Note: See also, Tax Bulletin *[Do I Need to Register for Sales Tax?](#) [(TB-ST-175)](#)*.

Tax Bulletins are up-to-date, online, easy-to-understand explanations of tax topics. *Tax Bulletins* are updated as needed to reflect changes in the rules.

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New York State Department of Taxation and Finance

Office of Tax Policy Analysis

Taxpayer Guidance Division

TSB-M-09(3)S
Sales Tax
May 6, 2009

Definition of a Sales Tax Vendor is Expanded to Include Out-of-State Sellers with Related Businesses in New York State

Recently enacted legislation (Part P-1 of Chapter 57 of the Laws of 2009) has amended the Tax Law to expand the definition of a sales tax vendor to include, under certain conditions, out-of-state sellers (remote affiliates) of taxable tangible personal property or services that are affiliated with businesses in New York (New York affiliates). This amendment is effective June 1, 2009, and applies to sales made or uses occurring on or after that date.

Under the new law, a New York business and an out-of-state seller are affiliated with each other if one owns, directly or indirectly, more than five percent (5%) of the other or if more than 5% of each person[1] is owned, directly or indirectly, by the same person or by an affiliated group of persons.

General

Under previous law, an in-state business, whether or not affiliated with an out-of-state seller, could cause the out-of-state seller to be required to register as a sales tax vendor if, among other activities, it engaged in solicitation activities on behalf of the out-of-state seller.

The amendments enacted by Chapter 57 effectively expand the types of activities conducted in New York by a company on behalf of an out-of-state seller that could cause the out-of-state seller to qualify as a sales tax vendor when the two companies are affiliated (as defined above). These activities now include a broad range of activities in addition to solicitation. The new legislation provides that remote affiliates are vendors and must register for sales tax purposes and begin to collect and remit sales tax when they are affiliated with a business in New York and either of the following conditions is met.

Conditions that require an out-of-state seller to register as a sales tax vendor

Condition I - A New York affiliate who is a sales tax vendor uses a trademark, service mark, or trade name in New York that is the same as that used in New York by the remote affiliate.

Condition II - A New York affiliate engages in **activities** in New York that benefit the remote affiliate in its development or maintenance of a market for its goods or services in New York, to the extent that those activities are sufficient for the remote affiliate to satisfy the nexus requirement of the United States Constitution.

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[1] The definition of "person" for sales tax purposes includes an individual, partnership (including a general, limited or special partnership or joint venture), limited liability company, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee, or any other person acting as an agent or in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of the foregoing and any State, municipality or instrumentality thereof.

For purposes of determining whether Condition II is met the department will consider whether the direct or indirect ownership exceeds fifty percent (50%), (i.e., if one owns, directly or indirectly, more than 50% of the other or if more than 50% of each person is owned, directly or indirectly, by the same person or by an affiliated group of persons).

When direct or indirect ownership exceeds fifty percent (50%)

Condition II will be considered to be met if the percentage of direct or indirect ownership exceeds fifty percent (50%) and the New York affiliate engages in any activities that are more than de minimis and that promote the development or maintenance of a market for the remote affiliate's products or services in New York. The **activities** that will result in vendor status include, but are not limited to:

- referring New York customers to the remote affiliate;

- accepting merchandise returns from catalog, telephone, or internet customers of the remote affiliate;

- soliciting New York customers using names and addresses from the remote affiliate's mailing list (including an email list);

- distributing catalogs or discount coupons on behalf of the remote affiliate;

- distributing or displaying advertising on behalf of the remote affiliate;

- accepting catalog, telephone, or internet orders on behalf of the remote affiliate;

- fulfilling sales ordered from the remote affiliate's Web site or catalog (including in-store pick up of items ordered from a catalog or Web site);

- handling distributions or warehousing in New York of products sold by the remote affiliate;

- performing repair services on behalf of a remote affiliate (e.g., warranty services); and

- directing the business activities of a remote affiliate, including for example, decisions about strategic planning, marketing, inventory, staffing and distribution.

