. (Cal. Code Regs., tit. 18 § 1684(c)(1)(D). A retailer can rebut the presumption if the retailer can substantiate that its physical presence is so slight that the United States Constitution prohibits this state from imposing a use tax collection on the retailer. (Cal. Code Regs., tit. 18 § 1684(c)(1).)

As relevant here, a construction contract includes a contract – whether on a time and material, lump sum, cost plus, or other basis – to erect, alter, or repair any building or structure,

project, development, or other improvement on or to real property. (Cal. Code Regs., tit. 18, § 1521(a)(1)(A).) A construction contractor is any person who for himself or herself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract. (Cal. Code Regs., tit. 18, § 1521(a)(2).) Construction contractors are generally the consumers of materials that they furnish and install in the performance of construction contracts, and they owe sales or use tax measured by their cost of the materials. (Cal. Code Regs., tit. 18, § 1521, subd. (b)(2)(A)1.) However, "if the contract explicitly provides for the transfer of title to the materials prior to the time the materials are installed, and separately states the sale price of the materials, exclusive of the charge for installation, the contractor will be deemed to be the retailer of the materials." (Cal. Code Regs., tit. 18, § 1521, subd. (b)(2)(A)2).)[4] Appellant argues that it was not required to collect and remit use tax to California because it lacks nexus with California. Appellant asserts that though it held a "California Resale Certificate" during the liability period, it only did so because its vendors requested or required it and not because it was legally obligated to collect and remit use tax. Appellant further contends that the Certificate is irrelevant because appellant lacked nexus with California.[5]

Appellant held a Certificate throughout the liability period. Thus, appellant had a duty to collect use tax from its California customers and remit that tax to the state, regardless of whether appellant was otherwise engaged in business in this state. (See Cal. Code Regs., tit. 18, § 1684(e)(2).) The fact that appellant may have only decided to register for a Certificate at the behest of its vendors is irrelevant. Furthermore, appellant's argument that it lacked substantial nexus with California and therefore the Certificate is irrelevant is incorrect. Once appellant was

[4] The parties have not provided evidence that would allow us to make a finding regarding the correct measure, and there appears to be no dispute regarding the measures determined by respondent. Nevertheless, we note that garage doors, like any other door, are typically considered materials when they are provided and installed pursuant to a construction contract. (See Cal. Code Regs., tit.18, §1521, Appendix A.) The contractor is considered the consumer of materials used in the performance of the contract, and, unless the contractor paid sales tax reimbursement to the vendor, use tax, measured by its cost of the material, applies. (See Cal. Code Regs., tit.18, §1521(b)(2)(A)1.) However, CDTFA scheduled California sales from appellant's "sales report," and there is nothing in the evidence to indicate that the scheduled amounts were anything other than the full price charged to appellant's customers, including appellant's markup. This is not necessarily incorrect. If the contract transferred title to the materials to the property owner before installation and separately stated the sales price of the materials, then the appellant was the retailer of the materials, and either sales tax or use tax applied, both being measured by the sale price charged to the property owner, including the contractor's markup. (See Cal. Code Regs., tit.18, § 1521(b)(2)(A)2.)

[5] Appellant contends that *Appeal of B & D Litho, Inc.*, *supra*, is not "relevant or binding," but does not provide further explanation.

issued the Certificate, appellant was obligated to collect use tax and remit it to CDTFA until the Certificate was cancelled. (Cal. Cod Code Regs., tit. 18 § 1684(e)(2),(4). On that basis, we find that appellant was required to collect and pay California's use tax and remit that tax to CDTFA.

Although our finding regarding the Certificate is dispositive, CDTFA also based its determination on its conclusion that appellant was the general construction contractor in connection with all installations of TPP in California.

Appellant argues that the installers located in California do not create nexus with California for appellant. Appellant contends that it contracted with its vendor, located outside of California, who then coordinated the installations and that appellant never directly communicated with the installers. Appellant is a construction contractor as defined in Regulation section 1521 because it agreed to perform and did perform construction contracts to alter, repair or make improvements on or to real property, by selling and installing garage doors in California. Agreements that appellant may have had with the manufacturer, or that the manufacturer may have had with installers in California do not change the relationship between appellant and its California customers and thus, do not affect our analysis under regulation section 1521. As such, appellant owed use tax on its use of materials in California.

Appellant further argues that its business would meet the definition of "slight" pursuant to Regulation section 1684(b)(2), as appellant is "a father-son business with sales well within the current $500,000 threshold volume for economic nexus in California."[6] As noted above, despite the amount of sales made in California, appellant was required to collect use tax and remit it to CDTFA because appellant held a Certificate and was also engaged in construction contracts in California. Furthermore, Regulation section 1684 subdivision (b)(2) creates a rebuttable presumption that a retailer is engaged in this state as defined in section 6203 of the Revenue and Taxation Code if the retailer has any physical presence in California. A retailer may rebut the presumption if the retailer can substantiate that its physical presence is so slight that the United States Constitution prohibits this state from imposing a use tax collection duty on the retailer. (Cal. Code Regs., tit. 18 § 1684(b)(2).) Thus, the burden is on appellant to rebut the presumption that it was engaged in business in this state. Here, appellant has failed to do so. The "rebuttable

[6] Appellant has not cited any authority for the $500,000 threshold it refers to; however, we assue that appellant is referring to R&TC section 6203(c)(4) which states that definition of retailers engaged in business in this state specifically includes, but is not limited to, any retailer that has total combined sales of TPP for delivery in this state that exceed $500,000. The $500,000 threshold was enacted as part of revisions to the statute that became effective on June 27, 2019, and thus are not relevant to this appeal.

presumption" language found in Regulation section 1684 and relied upon by appellant is prefaced by the words, "Except as otherwise provided in this regulation." (See Cal. Code Reg., tit. 18, § 1684(b)(2).) Regulation section 1684(c) states, in pertinent part, that on and after September 15, 2012, a retailer is engaged in business in this state, as defined in R&TC section 6203, if the retailer has a representative operating in California on the retailer's behalf, including a person operating in California under the authority of the retailer or its subsidiary, for the purpose of installing TPP. Appellant sold TPP in California with installation services. The installations were performed in California on appellant's behalf. Thus, we find that appellant failed to rebut the presumption set forth in Regulation section 1684.

Lastly, appellant argues that the $9,019[7] measure of ex-tax materials consumed on construction contracts (audit item 2) is so small in comparison to the combined $289,381 measure of disallowed ex-tax sales (audit items 1 and 3) that it is patently unfair to base a finding of nexus on that relatively small amount. We find this argument unpersuasive.
Audit item 2 is not the measure of jobs that included installation, but rather is the measure of sales of miscellaneous materials used to install garage doors. We do not know the number or total measure of sales that included installation because appellant did not provide that information to us. All that we can determine from the evidence is that at least five of the nine customers who purchased ex-tax materials used for installation also purchased doors.

[7] We note that this statement is incorrect; the $9,019 measure is comprised of the cost of ex-tax materials used on installations and is not comprised of sales that included installation costs. We further note that the measure is $9,019 and not $9,018 (as stated by appellant).

HOLDING

Appellant had a duty to collect use tax from its California customers during the liability period and to remit that tax to CDTFA.

DISPOSITION

We sustain respondent's action denying the petition for redetermination.

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Natasha Ralston
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Natasha Ralston
Administrative Law Judge

We concur:

DocuSigned by:
Michael F. Geary
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Michael F. Geary
Administrative Law Judge

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

Date Issued: 5/26/2021