

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-86(13)S
Sales Tax
March 26, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S851025A

On October 25, 1985, a Petition for Advisory Opinion was received from Edna Jacobs D/B/A Industrial Sales, Post Office Box 76 Gedney Station, White Plains, N.Y. 10605.

The issues raised are (1) whether Petitioner is required to report on its sales tax returns sales of tangible personal property it arranges between a buyer and seller; and (2) whether sales of merchandise in certain hypothetical situations described by Petitioner must be included on its sales tax return.

Issue 1.

Petitioner accepts telephone orders for household appliances and places them, also by telephone, with suppliers who deliver the goods directly to the purchasers from their stock of merchandise. The purchasers are billed by, and make payment to the suppliers who then pay a sales commission to the Petitioner.

Section 1105(a) of the Tax Law imposes a tax on the "receipts from every retail sale of tangible personal property, except as otherwise provided in this article".

The Tax Law states that the term "receipt" shall mean "[t]he amount of the sale price of any property and the charge for any service taxable under this article, valued in money...". The terms "sale, selling or purchase" are defined as "[a]ny transfer of title or possession or both... for a consideration, or any agreement therefor...". The term "vendor" is defined, in part, as "[a] person making sales of tangible personal property or services, the receipts of which are taxed by this article...". (Tax Law 1101[b][3], [5]; [8] [A]).

Therefore, when Petitioner merely accepts an order and directs a supplier to deliver goods to a customer, and Petitioner neither takes title to the property nor bills or receives payment for the merchandise, it is not itself making a retail sale, and therefore is not a "vendor" with respect to such transaction. See Mobilehome Marketing, Inc., State Tax Commission Advisory Opinion, July 31, 1981, TSB-A-81(11)S.

Department of Taxation and Finance Form ST-150.1, Instructions for ST-100 (Quarterly return), enumerates, on page four, transactions that must be reported on the sales tax return, as follows:

"Box A - Gross sales and services.

Enter the total amount of sales made by the business . . ., including those exempt from sales taxes. Do not include the amount of sales taxes collected. Include all sales made within New York State (even if for delivery outside New York State) and sales made at business locations outside New York State for delivery into New York State. Do not include sales made at business locations outside New York State which do not involve deliveries into New York State.

Box B - Taxable sales and services.

Enter the total dollar amount of the sales subject to New York State and local sales taxes"

Accordingly, since sales commissions paid to the Petitioner are not receipts from sales made by it as a "vendor", such amounts should not be included on its sales tax return.

Issue 2.

Petitioner questions whether transfers of merchandise under the following conditions must be reported by Petitioner on its sales and use tax return:

A. Both the supplier and the customer are located outside New York State and the property is delivered outside the state.

B. Same as "A", except that,

- 1) the trucking company has an office in New York State, or
- 2) the customer mails a deposit for goods ordered to the Petitioner, prior to their delivery by the supplier.

C. The supplier is located within New York State and the delivery is made to the customer outside of New York State.

D. The supplier is located outside of New York State and the merchandise is delivered to a customer in New York State.

Article 28 of the Tax Law provides that every person who makes retail sales of tangible personal property in New York (which includes sales where the property is delivered to the customer in New York) is required to register with the Tax Commission and to collect the sales tax due with respect to such sales.

The Tax Law contains, in part, the following definitions:

Section 1101(b)(8) "Vendor. (i)(C) A person who solicits business either by employees, . . . agents or other representatives or by distribution of catalogs, or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article;. . . ."

Section 1131 (1). . . "person required to collect any tax imposed by this article shall include: every vendor of tangible personal property or services; . . . (4) "Property and services the use of which is subject to tax" shall include: (a) all property sold to a person within the state, whether or not the sale is made within the state. . . ."

The Sales and Use Tax Regulation states that the term "vendor" includes "[a]n independent manufacturers representative representing many clients and acting on his own behalf [who] solicits orders from New York State customers" (20 NYCRR 526.10 [a][1][i], example 3).

Provisions governing vendors located outside New York State are set forth in Regulation Section 526.10, as follows:

"(e) Interstate vendors. (1) A person outside of this State making sales to persons within the State, who solicits the sales in New York, as defined in subdivision (d) of this section, or who maintains a place of business as defined in subdivision (c) of this section, is required to collect the sales tax on the tangible personal property delivered in New York or the services performed in New York."

