

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division**

TSB-A-08(53)S
Sales Tax
December 15, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080118A

On January 18, 2008, the Department of Taxation and Finance received a Petition for Advisory Opinion from Crowe Chizek & Company LLC, 9910 Dupont Circle Drive East, Suite 230, Fort Wayne, Indiana 46845. Petitioner, Crowe Chizek & Company LLC, provided additional information pertaining to the Petition on May 16, 2008.

The issue raised by Petitioner is whether its client's sales of displays are subject to sales tax at its place of business when picked up by a common carrier hired by the client's customer.

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

Petitioner's client (hereinafter "Company"), has a business location in New York and is presently registered for sales tax purposes in New York.

Company manufactures displays. Company accepts, in New York, customer orders to produce displays. Once the display is completed, Company notifies the customer that its order is ready. Customers arrange for a common carrier to pick up their display from Company in New York State. Company delivers the display to the common carrier for delivery by the carrier to the customer. The common carriers hired and paid by the customer then deliver the property in accordance with the customer's direction. Should an order be destroyed in transit, the Company bears no loss.

Company's bill of sale provides for shipping terms FOB origin and the sales agreement specifies that title passes at the point that the customer's representative picks up the item at Company's dock. Company, as a courtesy to its customer, does prepare bills of lading and other like documentation that indicates the destination to which the products are shipped via the customer's designated common carrier.

Applicable law and regulations

Section 1213 of the Tax Law provides, in part:

Deliveries outside the jurisdiction where sale is made. Where a sale of tangible personal property or services . . . is made in any city, county or school district, but the property sold . . . is or will be delivered to the purchaser elsewhere, such sale shall not be subject to tax by such city, county or school district. However, if delivery occurs or will occur in a city, county or school district imposing a tax on the sale or use of such property . . . the vendor shall be required to collect from the purchaser, as provided in

section twelve hundred fifty-four, the aggregate sales or compensating use taxes imposed by the city, if any, county and school district in which delivery occurs or will occur, for distribution by the commissioner to such taxing jurisdiction or jurisdictions. For the purposes of this section delivery shall be deemed to include transfer of possession to the purchaser and the receiving of the property . . . by the purchaser.

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides:

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.

Section 526.7(e)(2) of the Sales and Use Tax Regulations provides, in part:

(2) Except as otherwise provided in paragraph (3) of this subdivision, 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.

Section 533.2 of the Sales and Use Tax Regulations provides, in part:

Records to be kept. (a) General. (1) For the proper administration of the sales and use tax law and to prevent evasion of the sales tax, it is statutorily presumed that all receipts from sales and purchases of property or services of any type mentioned in subdivisions (a) through (d) of section 1105 of the Tax Law, all rents for occupancy of the type mentioned in subdivision (e) of such section, and all amusement charges of any type mentioned in subdivision (f) of such section are subject to the tax until the contrary is established. The burden of proving that any receipt, amusement charge or rent is not taxable is on the vendor or the customer. To satisfy his burden of proof, a vendor must maintain records sufficient to verify all transactions.

* * *

(b) Sales records. (1) Every person required to collect tax, including every person purchasing or selling tangible personal property for resale must keep records of every sale . . . and all amounts paid, charged or due thereon, and of the tax payable thereon. The records must contain a true copy of each:

(i) sales slip, invoice, receipt, contract, statement or other memorandum of sale;

* * *

(iii) cash register tape and any other original sales document.

Where no written document is given to the customer, the seller shall keep a daily record of all cash and credit sales in a day book or similar book.

(2) The sales record either must provide sufficient detail to independently determine the taxable status of each sale and the amount of tax due and collected thereon or may be substantiated by analysis of supporting records.

* * *

(3) The seller must maintain records which substantiate points of delivery if delivery was made at a place other than his place of business. Such documents should include receipts from parcel delivery services, common carriers, unregulated truckers, the United States Postal Service, foreign freight forwarders, and logs from company vehicles. Such documents must be referenced to specific sales transactions.

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Company manufactures displays. When the display is complete, Company notifies the customer. Customers arrange for shipping of displays from Company's location in New York to the customer's location of choice. The shipping is performed by common carriers. Company prepares bills of lading and other documentation that indicate the destination to which the products are shipped by the common carrier. Company's bill of sale provides for shipping terms FOB origin. The sales agreement specifies that title passes at the point that the customer's representative picks up the item at Company's dock.

