



Advisory Opinion: TSB-A-24(52)S

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether it must collect and remit sales tax on sales of tangible personal property to consumers within or outside New York State that are stored in the State by a third-party fulfillment provider.

We conclude that Petitioner is a marketplace seller and does not need to register for sales tax purposes or collect and remit sales tax if sales tax is being collected and remitted on sales facilitated by its marketplace provider, and it makes no other sales in New York State.

Facts

Petitioner sells a variety of scopes and binoculars. Petitioner is based in Louisiana and does not have any offices or employees in New York State. Petitioner has an agreement with Company X to facilitate the sale of Petitioner’s products on Company X’s website. Company X may store Petitioner’s product at a New York facility prior to purchase by New York or out-of-state consumers. Upon receipt of a consumer order from Petitioner’s inventory, Company X fulfills and ships the products. Company X publicly states on its website that it “will be responsible to calculate, collect, remit and refund state sales tax on sales sold by third party sellers for transactions destined to states where Marketplace Facilitator and/or Marketplace collection legislation is enacted.”

Analysis

In general, businesses that sell tangible personal property or taxable services to customers in New York are required to register for sales tax purposes and collect and remit sales tax if they have nexus with New York State. Tax Law § 1101(b)(8). Nexus may be established in various ways, including the presence of property, employees, or representatives in the State or by the solicitation of sales in the State. An entity may have nexus if it regularly or systematically solicits business in New York State, even if it has no physical presence in the State. See Tax Law § 1101(b)(8)(iv); TSB-M-19(4)S; see generally, *South Dakota v. Wayfair, Inc. et al.*, 138 S.Ct. 2080, 2099-2100 (2018). For example, the Tax Law creates a presumption that an entity with no physical presence in New York State but has cumulative sales of \$500,000 and has made or facilitated 100 or more sales of tangible personal property within the State in the previous four sales tax quarters must register for sales tax purposes, collect sales tax, and remit the same to the Department. See Tax Law § 1101(b)(8)(iv); TSB-M-19(4)S. However, the presence of a seller’s property on the premises of an unaffiliated fulfillment center in this State does not create nexus for the seller if the services provided by the fulfillment center are limited to (i) the acceptance of orders; (ii) responses to consumer correspondence and inquiries; (iii) billing and collection activities; or (iv) the shipment of orders from an inventory of products offered for sale. Because determinations about nexus turn on multiple factors and are heavily fact-dependent, we cannot provide an opinion about whether Petitioner has nexus with New York.

A marketplace provider that has nexus with New York is required to collect and remit sales tax on all taxable sales of tangible personal property that it facilitates for marketplace sellers, regardless of whether the marketplace seller is required to register for sales tax purposes See Tax Law § 1101(e). A sale is facilitated by the marketplace provider if it “provides the forum in which, or by means of which, the sale takes place or the offer of sale is accepted, including a shop, store, or booth, an internet website, catalog, or similar forum; and...[the marketplace provider] or an affiliate ... collects the receipts paid by a customer to a marketplace seller for a sale of tangible personal property, or contracts with a third party to collect such receipts.” Tax Law § 1101(e)(1). A marketplace seller is a “person...who has an agreement with a marketplace provider under which the marketplace provider will facilitate sales of tangible personal property by such person...” Tax Law § 1101(e)(2).

A marketplace provider shall either execute and deliver to a marketplace seller Form ST-150, *Marketplace Provider Certificate of Collection*, or have a publicly available agreement approved by the Commissioner stating the marketplace provider will remit tax on marketplace seller sales made to consumers in New York. If the marketplace provider delivers Form ST-150 or posts approved public agreement language, the marketplace seller is relieved from its obligation to remit sales tax on sales to New York customers that are facilitated by the marketplace provider. In addition, the marketplace seller would not be required to register for sales tax if it makes no sales to New York customers other than those facilitated by the marketplace provider. TSB-M-19(2.1)S *Sales Tax Collection Requirement for Marketplace Providers* contains the Commissioner’s approved language for a publicly available agreement between a marketplace provider and marketplace seller.

In this matter, Company X and Petitioner have agreed that Company X will advertise and facilitate sales of Petitioner’s products through its website. Accordingly, Company X is a marketplace provider and Petitioner is a marketplace seller. Company X is required to collect sales tax on sales of Petitioner’s tangible personal property sold through its website. Company X publicly states on its website that it “will be responsible to calculate, collect, remit, and refund sales tax on sales sold by third party sellers for transactions destined to states where Marketplace Facilitator and/or Marketplace collection legislation is enacted.” Company X includes New York on the list of states that it will collect and remit sales and use tax on behalf of its sellers. The website’s language is consistent with the publicly available agreement language in TSB-M-19(2.1)S.

Therefore, Petitioner does not need to collect and remit sales tax on New York sales facilitated by Company X’s website and will not be required to register for sales tax purposes as long as it makes no other sales in New York State. Sales of tangible personal property delivered to customers outside the State are not subject to New York State and local sales taxes.

DATED: November 12, 2024

/s/

MARY ELLEN LADOUCEUR
Principal Attorney

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.