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TEXAS WORKERS COMPENSATION COMMISSION
7551 METRO CENTER DR. STE 100
AUSTIN, TX 78744

10 of 18 DOCUMENTS

NAME: IN RE: * * *

NUMBER: HEARING NO. 41,140

COURT: COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS

CITE: 2002 *Tex. Tax LEXIS 182*

DATE: September 19, 2002

PANEL: [*1]

ELIZABETH WILSON DAVIS, Administrative Law Judge

COUNSEL: ELIAS V. LORENZANA, JR., Representing Administrative Hearings Section

* * *, Representing Petitioner

OPINIONBY: DAVIS

TAXPAYER NO.: * * *

AUDIT OFFICE: * * *

AUDIT PERIOD: 01/01/92 THROUGH 09/30/00

LIMITED SALES, EXCISE AND USE TAX/RDT

COMPTROLLER'S DECISION

PRELIMINARY DISCUSSION:

At Petitioner's request, the Administrative Law Judge ("ALJ") based this Comptroller's Decision on a review of the parties' written submissions.

The ALJ took official notice of all records of the Comptroller's office that pertain to the Petitioner and the issues involved in the case. Unless otherwise indicated, all Section references are to Title 2, Texas Tax Code Ann. (Vernon 1992). References to Rules are to sections of Title 34, Texas Administrative Code.

CONTENTION OF PETITIONER:

Petitioner contends that it does not have nexus in Texas.

FINDINGS OF FACT:

The Administrative Hearings Section ("AHS") filed Proposed Findings of Fact. The following Findings represent the ALJ's ruling on those Proposed Findings of Fact:

1. Petitioner requested a redetermination hearing on the limited sales and use tax combined billing self-assessment [*2] of Petitioner for the exam period January 1, 1992, through September 30, 2000.
2. Petitioner is a California corporation engaged in the manufacture and sale of desktop computers, workstations, and servers.

3. Petitioner markets its products directly to major corporations, governmental and educational entities, small businesses, and end users, via an internet web page and a toll-free 800 number.
4. Petitioner offered and provided on-site product warranty and service agreements for its computer hardware products through third-party providers in Texas.
5. Petitioner was examined by the Agency's Business Activity Research Team (BART) Audit Group on the sales tax combined billing self-assessment for the examination period January 1, 1992, through September 30, 2000.
6. Based upon the findings of the Agency's BART Audit Group, Petitioner was determined to have sufficient nexus in Texas for purposes of the Texas sales tax; therefore, Petitioner was assessed an estimated Texas sales tax for the examination period.
7. Petitioner's Onsite Service Warranty n1 provides as follows:

...Unless otherwise noted on the sales invoice ("invoice"), actual onsite service will be provided [*3] by * * * or another qualified third party ("provider").

EQUIPMENT:

The equipment covered is identified on the invoice. ...

SCHEDULE & SERVICE HOURS:

These terms and conditions are effective for a period of one (1) year, beginning with the date of shipment of the system to the customer. Service will be provided on a "best efforts" basis, typically within eight (8) business hours after receipt of replacement parts by provider, if within 50 miles of the nearest provider service location, or if more distant, typically within sixteen (16) business hours. ...

SERVICE AREA:

The "bill to" address on the invoice will be the location at which on-site service will be provided unless otherwise noted on the invoice. If the customer relocates, service will be provided to the new location if that location is within the United States and Canada.

SERVICE TO BE PROVIDED:

This onsite service warranty covers onsite removal and replacement of defective parts necessitated by equipment failure, which occurred during normal use. ...

PROVIDER'S RESPONSIBILITIES:

The provider has responsibility for providing telephone technical support and arranging, as appropriate, for providing [*4] on-site services without additional charge (except as noted): . . .

n1 This language is from the On-Site Service agreement submitted with the AHS's Proposed Findings of Fact. The agreement has the date 9/24/96 in the bottom right corner.

CONCLUSIONS OF LAW AND DISCUSSION:

Petitioner's contention should be denied.

Petitioner contends that it does not have nexus in Texas. It argues that the mere fact that it may provide for onsite warranty work via a third-party service provider does not establish "substantial nexus" in Texas for assessing sales and use tax as required by the U.S. Supreme Court in *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992).

Additionally, Petitioner argues the fact that it may have an internet-generated sale that may require onsite warranty work seems to be a tenuous thread to establish "substantial nexus" with a particular state. It states that it does not do the

actual onsite warranty work, and that its contracts disclose and provide for an unrelated service provider to do the work. Additionally, it argues that the onsite warranty repair occurs less than once a year on average, but submitted no evidence to substantiate this assertion. [*5]

The AHS argues that nexus is established in Texas for sales and use tax purposes because Petitioner provides onsite warranties to its customers in Texas, and provides technical support services to its Texas customers.

