September 12, 2002

BEFORE THE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Petition for Redetermination
Under the Sales and Use Tax Law of

BARNES & NOBLE.COM
Account: SC OHB 97-732835
Case ID: 89872

Memorandum Opinion

[1] This opinion considers the merits of a petition for redetermination for the period November 15, 1999, through March 31, 2000. At the Board hearing, petitioner protested a determination related to petitioner's sales to California purchasers.

[2] Petitioner is a Delaware limited liability company known as "barnesandnoble.com llc." Petitioner makes online retail sales of tangible personal property (e.g., books, videos, music and computer software) via the Internet. The goods petitioner sells to California purchasers are delivered by common carrier or by United States mail from outside California. Petitioner alleges that it is a separate and distinct legal entity from Barnes & Noble Booksellers, Inc. (hereafter Booksellers), an affiliated corporation that sells similar goods in "brick-and-mortar" stores throughout the country, including California. Petitioner alleges that it did not maintain, occupy or use any place of business in California during the audit period at issue. (See Rev. & Tax. Code, 6203, subd. (c)(1).) Petitioner was not registered with the Board during the period in question and, thus, filed no sales and use tax returns related to this period.

[3] The Sales and Use Tax Department (Department) asserts that petitioner was a retailer engaged in business in this state during the period in question based on the following known facts: Sometime in mid-November 1999, Booksellers began distributing in California discount coupons for purchases made through petitioner's website (hereafter the coupons). Booksellers's customers received the coupons as an insert in the shopping bags into which their purchases from Booksellers were placed by Booksellers's employees. The coupons offered a $5 discount on a purchase from petitioner of $25 or more, exclusive of handling and shipping charges, with certain restrictions. Each coupon could only be used once, and each of petitioner's customers could only use one coupon during the offer period, which expired on January 31, 2000. The coupons contained an alphanumeric "coupon claim code," which purchasers had to enter on line to obtain the discounted price. The coupons were limited to online

transactions with petitioner, and the coupons could not be used for purchases made at Booksellers's stores.

[4] Petitioner paid for the printing of the coupons Booksellers distributed, and the coupons were placed in special promotional shopping bags that had the "Barnes & Noble" logo printed on one side and petitioner's "bn.com" logo on the other. Petitioner paid for the costs associated with printing petitioner's logo on the bags. These bags were then shipped to New Jersey where a third party inserted the coupons for a fee, which petitioner paid. Finally, the coupon-containing, cross-promotional bags were then shipped from New Jersey to Booksellers's stores throughout the country, including California. Booksellers's stores were notified that they were to receive the special bags with the coupons on November 12, 1999, and that these bags and coupons should be distributed only until December 19, 1999.

Opinion

[5] With certain exceptions that are not relevant to this matter, Revenue and Taxation Code section (hereafter Section) 6203 imposes a use tax collection obligation on ". . . every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state. . . ." Under subdivision (c)(2) of Section 6203, the meaning of "retailer engaged in business in this state" includes:

> "[a]ny retailer having any representative, agent, salesperson, canvasser, independent contractor, or solicitor operating in this state under the authority of the retailer orits subsidiary for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property."

When, as here, no dispute exists with respect to an out-of-state seller's status as a retailer, three additional requirements must be satisfied for the seller to be a "retailer engaged in business in this state" under Section 6203, subdivision (c)(2).

[6] First, the out-of-state retailer must have a representative, agent, salesperson, canvasser, independent contractor or solicitor (hereafter, collectively, representative). Second, this representative must be operating in California under the authority of the out-of-state retailer or its subsidiary (i.e., the in-state representative must be authorized to act on the out-of-state retailer's behalf). Third, the out-of-state retailer's authorized representative's operations in California must include one of the following activities: selling, delivering, installing, assembling or taking orders for tangible personal property. Applying this analysis to the instant matter, these three requirements are met if: (1) Booksellers was petitioner's authorized representative in this state for purposes of distributing petitioner's coupons; and (2) the distributing of

such coupons constitutes "selling." The first issue is a matter of fact, the second is a matter of law.[1]

1. Authorized Representative

[7] As to the first issue, the available evidence suffices to establish that, for the audit period, Booksellers was petitioner's authorized representative in this state for the purpose of distributing the coupons. As indicated above, by petitioner's own admission, petitioner paid the costs both for printing the coupons and for stuffing the coupons into the cross-promotional shopping bags. Petitioner implicitly acknowledges that petitioner had some role in authorizing when and how long Booksellers distributed the coupons because petitioner alleges that Booksellers was instructed to distribute the coupons for only a limited period of time. When the authorized period of distribution was over, Booksellers was apparently obligated to dispose of any remaining coupon-containing bags. Finally, petitioner honored the redemption of the coupons distributed by its authorized representative, which it would not have done had their distribution by Booksellers not been authorized by petitioner.

