STATE OF CALIFORNIA

480.0250

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of: Begin deleted text REDACTED TEXT End deleted text Petitioner	DECISION AND RECOMMENDATION

The Appeals conference in the above-referenced matter was held by Senior Staff Counsel Elizabeth Abreu on February 9, 1995 in Sacramento, California.

Appearing for Petitioner:

Appearing for the
Sales and Use Tax Department:

Protested Item

The protested tax liability for the period January 1, 1988 through June 30, 1992 is measured by:

	Item	State, Local, and County
A.	Taxable sales of gun safes not Reported – actual basis	$543,269

In addition the determination included the failure-to-file penalty.

Petitioner's Contentions

1. Except for sales made at the CA gun shows, petitioner did not have nexus with California.

2. Petitioner's dealers were the retailers of its custom-built safes.

3. Petitioner is not liable for the failure-to-file penalty.

Summary

Petitioner is a out-of-state corporation which manufactures and sells gun safes, both custom-built and standardized versions. The safes are free-standing and are fully assembled before delivery.

During the audit period, petitioner sold its safes by various methods. Some safes were sold to businesses which had stores or other facilities in California and had California seller's permits. These transactions are not in dispute since the auditor regarded these sales as sales for resale even though the purchasers did not issue resale certificates.

Approximately 50 to 60 percent of petitioner's sales to California customers were sold directly to customers who ordered the safes by telephone. These orders were generally received as the result of advertising in trade magazines such as "American Rifle." These advertisements listed petitioner's name and telephone number. Petitioner shipped the safes for these orders by common carrier from its facilities out-of-state. These sales were included in the audit and are in dispute.

Approximately one-quarter of the sales to California customers were made by employees and sales agents of petitioner who took orders from customers at gun shows which were held in X--------, California. The employees and sales agents brought the orders back to out-of-state where petitioner filled them by shipping the safes via common carrier directly to the customers in California. The CA gun shows which petitioner's employees and sales agents attended were held during following months:

May, 1988	May, 1990
December, 1988	December, 1990
June, 1989	May, 1991
November, 1989	November, 1991
December, 1989	

Petitioner agrees that it should have collected and paid use tax on the orders received at the CA gun shows.[1]

Finally, petitioner had two itinerant dealers, one who lived in out-of-state and the other who lived in out-of-state to generate sales of its safes. Petitioner did not have written contracts with these dealers. The dealers generally maintained an inventory of

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[1] Four persons whom petitioner's representative stated were employees of petitioner obtained seller's permits from the Board on January 1, 1991 and closed out the permits on December 31, 1991. Each reported a small amount of sales which do not appear to have been included in the audit.

standardized safes by purchasing them directly from petitioner and then reselling these safes to their customers. These transactions are not in dispute. However, for customized safes, the dealers filled out order forms provided by petitioner. These forms, which are entitled "Sales Orders," had petitioner's name, address, and telephone number on the top. In some transactions, the dealer required the customer to sign the form. Orders were taken by the dealers from California purchasers, both in California and at trade shows out of state. These transactions are in dispute.[2]

Petitioner contends that the dealers were the retailers of the customized safes. In support of its contention, petitioner stated that it has no control over when, where, or how the dealers sold the customized safes. The dealers could sell door to door, at gun shows, through industry contacts, or any other means the dealers wished to employ. Nor did the dealers have to obtain approval from petitioner to accept an order. Furthermore, petitioner did not set the price at which the dealers sold the safes. Petitioner charged the dealers wholesale price for the safes. The dealers could resell the safes at any price they could negotiate. They were not working on a commission.

The audit staff contends that petitioner was the retailer in these transactions because the sales order forms contained the name, address, and telephone number of petitioner and were signed by the customer, and the customer made all payments to petitioner.

We received the following additional information regarding these sales at the Appeals conference:

The dealers required a deposit from the customers, though occasionally a customer would make full payment at the time of the order. Some of the checks issued for the deposits were made out to petitioner; other checks were made out to the dealer. If a customer paid a deposit with a credit card, the dealer would take the customer's credit card number, and petitioner would run the number through its account, i.e., the credit card company paid petitioner.

Petitioner would not ship a safe until it received payment for the balance on the order. About the time petitioner was ready to build or ship a safe, petitioner would call the customer and ask for the balance. The customer paid petitioner directly for the balance.

