New York State Department of Taxation and Finance
Office of Counsel

TSB-A-17(20)S
Sales Tax
August 4, 2017

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S141107A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [redacted] (Petitioner). Petitioner asks whether the amounts it collects from customers when it arranges for the provision of on-site heating, ventilation and air conditioning maintenance and repair services (HVAC Services), including its "management and consulting fees," are subject to New York State and local sales tax. We conclude that all of Petitioner's charges are subject to New York State and local sales tax.

Facts

Petitioner is a Florida-based limited liability company that provides HVAC-related services to customers, most of which are national retail chains with numerous locations throughout the United States. Petitioner consults with its customers to design and implement a "systematic, coordinated, headquarters-driven approach" to managing their HVAC-related maintenance and repair needs. Part of what Petitioner does in this regard is design preventive maintenance, service, and emergency repair programs that can be implemented in all of a customer's locations. These programs generally include, among other things, recommended preventive maintenance service and rate schedules, as well as detailed lists of tasks to be performed. While Petitioner has customers with locations in New York State, Petitioner itself does not own property or have facilities, offices, or employees here, nor does it dispatch its employees to New York State for any reason. Moreover, Petitioner indicates that it does not employ any licensed HVAC technicians and, consequently, does not directly perform any HVAC Services for its customers.

Once an HVAC service program has been created, Petitioner indicates that a customer generally will enter into a "master service and maintenance contract" with a national HVAC service provider with the capacity to perform repair and maintenance services at a large number of that customer's locations. Sometimes, however, a customer will have a location that falls outside of a national provider's coverage area, in which case Petitioner will arrange, in consultation with its customer, for a local or regional contractor to perform any HVAC Service that may be necessary. When this is required, Petitioner will contact a service provider that has been pre-screened by it, and that is a member of what it calls its "Peer Partner Network," or PPN. To be a member of Petitioner's PPN, contractors must enter into a "Partner Agreement" (PA) with Petitioner. Notably, this PA is not an agreement to perform any work, nor is it a guarantee that a "peer partner" (Partner) will be offered any work. Rather, the only benefit conferred upon Partners is the possibility that

they may be asked to provide, on an independent contractor basis, onsite HVAC Services for one of Petitioner's customers in the future. This is reflected in the PA, which provides as follows:

> Partner acknowledges that this Agreement does not require it to perform any work for [Petitioner], and it does not require [Petitioner] to refer any work to the Partner. [Petitioner] retains the right, on behalf of its client, to engage others to perform the same type of services to any [customer of Petitioner] without any obligation to Partner. [Petitioner] makes no representation as to the number, frequency or dollar value of work orders for services to be issued to Partner under this Agreement.
>
> For all purposes herein, and in the performance of its duties and obligations under this Agreement, the Partner is and shall remain an independent contractor. Nothing contained herein shall be deemed to create or be construed as creating a joint venture, partnership, master-servant or employer-employee relationship between Partner and [Petitioner]. The Partner must maintain all necessary licensing required by state and local laws where service is performed for [Petitioner].

To the extent a Partner is asked to perform HVAC Services at a customer's site, the PA requires that such work be performed in accordance with various terms and conditions. Among these is a requirement that Partners not solicit or accept business directly from any of Petitioner's customers. In addition, the PA contains "service guidelines" that must be adhered to:

> a) Once a service call is issued, the technician or dispatcher must call [Petitioner] with confirmation of receipt and an estimated time of arrival of the technician to the site.
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> b) If the [Estimated Time of Arrival] is delayed or changed, [Petitioner] must be notified immediately.
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> c) Once the technician has determined the origin of the service problem[,] he or she should perform the needed repairs up to the Not To Exceed amount ("NTE"). If the service call cannot be completed within the NTE then Partner must call [Petitioner] and request an increase in the NTE for that job before commencing repairs, and may not proceed unless [Petitioner] has approved the increase. Neither [Petitioner] nor [Petitioner's] client shall be liable to Partner for any amounts charged in excess of the NTE that were not approved by [Petitioner], in writing, beforehand.
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> d) Partner **must** notify [Petitioner] immediately if parts must be ordered, or that a quote is being submitted for repairs that cannot be made on site. [Emphasis in original].
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> e) Once the service has been completed, Partner must notify [Petitioner] immediately.

f) All service calls must have a customer signature on the Partner technician's backup (not [Petitioner's] work order) before he leaves the client's site. If there is no customer signature, [Petitioner] reserves the right not to pay the invoice submitted.

g) All service calls should have a response time as stated on the work order unless otherwise agreed upon by the Partner and [Petitioner] on a non-emergency basis, as determined on a specific call.

h) All service calls (unless a quote is waiting on approval) must be completed within five business days. All quotes are due to [Petitioner] within 24 hours of the technician being on site.

