

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from the [REDACTED] (“Petitioner”). Petitioner asks whether it must collect sales tax at an annual fundraising event for both the products it sells and sales made on behalf of vendors who are not present at the event.

We conclude that Petitioner’s sales of its own products at the annual fundraiser are exempt from sales tax as those sales do not constitute sales from a shop or store operated by an exempt organization. However, sales on consignment from contributing vendors, who do not attend the event, are subject to taxation because Petitioner is acting as an agent or co-vendor of these vendors.

Facts

Petitioner is an exempt organization under IRC § 501(c)(3) and is registered as an exempt organization for New York State sales tax purposes. Petitioner holds an annual two day “ [REDACTED] ” fundraiser where Petitioner sells tangible personal property on behalf of vendors who are not present at the fundraiser. On these sales, Petitioner retains a commission and remits the balance of the proceeds, plus sales tax, to the vendors. Petitioner also sells its own items at the fundraiser and collects and remits sales tax on those sales.

Analysis

Tax Law § 1105 imposes sales tax on all sales of tangible personal property. However, Tax Law § 1116 provides that sales of tangible personal property by exempt organizations are not subject to sales tax, with some exceptions, such as sales of tangible personal property by any shop or store operated by the exempt organization. *See* Tax Law § 1116(b)(1). A shop or store is “any place or establishment where goods are sold from display with a degree of regularity, frequency and continuity...” 20 NYCRR 529.7(i)(2) (emphasis added). A two-day annual event lacks the frequency and continuity required to constitute the operation of a shop or store within the meaning of the Tax Law. Thus, Petitioner’s sales of its own items at the fundraiser are exempt from sales and compensating use tax. *See* TSB-A-13(29)S and Publication 843 *A Guide to Sales Tax in New York State for Exempt Organizations*. If Petitioner has collected sales tax on these sales, Petitioner can apply to the Department for a refund pursuant to Tax Law § 1139 within the time periods provided by that section, but only if it can demonstrate that it first refunded the tax to its customers. *See* TB-ST-350, *How to Apply for a Refund of Sales and Use Tax*.

Notwithstanding the fact that Petitioner's own sales are not subject to sales tax, its sales of tangible personal property consigned to it by vendors are subject to sales tax. Such sale arrangements result in a co-vendor or agency relationship on behalf of the non-exempt vendor and, therefore, the Petitioner must collect sales tax on those sales whether or not the sales are made by a shop or store operated by Petitioner. *See, e.g., Nassau County Museum of Art*, TSB-A-03(34)S. Furthermore, as a co-vendor, Petitioner is jointly responsible for the taxes due on the sales made on behalf of the consignors. Accordingly, Petitioner must collect sales tax and remit that tax to the Department for sales made on behalf of the absent vendors, rather than returning the collected tax to these vendors *See Tax Law § 1101(b)(8)(ii)(A); Matter of Jericho Boats of Smithtown, Inc. v. State Tax Commission*, 144 AD 2d 163 (3d Dep't 1988).

DATED: October 13, 2020

/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.