

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner).

Petitioner asks whether, as a result of operating an online marketplace in which it facilitates taxable sales by independent software vendors (ISVs), it qualifies as a vendor for sales tax purposes and what the consequences of such status would be. We conclude that, assuming that Petitioner has sufficient nexus with the State and the ISV qualifies as a vendor for sales tax purposes, it is within the discretion of the Commissioner of Taxation and Finance to treat Petitioner as a vendor based on such activities, in which case Petitioner would be jointly liable with the ISV to collect sales tax and must assume all the responsibilities of a vendor.

Facts

Petitioner develops and markets a wide range of software, services, and digital products. In connection with these products, Petitioner operates online marketplaces on which ISVs may offer for sale, among other things, software, games, and apps (“software products”) for customers to download electronically, using their personal computers, tablets, game consoles, phones, and other devices. Although the marketplaces are separately branded (e.g., “Company X Phone Store,” “Company Y Video Game Store”), this Advisory Opinion will refer to them collectively as “Marketplace.”

Customers gain access to the Marketplace using their computing devices. Customers may search a catalog that identifies the title and the ISV of the prewritten software available for purchase. To initiate a purchase, the customer selects a title to add to the shopping basket. The customer checks out using a credit card or other form of payment. Petitioner processes the payment using its own payment infrastructure, and electronically delivers the product from one of its data centers. The sale may include titles from more than one ISV. Petitioner is not required to obtain approval from the ISVs prior to sale.

Under the Marketplace arrangements, the ISVs enter into service agreements with Petitioner whereby Petitioner agrees to host and supply the prewritten software to customers on each ISV's behalf, process the customer's payments, and remit the proceeds to each ISV, less Petitioner's service fee. Petitioner is entitled to withhold the service fee, equal to a percent of the software product's sales price, from the sales proceeds. Petitioner also calculates the appropriate amount of sales tax due on the transaction and remits the sales tax directly to the Department.

Petitioner does not sublicense the software product to the customer. The license agreement is directly between the ISV and the customer. The ISV, as the licensor, determines the price at which the software products are sold to end customers.

For purposes of this Advisory Opinion, it is assumed that Petitioner has sufficient nexus to New York to permit the State to require it to collect sales tax.

Analysis

Sales tax is imposed on the retail sale or use of tangible personal property, and the sale, except for resale, of certain enumerated services. *See* Tax Law § 1105(a), (b), and (c). Included in the definition of tangible personal property is “prewritten computer software.” *See* Tax Law § 1101(b)(6). The tax is imposed on the customer, but is required to be collected by “a person required to collect tax when collecting the price.” *See* Tax Law § 1132(a)(1). Among the persons required to collect tax is a “vendor” as defined in Tax Law § 1101(b)(8). *See* Tax Law § 1131(1).

Petitioner does not dispute that the sales of the software products in its Marketplace are subject to sales tax as sales of prewritten computer software when the products are delivered to customers in New York. Rather, Petitioner asks whether, by virtue of facilitating those sales on behalf of ISVs, it is a vendor and thus a person required to collect tax with regard to such sales. The definition of “vendor” in Tax Law § 1101(b)(8)(ii)(A) provides that “when in the opinion of the commissioner it is necessary for the efficient administration of this article to treat any salesman, representative, peddler or canvasser as the agent of the vendor, distributor, supervisor or employer . . . for whom he solicits business, the commissioner may, in his discretion, treat such agent as the vendor jointly responsible with his principal, distributor, supervisor or employer for the collection and payment over of the tax.” This provision permits the Department to treat as vendors intermediaries that perform key acts in facilitating taxable sales by vendors. *See Jericho Boats of Smithtown, Inc. v. State Tax Comm'n*, 144 AD2d 163 (3d Dep’t 1988); *Names in The News v. New York State Tax Comm’n*, 75 AD2d 145 (3d Dep’t 1980). Thus, in *Jericho Boats* the Appellate Division determined that the Department properly treated as a vendor a broker that facilitated the sale of boats by displaying the boats or pictures of the boats, arranging the sales, sometimes providing financing, and collecting the purchase price. *See Jericho Boats, supra*.

Petitioner performs duties similar to the broker in *Jericho Boats* on behalf of the ISVs selling software products in its Marketplace: it provides information about the ISVs’ products, brings buyers and sellers together by hosting the website where sales can be made and accepted, and collects the purchase price. Presumably some of the ISVs qualify as vendors (hereafter “ISV vendors”) within the meaning of Tax Law § 1101(b)(8). Accordingly, under Tax Law § 1101(b)(8)(ii)(A), the Commissioner would be entitled to treat Petitioner as a co-vendor with regard to all taxable sales it facilitates on its Marketplace on behalf of ISVs that themselves qualify as vendors.¹ Doing so would relieve those ISV vendors that make sales only in Petitioner’s Marketplace of the need to register to collect tax and file returns, so long as Petitioner is complying

¹ This conclusion is inconsistent with the outcome in TSB-A-99(49)S. That Advisory Opinion no longer reflects the Department’s policy and should no longer be followed.

with its duties as a vendor, thereby reducing the administrative burden on those ISVs. *See* 20 NYCRR § 526.10(e)(3)(ii). Further, treating Petitioner as a vendor would improve the efficiency of sales tax administration: because Petitioner is collecting the selling price from the Marketplace customers, and sales tax is to be collected when the sales price is collected, Petitioner is in a better position than the underlying ISV vendor to collect the sales tax.

Assuming it is found to be a vendor, Petitioner asks a series of additional questions. First, it asks whether the Department would hold the ISV liable for tax in regard to a sale on which Petitioner has properly collected and remitted tax. The ISV would not be liable for tax so long as Petitioner, as vendor, properly collected and remitted tax due on the ISV's sales. *See* 20 NYCRR § 526.10(e)(3)(ii). Petitioner next asks whether it will be protected from liability by its acceptance of resale certificates and other exemption certificates from purchasers in regard to sales it facilitates on behalf of ISV vendors on its Marketplace. As a vendor, Petitioner would be protected from the presumption of taxability in Tax Law § 1132(c) with regard to such sales, if it timely accepts in good faith a properly completed resale or other exemption certificate. *See* Tax Law § 1132(c); 20 NYCRR § 532.4. Relatedly, Petitioner asks whether its acceptance of the resale certificates for such sales would also protect from liability the ISV on whose behalf it is facilitating the sale. Where Petitioner would be protected from liability as a result of its acceptance of a resale or other exemption certificate, the ISV would also be protected as long as the ISV has no actual knowledge that the sale did not qualify for the exemption or exclusion at issue. Finally, Petitioner asks whether, as a vendor, Petitioner would be entitled to seek a refund or a credit for any excess sales tax it has collected and remitted. Petitioner would be entitled to such refunds as long as it has refunded the customer the excess tax and makes a timely claim for refund. *See* Tax Law § 1139.

DATED: March 7, 2019

/S/

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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.