In addition to the above, the PA contains "procedural guidelines" that Partners must follow. These guidelines address issues such as the warranty that Partners must offer (30-days parts and labor on most calls), and what is required when submitting quotes to Petitioner for approval. In addition, these guidelines require that, when work is complete, the Partner prepares an invoice and delivers it to Petitioner for payment. In fact, the guidelines expressly provide that "[u]nder no circumstances shall Partner invoice any [of Petitioner's customers] directly." Moreover, the guidelines require that all inquiries about a job be directed to Petitioner and that a Partner may "not, under any circumstance contact [Petitioner's] client." The guidelines, however, make it "an absolute condition precedent to any payment by [Petitioner] to Partner that [Petitioner] is first paid the amounts in [the Partner's invoice] by [Petitioner's] client."

When Petitioner receives an invoice for HVAC Services performed by a Partner at a customer's location, it in turn submits an invoice to that customer for payment. According to Petitioner, this invoice will list the amount that is charged by the Partner that performed the work, as well as a fee for "management services" that Petitioner provides. After Petitioner's customer pays this bill, Petitioner sends payment to its Partner from the funds that it (Petitioner) receives. Each customer's funds are separately accounted for on Petitioner's books, and each account is debited or credited as payments are made or received. The amount that is charged by Petitioner for the HVAC Services performed is the same amount that is billed to Petitioner by its Partner. Petitioner contends that this amount is not marked-up, and that it currently includes the applicable sales tax that the Partner charges.

On July 8, 2014, an Advisory Opinion, TSB-A-14(17)S, was issued to Petitioner that determined that it was a retail vendor of the HVAC Services that it arranged for its customers, and that, as a result, it was required to collect sales tax on the entirety of its charges, including its "management fee." This decision was based, in part, on the terms of Petitioner's PA at the time, which contained a provision declaring that Partners would have "no direct contractual relationship

with [Petitioner's] clients except as a third party beneficiary" of the agreement.[1] Petitioner, in its current request for an advisory opinion, does not dispute that the HVAC Services being performed by Partners are subject to New York State sales tax pursuant to Tax Law §§ 1105(c)(3) and (5). Rather, Petitioner contends that TSB-A-14(17)S was "erroneous" because it merely arranges for the provision of these services as an agent of its customers and, therefore, it is not a retail vendor of such services. In support of this contention, Petitioner submits a revised PA that, while devoid of any reference to the lack of a contractual relationship between a Partner and Petitioner's customers, still contains provisions that require Partners to acknowledge and agree that Petitioner's customers are third-party beneficiaries of it. In addition, Petitioner added language to the revised PA stating that "Partner expressly acknowledges and agrees that [Petitioner] is entering into and acting under this Agreement strictly as the agent for its designated clients." Petitioner, however, indicates that it does not have any written agreements with its customers that reflect this agency relationship.

Analysis

Petitioner, contends that, when it makes arrangements for the provision of the on-site HVAC Services, it is doing so as an agent of a customer, so that its receipts from customers, especially its "management fee," should not be subject to sales tax. However, an agency relationship, at its core, is a fiduciary relationship where there is consent "by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act." *Custom Mgt. Corp. v. New York State Tax Com'n*, 148 AD2d 919 (3d Dep't 1989). To establish an agency relationship, therefore, there must be a manifestation that one party consents to act on behalf of another party, subject to the other party's control, and that the other party authorized this relationship. *See, e.g., Matter of Hooper Holmes, Inc. v. Wetzler*, 152 AD2d 871 (3d Dep't 1989); TSB-A-15(31)S; TSB-A-09(51)S. It logically follows, therefore, that to establish an agency relationship there must be, at a minimum, an agreement between the party claiming to be an agent, and the party for whom this "agent" claims to be acting. *See, e.g.*, TSB-A-09(51)S (Petitioner had agreement with its client to act as purchase agent); TSB-A-98(1)C (agency relationship established by a Power of Attorney); TSB-A-93(45)S (agency relationship exists where agreement appointed petitioner as an agent of an exempt organization).

