

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(16)S
Sales Tax
June 25, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S001002A

On October 2, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Old Republic Minnehoma Insurance Co. and Ordesco, Inc., 7050 S. Yale Ave., Suite 400, Tulsa, OK 74136. Petitioners, Old Republic Minnehoma Insurance Co. and Ordesco, Inc., furnished additional information with respect to the Petition on January 2, 2001.

The issue raised by Petitioners is who would be responsible for the collection and remittance of sales tax on the sale of extended service agreements on automobiles by credit unions and dealerships located in New York.

Petitioners submit the following facts as the basis for this Advisory Opinion.

Old Republic Minnehoma Insurance Co. (“ Old Republic”) is an insurance company. Ordesco, Inc. (“Ordesco”) is an administrator. Petitioners are affiliates owned by the same holding company. Petitioners do not currently sell extended service contracts in New York. It is anticipated that when Petitioners do sell extended service contracts in New York, Petitioners would contract with credit unions and dealerships to sell such contracts.

The service contracts sold by the credit unions and dealerships would be between Ordesco and the customer purchasing the automobile. When a credit union sells a service contract, the cost of the service contract would be added to the loan amount of the member purchasing the automobile. When a dealership sells a service contract, the cost of the service contract would be added to the invoice of the buyer purchasing the automobile. The credit union or dealership would send the premium for the extended service contract to Ordesco. Ordesco would withhold a fee and remit the premium to Old Republic. Under the terms of the contract entered into between Petitioners and the credit unions and dealerships, the credit unions and dealerships would be responsible for the collection and remittance of sales tax on the sale of the agreements.

In addition, Ordesco has hired an agent to provide services and training to the credit unions and dealerships. The agent will not collect a premium, but will be paid a fee by Ordesco.

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article . . . valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery . . . regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery . . . is provided by such vendor or a third party. . . .

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

* * *

(8) Vendor. (i) The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

* * *

(C) A person who solicits business either:

(I) by employees, independent contractors, agents or other representatives;

. . . and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article. . . .

* * *

(ii)(A) In addition, when in the opinion of the commissioner it is necessary for the efficient administration of this article to treat any salesman, representative, peddler or canvasser as the agent of the vendor, distributor, supervisor or employer under whom he operates or from whom he obtains tangible personal property sold

by him, or for whom he solicits business, the commissioner may, in his discretion, treat such agent as the vendor jointly responsible with his principal, distributor, supervisor or employer for the collection and payment over of the tax. An unaffiliated person providing fulfillment services to a purchaser shall not be treated as a vendor by the commissioner under this paragraph with respect to such activity. . . .

Section 1105(c) of the Tax Law imposes sales tax, in part, upon:

The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business. . . .

Section 1131(1) of the Tax Law provides, in part:

"Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. . . .

Section 1132(a)(1) of the Tax Law provides, in part:

Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies. . . .

Section 525.2(a)(2) of the Sales and Use Tax Regulations provides, in part:

Except as specifically provided otherwise, the sales tax is a "transactions tax," with the liability for the tax occurring at the time of the transaction. Generally, a taxed transaction is an act resulting in the receipt of consideration for the transfer of title to or possession of (or both) tangible personal property or for the rendition of an enumerated service. The time or method of payment is generally immaterial, since the tax becomes due at the time of transfer of title to or possession of (or both) the property or the rendition of such service. . . .

Section 526.10 of the Sales and Use Tax Regulations provides, in part:

Vendor. (a) Persons included. (1) (i) A person making sales of tangible personal property the receipts from which are subject to tax is a vendor.

* * *

(3) A person who solicits business by employees, independent contractors, agents or other representatives and by reason thereof makes sales to persons within the State of tangible personal property or services, the use of which is subject to tax, is a vendor.

Section 527.5(c) of the Sales and Use Tax Regulations provides, in part:

Maintenance and service contracts. (1) The purchase of a maintenance or service contract is a taxable transaction.

Section 532.1(a) of the Sales and Use Tax Regulations provides, in part:

Time of collection. (1) Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies.

Opinion

In this case, Petitioners propose to sell extended service contracts in New York State through credit unions and dealerships located within the State. The service contract sold by the credit unions and dealerships would be between Ordesco and the customer purchasing the automobile. When a credit union sells a service contract, the cost of the service contract would be added to the loan amount of the member purchasing the automobile. When a dealership sells a service contract, the cost of the service contract would be added to the invoice of the buyer purchasing the automobile. The credit unions and dealerships would send the premium for the extended service agreement to Ordesco. Ordesco would withhold a fee and remit the premium to Old Republic. Based on the facts of this Petition, the credit unions and dealerships would be deemed to be co-vendors of Petitioners when selling extended service contracts and would be required to register pursuant to Section 1134 of the Tax Law. See Section 1101(b)(8)(ii)(A) of the Tax Law.

Pursuant to Section 1105(c)(3) of the Tax Law and Section 527.5(c) of the Sales and Use Tax Regulations, the sale of a maintenance or service contract is a transaction subject to State and local sales and use taxes. In accordance with Sections 525.2(a) and 532.1(a) of the Sales and Use Tax Regulations, the sales tax is a transaction tax, with the liability for the tax occurring at the time of the transaction. Petitioners, along with the credit unions and dealerships acting as co-vendors, would be considered vendors as the term is defined in Section 1101(b)(8) of the Tax Law and Section 526.10 of the Sales and Use Tax Regulations. Pursuant to Section 1131(1) of the Tax Law, "persons required to collect tax" or a "person required to collect any tax imposed by this article" shall include every vendor of tangible personal property or services. Therefore, both Petitioners and the credit unions and dealerships would be jointly responsible and liable for the collection and

TSB-A-02(16)S
Sales Tax
June 25, 2002

remittance of the sales tax collected on the extended service contracts. Petitioners would be liable for any sales tax due on the sales of such service contracts if the credit unions or dealerships failed to properly report and remit the tax due on such sales. Petitioners, however, would not be required to remit tax on these sales to the New York State Department of Taxation and Finance if the credit unions and dealerships report and remit the tax due in compliance with Article 28 of the Tax Law.

DATED: June 25, 2002

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.