

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

TSB-A-13(10)S
Sales Tax
April 11, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S120221B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether he is a person required to collect tax for the purposes of Articles 28 and 29 of the Tax Law for certain purchases he finances or if he otherwise has any responsibility to collect and remit sales or use taxes for these purchases pursuant to these articles.

We conclude that Petitioner has no sales or use tax collection responsibilities for the purchases at issue.

Facts

Petitioner is registered as a vendor required to collect sales and use taxes because he makes taxable sales as part of his computer consulting business. Unrelated to this consulting business, Petitioner seeks to invest in another business located in New York State. This business (purchasing business) seeks to purchase machinery, equipment or supplies that it needs to make its products or otherwise use in its operation (e.g., office supplies). Instead of lending money to the purchasing business in fixed amounts, Petitioner will allow it to use Petitioner's credit card to make these purchases.

To make a purchase, Petitioner and the purchasing business will telephone a vendor selling an item which the purchasing business needs. The vendor will make out the invoice to the purchasing business and then ship the item directly to the address of the purchasing business. When payment is requested for the order, Petitioner will verbally give approval to the vendor for his credit card to be charged. The vendor will make the credit card paperwork out in Petitioner's name. The credit card issuer will bill Petitioner for the purchase and Petitioner's monthly statement from the credit card issuer will show a charge made for the purchasing business's purchase. The vendor will either collect tax at the time of purchase or the purchasing business will give the vendor an exemption certificate in those instances where the purchase qualifies for an exemption.

Petitioner plans to pay his credit card statement in full each month. The purchasing business will execute a promissory note to Petitioner for each such extension of Petitioner's credit. The purchasing business will pay the Petitioner's loan back over time, with interest, in accordance with the terms of the note. Petitioner does not otherwise participate in the profit or loss of the purchasing business's operation. Petitioner is not related to the purchasing business in any manner other than as a lender. Petitioner will not take a security interest in the items for which he loaned the purchase price, and he never uses, takes possession of, or has title to the items purchased.

Analysis

Sales Tax is imposed on “the receipts from every retail sale of tangible personal property, except as otherwise provided” Tax Law §1105(a). The Tax Law and the Department’s regulations provide that “[t]he 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.” Tax Law §1101(b)(5) and 20 NYCRR §526.7(1). In Petitioner’s situation, the vendor transfers both title and possession to the purchasing business with Petitioner loaning the funds used for the purchase, that is, the consideration, to the purchasing business through the use of his credit card. The vendor will collect any applicable sales tax due on the purchase and pay the tax over to the Department unless the purchasing business provides the vendor a properly completed exemption certificate (e.g., Form ST-121 for machinery or equipment that will be used or consumed directly and predominantly in the production of tangible personal property for sale.¹) Because the Petitioner never takes possession of or title to the items in question there is no sale between Petitioner and the purchasing business and Petitioner is not a person required to collect tax on these purchases. The tax owed on the transactions is collected by the vendor. It is expected that Petitioner will maintain the necessary books and records to show that the charges placed on Petitioner’s own credit card were pursuant to a financing relationship with the purchasing business and not Petitioner’s own purchases. He will need to be able to clearly establish this financing arrangement in the event his business is audited. Further, because Petitioner is acting as a lender, and not as the purchaser, he will have no right to request a refund or credit of the sales tax paid if a refund or credit is available (either because sales tax should not have been paid or if the item is returned to the vendor.) Moreover, in the event that the purchasing business fails to make payment to him on any item which he finances, Petitioner is not eligible to request a bad debt refund or credit for any amount of tax paid. *See* Tax Law §1139; *Matter of General Electric Capital Corporation v. Tax Appeals Tribunal*, 2 NY3d 249 (2004).

DATED: April 11, 2013

/S/

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.

¹ We note that the Department’s regulations require that an exempt organization must be the direct payer of record and it must make payment from its own funds in order for a purchase to be exempt. *See* 20 NYCRR §529.7(h). Petitioner did not indicate to which type of entity he was providing funds. However, if the purchasing business is an organization described in Tax Law §1116(a)(4), it could not make exempt purchases if Petitioner pays for those purchases.