

**New York State Department of Taxation and Finance  
Office of Counsel  
Advisory Opinion Unit**

TSB-A-12(8)S  
Sales Tax  
April 13, 2012

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S111229B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. The Petitioner is a New York Federal Firearms Licensee (FFL). The Petitioner asks whether he is required to collect New York State sales or use tax when, pursuant to various Federal, State and local legal requirements, he is authorized to transfer a gun purchased from an out-of-state FFL (the Seller) to the purchaser (the Buyer). In addition, the Petitioner asks whether the fees that he charges for certain administrative tasks that he is required to execute before transferring the gun to the buyer, including having a background check done by the FBI through the National Instant Criminal Background Check System (NICS), are receipts subject to New York State sales tax.

We conclude that the Petitioner, for purposes of a gun purchased out-of-state under the facts provided, is not required to collect New York State sales tax on the sale of the gun to the Buyer by a third party, and the Petitioner's fee for his administrative services (including contacting NICS for the purpose of their executing a background check) in conjunction with the transfer of the gun to the Buyer is not subject to New York State sales tax.

**Facts**

The Petitioner is a New York FFL and is a New York sales tax vendor, as the Petitioner has receipts from the sale of his own guns from his inventory in New York State. The Petitioner submitted the following facts.

The Buyer who is a resident of New York State purchases a gun from an out-of-state FFL (the Seller) and pays the Seller directly for the sale price of the gun.<sup>1</sup> The Petitioner does not know whether New York State sales tax is collected by the Seller on the sale. Because the federal Gun Control Act (GCA) prohibits transporting a gun across state lines (with certain exceptions not relevant herein), any gun purchased out-of-state by a New York resident who is not an FFL must be shipped to an FFL located in New York, who will contact NICS so that they may perform the required background check on the Buyer before the gun is conveyed to the Buyer. There is no charge to Petitioner for the background check. The gun is generally shipped by common carrier to a New York FFL, such as Petitioner, selected by the Buyer, typically near the Buyer's place of residence. Once the Petitioner receives the gun sold out-of-state to the Buyer, the Petitioner verifies the serial number of the gun,

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<sup>1</sup> The Petitioner is not part of the sales contract between the Buyer and the Seller, so no purchase contract was provided with the Petition. For the purposes of this Advisory Opinion, we assume that the out-of-state Seller transfers title to the gun to the purchaser at the time of sale. We also do not know to what extent the out-of-state Seller has contact with the State or the extent to which the out-of-state Seller has agents or affiliates acting on its behalf in New York. The obligation of the out-of-state Seller to collect tax was not raised by the Petitioner, and cannot be addressed on the facts provided with the Petition.

contacts the NICS so that they may perform the required background check on the Buyer, and establishes that the Buyer meets any other applicable legal requirement to possess the gun. If the Buyer is approved by NICS and meets the other legal requirements to possess the gun (waiting periods, etc.), the Petitioner prepares a bill of sale entering "\$0 consideration - customer paid out-of-state." The Buyer presents the bill of sale and other required paperwork prepared by the Petitioner to the local licensing authority, such as the sheriff, who will enter the gun on the Buyer's permit. Only then may the Petitioner legally transfer the gun to the Buyer. The Petitioner charges the Buyer a fee for the services he provides on the Buyer's behalf.

The Petitioner has no contractual arrangement with the Seller and does not receive any consideration for the sale or any other compensation from the Seller. The Petitioner may have no knowledge of the consideration paid by the Buyer for the gun, and he doesn't know if any sales and use tax was collected by the Seller. If the Buyer fails the background check, the Petitioner will either ship the gun back to the Seller (on the Buyer's behalf and at the Buyer's expense) or the Petitioner may sell it on a consignment basis for the Buyer. In either case, the Petitioner does so at the direction of the Buyer. The Buyer will be subject to the Petitioner's fee for the services only if he is approved by the background check and the other services are completed.