The subdivision (c) and subdivision (d) referred to in the foregoing section provide as follows:

"(c) Maintaining a place of business. A vendor shall be considered to maintain a place of business in the State if he, either directly or through a subsidiary, has a store, salesroom, sample room, showroom, distribution center, warehouse, service center, factory, credit and collection office, administrative office or research facility in the State.

(d) Soliciting business. (1) A person is deemed to be soliciting business if he has employees, salesmen, independent contractors, promotion men, missionary men, service representatives or agents soliciting potential customers in the State.

Example 1: An out of State company that has a sales representative contracting customers in the State is soliciting business as a vendor.

Example 2: An out of State company that has an independent salesman contacting customers in the State is soliciting business and is a vendor. The fact that the independent salesman represents other companies as well is irrelevant.

Example 3: An out of State company that has a booth at a trade fair, staffed by its promotion men, is soliciting business in the State and is a vendor.

(2) A person is deemed to be soliciting business in New York if he distributes catalogs or other advertising material, in any manner in the State.

(3) A person is deemed to be soliciting business if he places advertisements in New York newspapers or over New York radio or television stations, and either requests that orders, payments or inquiries be sent to a New York address or delivers orders to New York in vehicles that he controls."

Regulation Section 525.2 states that "[t]he sales tax is a "destination tax", where "the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate". (20 NYCRR 525.2 [a] [3]).

Accordingly, a sale is taxable at the place where the tangible personal property is delivered, or at the location where possession is transferred by the vendor to the purchaser or his designee. The point of delivery of the goods to the common carrier has no effect upon the tax consequence. See Touche Ross & Co., State Tax Commission Advisory Opinion, Jan. 9, 1986, TSB-A-86(3)S.

Thus, a vendor who sells and delivers goods from either within or without New York State to a purchaser at an out-of-state location would not include that sale in taxable sales (box B) on its tax return; however, it may have to be included in gross sales (box A) of the return in accordance with the foregoing instructions.

If a supplier who, within the purview of the foregoing regulations, is considered an "interstate vendor" delivers merchandise to a customer in New York State, it must include the sale in both box A and box B of its tax return.

Regulation 525.2 states, in part, that "[t]he sales tax is a "transaction tax", liability for the tax occurring at the time of the transaction. . . . The time or method of payment is immaterial, since the tax becomes due at the time of transfer of property (20 NYCRR 525.2[a][2]).

Consequently, amounts representing customer deposits for merchandise ordered need not be reported on Petitioner's sales tax return, because they do not constitute "receipts" pursuant to the Tax Law and Regulations. See also Matter of Post Road Caterers, Decision of the State Tax Commission, Oct. 3, 1980, TSB-H-80(207)S.

In general, whether or not a person who solicits business as an agent or other representative is required to report a sale on its return will depend on whether, in the light of the provisions above, it is the "vendor", and therefore the person required to collect the tax with respect to such transaction.

In this regard it must be noted that the Tax Law, in defining the term "vendor", includes the following provision:

"...when in the opinion of the tax commission 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 under whom he operates or from whom he obtains tangible personal property sold by him or for whom he solicits business,

the tax commission may, in its 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." (Tax Law, 1101(b)(8)(ii)).

In addition, the sales and use tax regulations state, in part, that. . .[e]very person . . . operating as an independent contractor representing a particular supplier selling tangible personal property is a vendor for sales tax purposes and must collect the tax on merchandise sold by him. . . . Both the representative and his supplier shall be jointly responsible for the collection and remitting of taxes and filing returns. (20 NYCRR 526.10[f][1], [2][ii]).

Consistent with these provisions is the decision reached in the Matter of Alan Drey Company v. State Tax Commission (67 AD2d 1055), that a broker acting as intermediary between a supplier and purchaser was responsible for the collection and payment over of tax.

The Regulations further state that ". . . [an] independent contractor whose supplier has registered and is complying with the responsibilities of a vendor shall not be required to register as a vendor." (20 NYCRR 526.10(f)[3][ii]).

Accordingly, Petitioner should ascertain that its suppliers, when delivering goods to New York destinations, collect and remit the applicable State and local sales taxes. If, for any reason, Petitioner's suppliers fail to do so, then it is Petitioner's responsibility to see that such taxes are collected. If Petitioner fails to collect tax when required to do so, Petitioner will be personally liable for the tax due.

DATED: March 26, 1986

s/FRANK J. PUCCIA

Director

Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.