In a few instances, customers wanted to rescind the contract or refused to pay the balance. In those transactions, petitioner had the dealer try to resolve the matter with the customer. However, if a customer insisted that he or she wanted to rescind the contract,

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[2] Both of these itinerant dealers obtainer seller's permits in 1991 and reported sales on returns filed with the Board. From our review of the audit working papers, it appears that the sales that they reported were not the sales made on petitioner's order forms and included in the audit. We assume that the dealers reported sales that they made from their own inventory.

petitioner would either issue a refund to the dealer or directly to the customer, depending upon what the dealer had worked out with the customer.

If a safe had a minor problem, the dealer would try to fix it. If there was a manufacturing defect, under the warranty the customer could send the safe back to petitioner by common carrier (freight paid by petitioner) or could give the safe to the dealer who would arrange to have it delivered to petitioner.

Petitioner was not certain how the customers were able to contact an itinerant dealer regarding the defects since the dealer's name, address, and phone number were not on the sales order but apparently this has not been a problem. The audit work papers (Sch. 12, p.2) state that the dealers had business cards which showed them as petitioner's "distributors."

Prior to January 1, 1991, petitioner did not have a seller's permit in California. However, while attending one of the Pomona gun shows, a Board employee told petitioner that it needed a permit to sell at the show. Petitioner thought it was applying for a temporary permit but discovered later that it was issued a permanent permit. The seller's permit was opened on April 2, 1991. At the time it applied for a permit, petitioner was told by a Board employee that coming twice a year to trade shows in California would not establish nexus.

According to petitioner, in 1991 it reported only sales that it made at the CA gun shows. However, beginning in 1992, the Board told petitioner that it must collect tax on everything sent into the state. Thereafter, petitioner began collecting and paying tax on all mail order sales, but petitioner did not pay tax on the sales which were originated by the itinerant dealers.

Petitioner also contends that it did not have sufficient nexus in California for the Board to tax its mail order sales of safes. The audit staff contends that petitioner's presence at the gun shows was sufficient to establish nexus. The auditor believed that logos for petitioner's safes were displayed at the gun shows and brochures were distributed. In addition, the auditor concluded that petitioner had also attended gun shows at locations in California other than CA during the following months:

November, 1988	May, 1991
	July, 1991
January, 1990	
March, 1990	
September, 1990 (2 shows)	
October, 1990	

The basis for the auditor's conclusion was that sales orders for California purchasers came in numbered groups at the time of these shows.

Petitioner asserts that its employees and sales agents did not attend these shows. Possibly, one or more of the dealers attended these shows which would explain the high number of orders around the time of the shows.

The audit working papers show the number of sales originating by mail order, by orders taken outside of California, and by orders taken in California. The latter orders are not broken down between those originating at the Pomona gun shows and those originating from the itinerant dealers. Petitioner made the following number of annual sales from the orders taken in California:

Year	No. of Sales	Total Amt. of Sales
1988	36	$40,057
1989	23	32,145
1990	70	92,173
1991	28	46,809
Total	157	$211,184

Petitioner does not have an office, warehouse, or other place of business in California. Petitioner does not solicit .orders by a television shopping system, a telecommunications system in California, or by means of advertising transmitted over a cable television system.

A failure to file penalty was imposed against petitioner. Petitioner filed the required statement under Revenue and Taxation Code section 6592. The audit staff agrees that this penalty should be deleted.

Analysis and Conclusion

Revenue and Taxation Code section 6051 imposes a sales tax on all retailers measured by their gross receipts from retail sales in this state of tangible personal property. Revenue and Taxation Code section 6201 imposes a use tax on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for storage, use, or other consumption in this state. Where, as here, title to tangible personal property transfers out-of-state, the applicable tax is use tax.

The use tax is imposed upon the purchaser, but if the retailer is engaged in business in California. and makes sales of tangible personal property for storage, use, or other consumption in California, the retailer must,. at the time of making the sale, collect the use tax from the purchaser and pay it to the state. (Rev. & Tax. Code § 6203.) The tax required to be collected by the retailer constitutes a debt owed by the retailer to the state. (Rev. & Tax. Code § 6204.)