## Analysis

The Petitioner first asks whether he is required to collect tax at the time he transfers the gun to the Buyer under the facts above. With certain exceptions that are not relevant, the federal GCA makes it unlawful for any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the state where he resides any gun purchased by such person outside the state where he resides.<sup>2</sup> However, a person who purchases a gun from an out-of-state seller may take legal possession of the gun, if an arrangement is made with an FFL in the purchaser's state of residence to perform certain legal requirements, such as a background check,<sup>3</sup> before transferring the gun to a buyer in his home state.

New York State imposes a tax upon the receipts from every retail sale of tangible personal property, except as otherwise provided in Article 28 of the Tax Law.<sup>4</sup> A "retail sale" is a sale of tangible personal property to any person for any purpose....<sup>5</sup> Tax Law section 1101(b)(5) defines "Sale, selling or purchase" as "any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume...conditional or otherwise, in any manner or by means whatsoever for a consideration." The tax is imposed on the customer, but is required to be collected by a person required to collect tax "when collecting the price."<sup>6</sup> "Persons required to collect tax" include every vendor of tangible personal property or services and certain persons who are under a duty to act for the vendor, such as a corporate officer.<sup>7</sup> Subparagraph (i) of the definition of vendor in Tax Law section 1101(b)(8) specifies certain persons making sales in the State. Subparagraph (ii) of that definition gives the Commissioner discretion to treat as a vendor "any salesman, representative, peddler or

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<sup>2</sup> 18 USCS §922(a)(3)

<sup>3</sup> 18 USCS §922(a)(3) and §922(b)(3).

<sup>4</sup> Tax Law §1105(a)

<sup>5</sup> Tax Law §1101(b)(4).

<sup>6</sup> Tax Law section 1132(a)(1).

<sup>7</sup> Tax Law §1131(1)

canvasser as the agent of the vendor, distributor, supervisor or employer *under whom he operates* (emphasis added) and from whom he obtains tangible personal property sold by him or for whom he solicits business....” The Petitioner does not qualify as a vendor under subparagraph (i) of the definition of vendor because the Petitioner did not sell the gun or collect the sales price nor does he qualify to be treated as a co-vendor under subparagraph (ii) because he did not operate under the Seller, he did not solicit business for the Seller, and he did not obtain property from the Seller that he (Petitioner) sold. Because Petitioner does not qualify as a vendor for purposes of closing the transfer of the gun purchased out-of-state, he is not a person required to collect the New York sales tax for this sale. The Buyer, however, would be responsible for any sales tax due on the gun purchase.

The Petitioner is required by federal law to record transactions pertaining to any guns in his possession.<sup>8</sup> It is presumed that all receipts for tangible personal property received pursuant to Tax Law sections 1105 subdivisions (a), (b), (c), and (d) are subject to tax.<sup>9</sup> Thus, the Petitioner has the burden of proving that any receipt is not subject to tax. He must retain the \$0 bill of sale in his records and also sufficient records to substantiate upon audit by the Department that he was not required to collect tax.

The Petitioner’s remaining question is whether the fee charged for administrative tasks that he performs pursuant to the federal GCA and required prior to transferring the gun to the Buyer is subject to sales tax. Sales tax is also imposed on the receipt from every sale of certain enumerated services as are specified in the Tax Law.<sup>10</sup> However, asking the NICS to complete a background check (for which Petitioner is not charged), creating the records necessary for Federal regulatory purposes, and ensuring that any State or local legal requirements are similarly met are not among the enumerated services that are subject to sales tax. Thus, Petitioner is not required to collect the sales tax on his fees.

DATED: April 13, 2012

/S/  
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DEBORAH R. LIEBMAN  
Deputy Counsel

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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.

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<sup>8</sup> 27 CFR Part 478.124.

<sup>9</sup> 20 NYCRR 532.4(a)(1); Tax Bulletin ST-770 (TB-ST-770).

<sup>10</sup> Tax Law §1105(c).