When direct or indirect ownership exceeds five percent (5%) but is less than or equal to fifty percent (50%)

Where the percentage of direct or indirect ownership interest, exceeds five percent (5%) but is less than or equal to fifty percent (50%), (i.e., if one owns, directly or indirectly, more than 5% but less than or equal to 50% of the other or if more than 5% but less than or equal to 50% of each person is owned, directly or indirectly, by the same person or by an affiliated group of persons), the department, in determining whether a remote affiliate is a vendor, will evaluate

1) the nature and extent of the **activities** performed by the New York affiliate(s) in New York on behalf of the remote affiliate and 2) the extent of the **actual direct or indirect control** exercised by one affiliate over the other affiliate or by any affiliate in the corporate group over the New York affiliate.

Examples

The following examples illustrate the information contained in this memorandum:

Example 1: A business operates retail stores in New York under the name Company A, and is a registered sales tax vendor. Company A is a wholly owned affiliate of an out-of-state business that operates a retail Web site under the name CompanyA.com. This company has no connection to New York State other than making sales of taxable merchandise that is delivered via common carrier to customers in New York State. Because Company A and CompanyA.com use the same trade name in New York, CompanyA.com meets Condition I and must register for sales tax purposes and collect New York State and local sales tax.

Example 2: Company N is a registered sales tax vendor and operates several retail department stores throughout New York. CompanyR.com is located out-of-state and operates an e-commerce Web site through which it sells taxable merchandise. CompanyR.com has no other connection to New York. Company N owns 85% of the issued and outstanding stock of CompanyR.com. Customers of CompanyR.com can visit any of Company N's retail stores to pick up catalogs or return purchases that were made through CompanyR.com's Web site. Because Company N holds an ownership interest in excess of 50% in CompanyR.com and accepts returns and distributes catalogs, CompanyR.com meets Condition II and must register for sales tax purposes and collect New York State and local sales tax.

Example 3: Company M maintains its corporate headquarters in New York and is affiliated with CompanyS.com with a 57% ownership interest. CompanyS.com is located out-of-state and operates a Web site through which it sells taxable merchandise to customers in New York. Company M creates and administers marketing plans and makes purchases of inventory on behalf of CompanyS.com. Because Company M holds an ownership interest in excess of 50% and makes marketing decisions and purchases inventory on behalf of CompanyS.com, CompanyS.com meets Condition II and must register for sales tax purposes and collect New York State and local sales tax.

Example 4: Company A and Company B have set up another company, CompanyC.com, in which each holds an ownership interest. CompanyC.com does not use the same trademark, service mark, or trade name as Company A or Company B. Company A holds a 45% ownership interest in CompanyC.com and does not do business in New York. Company B holds 55% of the ownership interest in CompanyC.com, has offices in New York, and is a registered sales tax vendor. Under a contractual agreement, Company B provides accounting and legal services in New York for CompanyC.com. Since Company B only provides accounting and legal services, CompanyC.com is not required to register for sales tax purposes and collect New York State and local sales tax.

Sales tax registration

A remote affiliate that makes taxable sales in New York and meets the expanded definition of a vendor, as explained above, must register for sales tax purposes and obtain a *Certificate of Authority* prior to June 1, 2009. To register for sales tax purposes, a business may apply using the *New York State Online Permit Assistance and Licensing* Web site at *www.nys-permits.org*, or fill out Form DTF-17, *Application to Register for a Sales Tax Certificate of Authority*, and send it to the address listed on that form. You must apply for your Certificate of Authority at least 20 days prior to June 1, 2009. For more information about the requirements and responsibilities associated with registering as a vendor to collect sales tax, see Publication 750, *A Guide to Sales Tax in New York State,* which is available on the department's Web site *www.nystax.gov*.

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.