[8] In sum, pursuant to petitioner's authorization, Booksellers's employees in California handed customers shopping bags that were emblazoned with petitioner's logo and that contained petitioner's coupons. This conduct served as a public statement that Booksellers had the authority to distribute the coupons on petitioner's behalf. Because the distribution of the coupons occurred, among other places, in California, this conduct also suffices to establish that Booksellers was petitioner's authorized representative in this state for this purpose.

2. Selling Activity

[9] As to the legal issue that remains, because it was accomplished through an authorized representative, the distribution of coupons, under the facts of this case, constitutes "selling" under subdivision (c)(2) of Section 6203. Because neither the Sales and Use Tax Law in general, nor Section 6203 in specific, contains a definition of "selling," following the accepted canons of statutory construction, this term should be construed according to its common usage. In other words, "selling" is inclusive of all activities that are an integral part of making sales. (See Board's recent Memorandum Opinion, Borders Online, Inc. (adopted September 26, 2001), hereafter Borders.)

[10] Petitioner has argued that "selling" should have the same meaning as "sale," which is defined in Section 6006 (i. e., petitioner contends that one is not "selling" unless one transfers title or possession of tangible personal property for

[1]The Department has not alleged that Booksellers, during the period at issue, engaged in any activities on petitioner's behalf in California that would constitute "delivering, installing, assembling, or the taking of orders for any tangible personal property" as these terms are used under subdivision (c)(2) of Section 6203.

consideration). Although unable to cite any dispositive authority for this contention, petitioner argues that such a construction would be consistent with California statutory and common law and with Borders . We disagree, because the definition of "selling" in Borders (i. e., "all activities that are an integral part of making sales") is entirely consonant with the plain language of Section 6203(c)(2) and with dictionary definitions of "selling." (See, e. g., American Heritage Dict. (3d college ed. 1993) p. 1238.)

[11] Specifically, Section 6203(c)(2) provides that retailers are engaged in business in California if they have "any [authorized] representative, agent, salesperson, canvasser, independent contractor, or solicitor" operating in California "for the purpose of selling, delivering, installing, assembling, or taking orders for any tangible personal property." Petitioner argues that, under Section 6203(c)(2), "selling" cannot include the activities of "offering for sale" or "solicitation" because, according to petitioner, "selling" only occurs when title to, or possession of, tangible personal property is transferred for consideration. (See Rev. & Tax. Code, 6006.) In other words, according to petitioner, in-state representatives that only solicit sales are not "selling," even if their solicitations result in sales. If this were the case, as to transactions subject to use tax where no nexus basis besides Section 6203(c)(2) exists, out-of-state retailers could avoid California use tax collection obligations merely by having their in-state sales representatives avoid delivering, installing, assembling or taking orders for tangible personal property (e. g., by instructing the purchasers to use the mail, telephone or Internet to place orders with a particular out-of- state retailer in response to the in-state representative's solicitations, with delivery directly to the purchasers via common carrier). It strains credulity to argue that such in-state sales representatives are not acting on behalf of out-of-state retailers "for the purpose of selling . . . tangible personal property." (See Rev. & Tax. Code, 6203, subd. (c)(2).) Moreover, all reputable dictionary definitions of "selling" (under the term "sell") include "offering for sale" within the standard meanings of the term. (See, e. g., American Heritage Dict. (3d college ed. 1993) p. 1238.)

[12] Thus, petitioner's argument that "selling" under Section 6203(c)(2) should have exactly the same meaning as "sale" under Section 6006 is unfounded. We further note that petitioner's argument acknowledges that the Sales and Use Tax Law does not define the term "selling." (See Rev. & Tax. Code, 6002-6024.) Moreover, petitioner has not cited any appellate case applying the Sales and Use Tax Law that defines "selling" or suggests that "selling" and "sale" should be treated as the same word. At the risk of belaboring the obvious, "sale" and "selling" are not the same word and, while clearly cognates, both words have their own distinct meaning. As noted above, in common usage, "selling" is understood to be inclusive, among other things, of "offering for sale." In short, the Borders definition of "selling" (i. e., "all activities that are an integral part of making sales") fairly captures the common understanding of the activity of "selling."

