

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

TSB-A-13(35)S
Sales Tax
October 16, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S130415A

The Department of Taxation and Finance received a Petition for Advisory Opinion from Petitioner [REDACTED]. Petitioner asks whether it must collect sales tax on its sales of bottled wine in the State. We conclude that Petitioner must collect sales tax on its New York sales.

Facts

Petitioner is incorporated under the laws of California. It is a retailer of bottled wine, which it sells through its website and on-line catalogs. Petitioner possesses an out-of-state direct shipper's license, pursuant to § 79-c of the Alcoholic Beverage Control Law, which authorizes it to sell bottled wine directly to New York State residents who are 21 years of age or older for their personal use if certain conditions are met. It transports its goods to New York exclusively through common carriers. Petitioner has no employees or agents of any kind in the State and it has no place of business or property in the State.

Analysis

The Tax Law imposes sales tax on retail sales of tangible personal property. The sales tax is imposed on the customer but is to be collected by a seller who is a person required to collect sales tax (Tax Law § 1132[a][1]).

Section 2 of the Twenty-first Amendment to the U.S. Constitution provides that “[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” Using the authority conferred by the Twenty-First Amendment, the State has conditioned permission to sell wine produced outside the State that is shipped directly to a resident in the State on, among other requirements, the seller collecting sales tax and otherwise complying with the duties of a vendor under the Tax Law (Alcoholic Beverage Control Law § 79-c[3][f]). Furthermore, paragraph (i) of subdivision (3) of § 79-c requires licensees to “execute a written consent to the jurisdiction of this state, its agencies and instrumentalities and the courts of this state concerning enforcement of this section and any related laws, rules, or regulations, including tax laws, rules or regulations.”

Conditioning the right of an out-of-state wine seller to directly ship wine to New York residents on the seller accepting the duty to collect the State's sales and use tax is constitutional, regardless of whether the seller has a physical presence in the State. According to the Supreme Court, “[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system”

(*California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 [1980]). In *Granholm v. Heald* (544 U.S. 460, 462 [2005]), the Supreme Court rejected New York's argument that the need to protect sales tax revenues justified the State's former prohibition against direct sales of wine to residents by out-of-state distributors. The majority was careful to note that its decision did not deprive the State of authority to regulate the importation of wine for sale, in part to ensure the proper collection of the State's taxes:

New York and its supporting parties also advance a tax-collection justification for the State's direct-shipment laws. While their concerns are not wholly illusory, their regulatory objectives can be achieved without discriminating against interstate commerce. In particular, New York could protect itself against lost tax revenue by requiring a permit as a condition of direct shipping. This is the approach taken by New York for in-state wineries. The State offers no reason to believe the system would prove ineffective for out-of-state wineries. Licensees could be required to submit regular sales reports and to remit taxes.

(Id. at 491). As Professor Hellerstein has commented, the idea that the physical presence nexus requirement of *Quill v. North Dakota* (504 U.S. 298 [1992]) "would independently bar New York from imposing a *nondiscriminatory* registration and tax collection requirement on the out-of-state winery is flatly inconsistent with the way the [*Granholm*] Court (not to mention the dissenters) read the Twenty-First Amendment" (Hellerstein, *State Taxation* ¶ 19.02[4] [3d ed.]).

Accordingly, Petitioner must collect sales tax on its sales of bottled wine in the State.

DATED: October 16, 2013

/S/

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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.