The first issue in this case is whether petitioner or its itinerant dealers were the retailers of the custom-made safes. A manufacturer who ships the property directly to the purchaser is not always the retailer of the property. (See Bank of America v. State Board of Equalization (1962) 209 California Appeals 2nd District 780 and Meyer v. State Board of Equalization

(1954) 42 Cal.2d 376.) In order to make that determination, we must look at the facts and circumstances in each case.

The facts that weigh in petitioner's favor are that: the dealers did not have to obtain petitioner's approval for an order; in some transactions the customers named the dealers as the payee on the check; the dealers set the selling price; and in some transactions where the purchaser wanted to rescind the contract or return a defective safe, the dealer refunded the money directly or arranged for the return of the safe.

However, on balance, we believe that the facts support a finding that petitioner was the retailer. Petitioner's name and address, not the dealer's, was prominently printed on the top of the sales orders. All credit card payments were made through petitioner's account. In some transactions the purchaser made the deposit payable to petitioner. Petitioner notified the customer when the safe was about to be manufactured or shipped and asked for payment of the balance to be sent directly to petitioner. Although petitioner did not require the dealers to seek approval of an order, it was not necessary since petitioner obtained payment first before sending a safe and therefore did not have to be concerned about a customer's credit rating.

The next question is whether petitioner was engaged in business in California. During the audit period, the relevant code section provided as follows:

"'Retailer engaged in business in this state' as used in this and the preceding section means and includes any of the following:

* * *

> (b) Any retailer having any representative, agent, salesman, canvasser, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property." (Rev. & Tax. Code § 6203(b).)

In this case, petitioner had both its own employees and the dealers, who were its salespersons and representatives, in California for the purpose of taking orders for its safes. Both the employees and the dealers were operating under the authority of petitioner to take orders from customers. Therefore, we conclude that petitioner was a retailer engaged in business as defined above.

We also conclude that petitioner meets the constitutional requirements for nexus. The facts in this case are similar to those in Scripto v. Carson (1960) 362 U.S. 207, in which a Georgia retailer sold and shipped tangible personal property to Florida consumers. Scripto had no business locations in Florida nor, as relevant to Florida's statute in question, any regular employees or agents in that state. During the period in question, however, Scripto used several Florida residents known as "jobbers." It was through these jobbers that the sales to residents of Florida occurred. Each jobber had a contract with Scripto which specifically provided that the parties intended to create the

relationship of "independent contractor." The court held that the presence of these jobbers was sufficient to establish nexus.

Scripto was cited approvingly in Tyler Pipe Industries, Inc. v. Washinqton Department of Revenue (1987) 483 U.S. ,232. Tyler had no presence in Washington except for a sales representative who acted on its behalf. The Court held that the activities performed by the representative in Washington were significantly associated with Tyler'S ability to establish and maintain a market in that state. ,The Court upheld the tax, stating that the characterization of Tyler's representative as an independent contractor or as an agent was irrelevant. (Id. at 249-51.)

As in Scripto and Tyler, petitioner had a presence and therefore nexus in California because petitioner had representatives who were taking orders on petitioner's behalf in California. Both petitioner's employees and its dealer's entered California on a regular basis, and their combined presence was sufficient to establish nexus. Since petitioner was engaged in business in California and had nexus, petitioner was required to collect and pay use tax on all of its retail sales to California customers, whether such sales were initiated by a telephone order or an order with petitioner's dealers or employees.

We recommend, however, that the failure-to-file penalty should be deleted pursuant to the authority of Revenue and Taxation Code section 6592. Petitioner's vice-president, who was at the Appeals conference, struck us as someone who was making every attempt to comply with the law, and we believe that the principals of petitioner had an honest belief that they were not required to collect and pay use tax on the transactions in issue.

We also note that five of the sales orders included in the audit show Begin deleted text REDACTED TEXT End deleted text as the purchaser. Mr. Begin deleted text REDACTED TEXT End deleted text was one of the dealers. It appears that Mr. Begin deleted text REDACTED TEXT End deleted text was purchasing these safes for his inventory and for resale. Therefore, these sales should be deleted from the audit.

Recommendation

Delete the penalty. Delete the five sales made to Begin deleted text REDACTED TEXT End deleted text. Redetermine without further adjustment.

Elizabeth Abreu, Senior Staff Counsel

Date: April 25, 1995