It should be noted that the expense of delivering manufactured goods from a manufacturer to its customer is always borne by the customer. Whether the delivery cost is included in the purchase price or separately indicated in the contract of sale and included on the invoice as a separate distinct charge, the expense of the delivery of the goods to the purchaser is either directly imposed upon or indirectly passed through to the purchaser. For other than "over the counter" purchases at a "bricks and mortar" store, in most remote sales transactions (e.g., mail order, telephone, Internet, etc.), the customer is commonly provided the option of determining the method (e.g., air, ground, etc.) and urgency (e.g., overnight, weekends, regular, etc.) of delivery with appropriate differential costs imposed depending on the options chosen by the customer. As discussed below, the details respecting delivery to the customer may affect the incidence of the sales tax.

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides that the sales tax is a "destination tax." The point of delivery to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate. Section 526.7(e)(2) of the Sales and Use Tax Regulations

provides that a sale of tangible personal property, where title to the property passes in New York State, but delivery occurs outside of New York State, is not subject to tax. Thus, out-of-state delivery by the vendor to the customer; whether by the vendor's own vehicles, private and contract carriers hired by the vendor, or common carrier, is considered to be a nontaxable out-of-state sale.

However, if the property is delivered by the vendor directly to a customer who either immediately removes the property from the state (*Matter of David Hazan, Inc.*, Det Tx App Trib, April 21, 1988, DTA Nos. 80024, 80025, affd 152 AD2d 765, affd 75 NY2d 989; *Matter of Jacques Francais Rare Violin, Inc*, Det St Tx Comm, October 5, 1984, TSB-H-85(6)S; *Matter of Maximilian Fur Co., Inc*, Det Tx App Trib, August 9, 1990, DTA No. 801479,) or gives the goods to a foreign freight forwarder for export from New York, the sale is considered to be an in-state sale subject to the applicable sales and use tax (*Matter of Queens Discount Appliances, Inc.*, Det Tx App Trib, December 30, 1993, DTA No. 807403).

Likewise, when vendors deliver property to a customer's own truck in New York (*F & M Schaefer Brewing Co. v Gerosa*, 4 NY 2d 423, 427; affd 3 AD2d 898; appeal dismissed, 358 U.S. 282) or to the customer's private or contract carrier (*Matter of Savemart, Inc. v State Tax Commission*, 105 AD2d 1001, appeal dismissed 64 NY2d 1039, lv denied 65 NY2d 604,) an in-state transfer of possession of purchased goods is considered to have occurred. Where the customer itself was a common carrier, in-state delivery to the customer for purposes of the customer providing its own transportation and delivery to an out-of-state location was also considered a transfer of possession within New York (*James Waite, Officer of Harrison Radio Corp; Michael Waite, Officer of Harrison Radio Corp*, Det Tx App Trib, January 12, 1995, DTA Nos. 806363, 806419).

However, in-state deliveries by vendors to a customer's foreign freight forwarder for delivery by the freight forwarder to the customer outside the country are considered to be out-of-state sales. Moreover, when the vendor relinquishes possession of the property directly to a common carrier, the sales tax is to be collected at the combined State and local rate in effect where the common carrier delivers the property. This is so even if the common carrier is directly contracted and paid by the purchaser (*Norman Levy Associates, Inc.* Adv Op Comm T&F, April 22, 1996, TSB-A-96(23)S). Thus, regardless of the contract terms of sale (e.g., FOB, FAS., etc.), for purposes of the incidence of the sales tax, delivery by common carrier is deemed to be delivery by the seller. See also Technical Services Bureau Memorandum entitled *1982 Legislation Information For Sellers and Purchasers of Automotive Fuel*, October 26, 1982, TSB-M-82(28)S.

Accordingly, where Company has relinquished possession of the displays directly to the custody of a common carrier, Company is required to collect the appropriate sales tax in effect at the point where the common carrier delivers the displays to the customer. See section 1213 of the Tax Law. Provided that Company maintains records indicating points of delivery, Company

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is only liable to collect sales tax on deliveries made to locations in New York State. Such records should include the customer invoice showing the location of the delivery and copies of bills of lading from the common carrier. See section 533.2 of the Sales and Use Tax Regulations. Company is not required to collect New York State and local sales tax where the records indicate that Company has released the display directly to a common carrier for delivery by that common carrier to an out-of-state destination.

DATED: December 15, 2008

/s/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.