As noted above, Petitioner does not have any written agreements with its customers. As such, Petitioner is unable to point to any document that states that any customer considers its relationship with Petitioner to be one of agency. Moreover, and with respect to Petitioner's PA, there is nothing in the petition that indicates that any of Petitioner's customers know about, let alone have agreed to, the terms of this document. Thus, while Petitioner's current PA indicates that it is acting as an agent of its customers and makes *Partners* acknowledge and agree to this, it does not evidence the existence of an agency relationship between Petitioner and its customers. This is especially true because no signature or other type of acknowledgment by Petitioner's customers is required by the PA.

[1] The decision in TSB-A-14(17)S was based on other documents and information provided by Petitioner at that time, none of which is relevant to, nor has been considered for purposes of, this Advisory Opinion.

Moreover, the PA is, at best, ambiguous on its face with respect to Petitioner's relationship with its customers. For example, while the PA states that Petitioner is its customer's agent in a number of places, it also provides that certain terms and conditions be adhered to by a Partner "if it is retained *by [Petitioner]"* to perform work for one of its customers. In addition, the PA requires Partners to acknowledge that the agreement "does not require it to perform any work *for [Petitioner]*, and it does not require [Petitioner] to refer any work to the Partner." (Emphasis added). The PA also contains a provision requiring Partners to maintain all necessary licensing required by "state and local laws where service is performed *for [Petitioner]."* These passages suggest that the Partner is being hired by Petitioner, and not one of its customers. Moreover, the PA requires that a Partner "acknowledge and agree," not just that Petitioner is an agent of its customers, but that Petitioner's customers are third-party beneficiaries of the Agreement. These provisions are contradictory, because, if Petitioner were its customer's agent, the customer would be more than merely a third-party beneficiary of the PA. *See, e.g., Key Int'l Manufacturing, Inc. v. Morse/Diesel, Inc*., 182 AD2d 448, 453 (2d Dep't 1988) (a principal is liable on contracts entered into on its behalf by an authorized agent). Also, while Petitioner may consult with customers and require their approval at times, the PA itself does not demonstrate a sufficient level of control over Petitioner by its customers to support a finding of agency. *See, e.g., Matter of MGK Constructors*, Tax Appeals Tribunal, March 5, 1992. If anything, the PA, which essentially requires Partners to deal solely with Petitioner when performing work and expressly prohibits them from contacting Petitioner's customers "under any circumstance" suggests that Petitioner's customers play little, if any, role in the decision-making process.

In light of the above, we cannot find that Petitioner, when it makes arrangements with Partners to perform HVAC Services at a customer's site, is making such arrangements as an agent of its customers. Rather, we conclude, as we did in TSB-A-14(17)S, that Petitioner is purchasing these HVAC Services from its Partners and reselling them to its customers, thus making Petitioner a retail vendor of such. That Petitioner may not itself employ HVAC technicians, or that it does not do HVAC repair or maintenance work directly for customers, is of no consequence. Accordingly, all of Petitioner's receipts from its customers are subject to New York State and local sales tax, which Petitioner must collect. This includes what Petitioner bills as a "management fee," as this is simply an itemized expense of the HVAC Service being provided. 20 NYCRR 526.5(e). See *also* TSB-A-05(7)S. In addition, Petitioner should provide each of the Partners that perform HVAC Services for its customers with a properly completed resale certificate (Form ST-120), the good-faith receipt of which would release them from the obligation to collect sales tax from Petitioner.

Finally, Petitioner raises other arguments in its Petition, including that its management fee is not an itemized expense of the HVAC Services provided to its clients, but is rather a separate non-taxable charge. However, this claim is premised on the belief that Petitioner is acting as agent for its customers, which, for the reasons discussed above, we conclude has not been substantiated. Likewise, Petitioner contends that it lacks nexus with New York State. However, having found that Petitioner is providing HVAC Services through the use of independent local and regional sub-

contractors in the State, we find that sufficient nexus between Petitioner and New York State exists. *See, e.g., Matter of Orvis Co., Inc. v. Tax Appeals Tribunal*, 86 NY2d 165, 178 (1995) (economic activity by a vendor or on a vendor's behalf enough to establish nexus). *See also Scripto, Inc. v. Carson*, 362 US 207 (1960) (conduct of business through independent contractors sufficient to establish nexus); *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992) (noting that *Scripto* involved a physical presence by the business at issue within the state). Petitioner, therefore, must register with the Department for sales tax purposes. *See* Tax Law § 1101(b)(8)(i)(A).

DATED: August 4, 2017

/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.