

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

TSB-A-02(48)S  
Sales Tax  
September 18, 2002

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020125A

On January 25, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Luisa Frate, 3155 Cole De Liesse Road, St. Laurent, Quebec, Canada, H4N2N4. Petitioner, Luisa Frate, provided additional information with respect to the Petition on February 26, 2002.

The issue raised by Petitioner is whether the National Film Board of Canada (NFB) is required to collect and remit sales tax on sales of videotapes and films made through NFB's Web site to persons in New York State.

Petitioner submits the following facts as the basis for this Advisory Opinion.

The NFB is in the process of implementing an Internet store accessible in the United States from which it will sell and rent films and videotapes. NFB's server is located in Canada. NFB will be displaying its inventory items in United States currency and the transactions recorded on the customer credit card will be captured in United States currency. NFB presently has a small office in New York City.

**Applicable Law and Regulations**

Section 1101 of the Tax Law provides, in part:

(a) When used in this article the term "person" includes an individual, partnership, limited liability company, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee, and any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of the foregoing.

(b) 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:

\* \* \*

(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.

(6) Tangible personal property. Corporeal personal property of any nature. . . .

\* \* \*

(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;

(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;

\* \* \*

(E) A person who regularly or systematically solicits business in this state by the distribution, without regard to the location from which such distribution originated, of catalogs, advertising flyers or letters, or by any other means of solicitation of business, to persons in this state and by reason thereof makes sales to persons within the state of tangible personal property, the use of which is taxed by this article, if such solicitation satisfies the nexus requirement of the United States constitution;

Section 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 525.2 of the Sales and Use Tax Regulations provides, in part:

Nature of tax.

(a) *Sales tax.* (1) (i) Except as specifically exempted or excluded, sales tax is imposed on the receipts from:

(a) every retail sale of tangible personal property, as provided in section 1105(a) of the Tax Law;

\* \* \*

(iii) Each of the various types of transactions has statutory exemptions, exceptions, exclusions and limitations. . . .

(2) 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 . . . .

(3) Except as specifically provided otherwise, the sales tax is a "destination tax." The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.

(4) The sales tax is generally a "consumer tax." That is, the person required to collect tax must collect the tax from the customer (*i.e.*, the consumer) when collecting the taxable receipt, rent or amusement charge to which the tax applies. The customer cannot shift the liability for payment of the tax to another person nor otherwise be relieved of such liability. The vendor, or other person required to collect the tax, collects the tax as trustee for and on account of the State and is also personally liable for the tax required to be collected.

Section 526.7 of the Sales and Use Tax Regulations provides, in part:

(a) Definition. (1) The words sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words sale, selling or purchase are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

\* \* \*

(e) Transfer of possession. (1) . . . a sale is taxable at the place where the tangible personal property or service is delivered, or the point at which possession is transferred by the vendor to the purchaser or his designee.

\* \* \*

(2) . . . a sale of tangible personal property, in which the title to the property passes in New York State, but in which delivery occurs outside of New York State, is not subject to tax.

\* \* \*

(4) Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

(i) custody or possession of the tangible personal property, actual or constructive;

(ii) the right to custody or possession of the tangible personal property;

(iii) the right to use, or control or direct the use of, tangible personal property.

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.

\* \* \*

(2) (i) A person maintaining a place of business in the State making sales, whether at such place of business or elsewhere, to persons within the State of tangible personal property or services, the use of which is taxed, is a vendor.

(ii) A person shall be considered to be maintaining a place of business in the State if it, either directly or through a subsidiary, has a store, salesroom, sample room, showroom, distribution center, warehouse, service center, factory, credit and collection office, administrative office or research facility in the State.

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(b) Responsibilities of vendors. Every vendor, unless specifically excluded by a section of the Tax Law or this Title, has certain obligations with respect to registration, collection of tax from customers, filing of returns and payment of tax. See Parts 532, 533, 539 and 540 of this Title.

(c) Interstate vendors. (1) A person outside this State making sales to persons within the State, who maintains a place of business in the State as described in paragraph (2) of subdivision (a) of this section . . . is required to collect the tax on any taxable property or services delivered in New York.

### **Opinion**

NFB will be making sales and rentals of tangible personal property in the form of films and videotapes in the United States, including New York State. Sales of tangible personal property are subject to New York State and local sales and use taxes. A rental is a sale for sales tax purposes. See Section 1101(b)(5) of the Tax Law. Since NFB has an office in New York City, it will be considered to have sufficient nexus with New York State to require it to register as a vendor in New York State for sales tax purposes. See National Geographic Society v. California Board of Equalization, 430 US 561 (1977); Section 1101(b)(8)(i)(B) of the Tax Law.

Where NFB sells or rents a film, videotape or other tangible personal property which is delivered to a location in New York State, it is required to either collect the sales tax at the rate in effect where the tangible personal property is delivered in the State, or, accept an appropriate and properly completed document from the purchaser or lessee showing that the purchaser or lessee is exempt from the sales tax on such purchase, within ninety days of the date of sale. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations.

Sales of tangible personal property delivered to locations outside of New York State are not subject to New York State or local sales tax.

DATED: September 18, 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.