Further, the AHS contends that "the Petitioner is required to collect sales and use tax because it has an agent or independent contractor that accepts returned or defective merchandise purchased from Petitioner. See TEXAS TAX CODE SECTION 151.107(a); see also SECTIONS 321.003, 321.104, 322.101, 322.102, 323.102, 323.003, and 323.104."

Rule 3.308(a)(1) provides that the sale, lease, or rental of computer hardware is subject to sales and use tax, which would include the computer hardware sold by Petitioner if Petitioner has nexus in Texas.

Section 151.101(a) imposes a use tax on the "storage, use, or other consumption in this state of a taxable item purchased from a retailer for storage, use, or other consumption in this state." Section 151.011(a) defines "use" relating to tangible personal property to mean "the exercise of a right or power incidental to the ownership of tangible personal property over tangible personal property . . ."

Section 151.105(a) "tangible personal [*6] property that is shipped or brought into this state by a purchaser is presumed, in the absence of evidence to the contrary, to have been purchased from a retailer for storage, use, or consumption in this state."

With regard to nexus, Section 151.103(a) provides that a "retailer engaged in business in this state who makes a sale of a taxable item for storage, use, or consumption in this state shall collect the use tax that is due from the purchaser and give the purchaser a receipt for the tax payment." n2

n2 Section 151.103(a) was amended effective September 1, 1993, to add additional language, which is not applicable in this case.

Section 151.107(a) defines a "retailer engaged in business in this state" in the following manner:

(a) For the purpose of this subchapter and in relation to the use tax, a retailer is engaged in business in this state if the retailer:

* * *

(7) otherwise does business in this state.

Section 101.002(b) provides that "except as otherwise provided by statute, the jurisdiction and authority of the state to determine the subjects and objects of taxation shall extend to the limits of the then-current interpretations of the Texas Constitution and United [*7] States Constitution and laws."

Section 151.403(b) provides that "a retailer engaged in business in this state as provided by Section 151.107 of this code shall file a tax report with respect to the use tax."

Rule 3.286 n3 sets out in subsection (a)(1) the definition of "engaged in business." The applicable subsections are set out below.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Engaged in business. A retailer is engaged in business in Texas if the retailer:

* * *

(G) conducting business in this state through employees, agents, or independent contractors.

n3 New Rule 3.286, adopted effective December 12, 1996, notes in the preamble of the new rule that the "new section omits all definitions of 'engaged in business' except those definitions requiring a 'physical presence' in Texas."

The primary issue in this hearing is whether its operations in Texas n4 result in Petitioner being a "retailer engaged in business in this state" and subject to collecting and remitting use tax pursuant to § 151.107 and 151.103(a), as those statutes are limited by [*8] the Texas and Federal Constitutions and laws regarding nexus.

n4 Providing on-site warranty service through third-party providers.

The ALJ concludes that the onsite repair performed for Petitioner by third-party service contractors was an activity in Texas that clearly falls within the provisions of Section 151.107(a)(7) and Rule 3.286(a)(1)(G). The ALJ further concludes that Petitioner had the necessary physical presence in Texas to result in constitutional substantial nexus under § 101.002, § 151.107(a)(7), and Rule 3.286(a)(1)(G).

Further, I find that these activities in Texas were above and beyond the mere mail order solicitation activities of the taxpayer in *Quill, supra*.

Accordingly, the ALJ concludes that Petitioner, as a seller engaged in business in Texas, was required to collect the use tax from its Texas customers and remit the tax collected to the Comptroller. *See* § 151.103.

RECOMMENDATION:

Based upon the findings of fact, conclusions of law, and discussion contained herein, the ALJ recommends that the assessment be upheld.

SIGNED September 19, 2002.

ORDER OF THE COMPTROLLER

The above decision of the Administrative Law Judge, resulting in [*9] Taxpayer's liability as set out in Attachment "A" which is incorporated by reference, is approved and adopted in all respects. This decision becomes final twenty-three (23) days from the date of this Order, and the total sum of the tax, penalty, and interest amounts is due and payable within twenty (20) days thereafter. If such sum is not paid within such time, an additional penalty of ten percent of the taxes due will accrue, and interest will continue to accrue.

If a rehearing is desired, a Motion for Rehearing must be filed with the Administrative Law Judge no later than twenty-three (23) days after the date of this Order, and must state the grounds upon which the motion is based.

RENDERED and ISSUED September 19, 2002.

CAROLE KEETON RYLANDER, Comptroller of Public Accounts of the State of Texas

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