

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S140729A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether a person required to collect tax can contract to include sales tax within its hourly rate for the job and not separately state the sales tax on the bill to the customer. Petitioner also asks whether a person required to collect tax that is presented with an exemption certificate has a duty to investigate the nontaxability of the transaction.

We conclude that a person required to collect tax may not “absorb” the sales tax that it must collect from its customers into its hourly rate. A person required to collect tax that accepts in good faith a timely, properly completed certificate is under no duty to investigate the customer’s representations on that certificate.

Facts

Petitioner entered into a contract with a construction contractor (“Purchaser”) whereby Petitioner agreed to provide security guard services at sites where Purchaser was doing construction projects. Purchaser told Petitioner that, because of a sales tax exemption, it was entitled to purchase Petitioner’s services without paying sales tax. Shortly after the contract was signed, Purchaser provided Petitioner with Contractor Exempt Purchase Certificates (Form ST-120.1) for each location where the services would be provided. Petitioner’s contract stated the hourly rate to be charged. The parties also executed a purchase order for each location, which stated the hourly rate, “including all applicable sales tax.” Thereafter, Petitioner sent Purchaser monthly invoices that delineated the hourly rate and the sales tax separately, indicating that the sales tax was “EXMPT 0.000%.” Petitioner was later advised that its security guard services were not exempt.

Analysis

Sales and use tax is imposed on, among other things, the receipts from the retail sale of tangible personal property and the sale, except for resale, of certain enumerated services. *See* Tax Law § 1105(a), (c). Here, Petitioner’s security guard service qualifies as a taxable protective service. *See* Tax Law § 1105(c)(8). As relevant here, a “person required to collect tax” is every vendor of tangible personal property and shall include any officer, director, or employee of a corporation or of a dissolved corporation, who as such officer, director, or employee, is under a duty to act for such corporation in complying with any requirement of the Sales and Use Tax Law. *See* Tax Law § 1131(1).

Petitioner asks whether it may “absorb” the sales tax that should be charged to its customers within its hourly rate for the job. The Tax Law provides that the tax is to be collected

by the person required to collect tax from the customer when collecting the purchase price from the customer. *See* Tax Law § 1132(a)(1). The Tax Law further provides that the person required to collect tax is required to separately state the tax on any invoice or other statement of the transaction provided to the customer. Accordingly, it would not be consistent with Petitioner's duties as a person required to collect tax under the Tax Law to agree to a contract clause that prohibits it from properly stating the tax due on an invoice for its security guard service. Moreover, a contract with a third party does not relieve Petitioner of these duties. "The words tax included or words of similar import, on a sales slip or other document, do not constitute a separate statement of the tax, and the entire amount charged is deemed the sales price of the property sold or services rendered." 20 NYCRR § 532.1(b)(3). In the event of a nonpayment or underpayment of sales tax, Petitioner, as a person required to collect tax, would be personally liable for the amount of the tax due for the service, along with penalty and interest. *See* Tax Law § 1133(a). Furthermore, a person required to collect tax that willfully fails to separately state sales tax on an invoice given to a customer in accordance with Tax Law § 1132(a) or willfully fails to collect sales tax may be subject to criminal penalties. *See* Tax Law §§ 1801(a)(6), 1817(d).

We note that the issue of whether a contract clause forbidding a person required to collect tax from separately stating a sales tax on a taxable service is enforceable has been addressed by at least one court, which held, in the context of the sales and use tax imposed by New York City, that such a contract is not enforceable. *See Rudnick Bros., Inc. v. John A. Johnson & Sons, Inc.* 8 AD2d 775 (1st Dept 1959) ("[w]hile the contract in issue provides that the seller is to absorb the sales tax in the purchase price, such provisions are illegal and unenforceable, since a buyer may not, by contract, be relieved of his statutory obligation to pay a city sales tax.")

Petitioner also asks whether a person required to collect tax that is presented with an exemption certificate has a duty to investigate the nontaxability of the transaction¹. Transactions of any type mentioned in Tax Law § 1105(c) are presumed to be subject to sales tax, with the burden on the person required to collect tax to prove that the transaction is not taxable. *See* Tax Law 1132(c)(1). A person required to collect tax can meet this burden by timely accepting in good faith a properly completed exemption certificate that applies to the transaction. *See* 20 NYCRR § 532.4(b)(2). This good faith standard does not impose a duty on a person required to collect tax "to investigate his customer" *See Saf-Tee Plumbing Corp. v. Tully*, 77 AD2d 1, 4 (3d Dep't 1980). However, it does require the person required to collect tax to exercise "reasonable due care." *See* 20 NYCRR § 532.4(b)(2)(i).

DATED: October 12, 2016

/S/
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Deputy Counsel

¹ Note that a person required to collect tax is not obligated to accept exemption certificates at all and instead may collect tax from its customers. *See* TSB-A-81(48)S.

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.