[13] Thus, in the instant matter, Booksellers's employees physically handed coupons for discounted sales directly to petitioner's existing and potential customers. Indeed, the sales at issue could not have been made as bargained for without the distribution of the coupons in question because, as petitioner concedes, the purchaser had to enter the alphanumeric "coupon claim code" printed on the subject coupons to complete the offer to purchase at the discounted price. Such conduct, as part of a nation-wide marketing campaign, was integral to petitioner's selling efforts during the period of coupon distribution, which coincided with the end-of-the-year holiday shopping season. Nothing is more integral to an out-of-state retailer's selling efforts than, as here, an authorized, in-state representative's solicitation of in-state customers. Thus, petitioner was engaged in business in this state. (See Rev. & Tax. Code, 6203, subd. (c)(2).)

[14] Moreover, we disagree with petitioner's argument that Booksellers's authorized coupon distribution was "mere advertising," not "selling" through an authorized in- state representative. While it is understood that "mere advertising" in California does not make an out-of-state seller a retailer engaged in business in this state, as explained below, Booksellers's conduct in California on petitioner's behalf cannot be fairly characterized as "mere advertising." Accordingly, petitioner's argument is unavailing.

[15] In the parlance of the advertising industry, an "advertisement" is a "written, verbal, pictorial, graphic, etc., announcement of goods or services for sale, employing purchased space or time in print or electronic media." (Wiechmann, NTC's Dictionary of Advertising (2d ed. 1993) p. 4.) "Advertising" is a subset of "marketing," which encompasses all "business activities that affect the distribution and sales of goods and services from producer to consumer." (Id. at p. 108.)

[16] Here, Booksellers is not a media vehicle (e. g., radio, television, cable television, newspapers, magazines, billboards, etc.), and petitioner did not "purchase space" in and on Booksellers's shopping bags. In fact, petitioner has not alleged that it made any payments to Booksellers at all. Rather, the evidence shows that petitioner and Booksellers engaged in a joint marketing effort targeted at their common customer base, with petitioner covering the printing costs of participating in this joint marketing effort.

[17] In short, the use of the employees of an authorized in- state representative to make sales solicitations by manual transmission of coupons cannot reasonably be characterized as "mere advertising." Booksellers's conduct in California on petitioner's behalf is clearly distinguishable from sellers who purchase space in a media vehicle, like a newspaper, to distribute coupons to existing and potential customers. Hence, Booksellers's authorized coupon distribution in this state constituted a "selling" activity on petitioner's behalf under subdivision (c)(2) of Section 6203.

[18] The fact that petitioner's authorized representative, Booksellers, only distributed petitioner's coupons corroborates that it is a selling activity, rather than mere advertising. (Cf. Borders, finding an in-state, authorized representative's preferential return policy, favoring customers of an out-of-state retailer, to be a selling activity.)

[19] In *Quill Corp. v. North Dakota (1992) 504 U. S. 298* [hereafter Quill], the United States Supreme Court held that, pursuant to the Commerce Clause of the United States Constitution, a state cannot impose a use tax collection obligation on out-of-state retailers unless those retailers have "substantial nexus" with that state. The Quill court explained that, to establish commerce-clause nexus, a state must show that the out-of-state retailer, or a representative of the out-of-state retailer, has a sufficiently substantial physical presence in the state to justify the imposition of a use tax collection obligation. (Ibid.) In this case, petitioner had a substantial physical presence in California through the many places of business and employees of Booksellers, petitioner's authorized representative in this state for the purpose of selling tangible personal property. Petitioner's substantial physical presence in this state more than suffices to establish that petitioner had commerce-clause nexus with California during the coupon distribution period. (See ibid.)

[20] In sum, the evidence is sufficient to establish that Booksellers, acting as petitioner's authorized representative, distributed the coupons for petitioner in California during the audit period. Such solicitation activities were an integral part of petitioner's selling tangible personal property. Therefore, due to Booksellers's actions in California as petitioner's authorized in- state representative, petitioner was a "retailer engaged in business in this state" during the audit period. Accordingly, petitioner was obligated to collect, and remit, use tax from petitioner's California customers during the audit period. (Rev. & Tax. Code, 6203, subds. (a) & (c)(2), 6204.)

[21] Adopted at Sacramento, California, on September 12, 2002.

Dean Andal, Member
Johan Klehs, Member
Claude Parrish, Member