

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

TSB-A-94 (39)S
Sales Tax
September 9, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940512A

On May 12, 1994 a Petition for Advisory Opinion was received from Moore Business Forms, Inc., 900 Buffalo Avenue, Niagara Falls, New York.

The issues raised by Petitioner, Moore Business Forms, Inc., are as follows:

1. Whether Petitioner will be liable for collecting and remitting sales or use tax on the tangible personal property purchased by Petitioner for customers from third party suppliers or will Petitioner be required to provide exemption certificates to the third party suppliers in such transactions.
2. Whether a customer's payment of a "vendor taxes charged" item appearing on Petitioner's billing invoice will be considered as a payment of the appropriate sales or use tax.
3. If Petitioner's billing invoice to a customer includes the amount of sales tax charged by a third party supplier but does not separately state such amount of sales tax, whether the customer will be considered to have paid the tax upon payment of such invoice.
4. Whether the receipts from Petitioner's charges to customers for the one-time license fee and for the fee for providing Petitioner's ordering/invoicing service will be subject to sales or use tax. If yes, whether the tax rate will be determined on the basis of the customer's location or Petitioner's location.

Petitioner's business is the manufacture and sale of business forms designed to meet the customers' specialized needs. In addition to its current business, Petitioner is proposing to further assist customers by acting as a "facilitator" or "go between" on behalf of customers in dealings with third party suppliers.

The purpose of Petitioner's proposal is to simplify and expedite the customer's ordering and invoicing of goods and services by creating a single "source" for all of the customer's supplies. The customer will no longer have to deal with a multitude of suppliers but instead will place all orders with Petitioner. Petitioner will contact the appropriate third-party supplier and direct the supplier to deliver the goods or services directly to the customer. All ordering will be done electronically through Petitioner's proprietary software. Both the customer and the supplier will be on the network. Petitioner will license the software to its customers for a fee. The customer will have the ability to access the program whenever it requires goods or services to be provided and will transmit an order for all such goods and services to Petitioner electronically. Petitioner will electronically pass along the orders to the appropriate third-party suppliers or to Petitioner's manufacturing plants for those

TSB-A-94 (39)S
Sales Tax
September 9, 1994

products which Petitioner is capable of providing. Third-party suppliers will drop-ship the goods directly to the customer in accordance with the order sent by Petitioner. Petitioner's manufactured goods will be sent by the plant of manufacture directly to the customer or to a warehouse designated by the customer.

The third-party supplier's invoice for the drop-shipment will be sent to Petitioner rather than to the customer. Petitioner anticipates that the invoice from the third-party supplier will reflect sales or use tax if the shipments are made to customers located in states in which the third-party supplier is registered to do business. For shipments to states where the third-party supplier is not registered, taxes will not be reflected on the supplier invoice. Petitioner will accumulate the invoices from third-party suppliers and periodically prepare a summary invoice for each customer which will include all third-party supplier invoices for the period involved as well as invoices for goods sold to the customer by Petitioner. The customer will then have to write but one check, to Petitioner, to pay for all supplies including taxes regardless of the source of the supplies. Petitioner will pay the third-party supplier invoice, including any applicable sale or other appropriate taxes reflected on the invoice received by Petitioner from the third-party supplier, directly to the third-party supplier.

Petitioner does not intend to accrue or invoice customers for use tax on any third-party supplier invoices involved in this program which do not themselves reflect sales or use tax.

Petitioner will charge the applicable sales or use tax on all goods that Petitioner manufactures and sells to customers.

The invoices prepared by Petitioner for customers will summarize all of the invoices received by Petitioner from the participating third party suppliers as well as all shipments of Petitioner manufactured goods and services.

Petitioner anticipates that the summary invoices issued to customers will contain line items showing the amounts due for goods provided to the customers by third-party suppliers. Petitioner anticipates that the summary invoice will have a separate entry entitled "Vendor Taxes Charged" or a similar phrase which will represent the taxes billed to the customer on the invoice sent to Petitioner by the third party supplier. It is anticipated that where Petitioner pays the invoice it receives from third-party suppliers in advance of its receipt of payment from the customer, Petitioner will forward the sales tax directly to the supplier and subsequently be reimbursed by the customer. Where Petitioner does not pay the invoice in advance, Petitioner will pass through to the supplier the tax payment received from the customer.

Petitioner will receive one check from the customer for its summary invoice. Petitioner will be responsible for separating the amounts due to third-party suppliers, including any sales tax invoiced by the third-party suppliers.

TSB-A-94 (39)S
Sales Tax
September 9, 1994

Petitioner will collect the appropriate sales or use tax from customers on charges for Petitioner's services as the facilitator of supply procurement as well as for the goods Petitioner supplies to the customer.

Section 526.10 of the New York State Sales and Use Tax Regulations states, in part:

Vendor. [Tax Law, §1101(b)(8)] (a) Persons included.

(1)(i) A person making sales of tangible personal property the receipts from which are subject to tax is a vendor.

...

A person making sales of services, the receipts from which are subject to tax, is a vendor....

(2)(i) A person maintaining a place of business in the State making sales, whether at such place of business or elsewhere, to persons within the State of tangible personal property or services, the use of which is taxed, is a vendor.

...

(b) Responsibilities of vendors. Every vendor, unless specifically excluded by a section of the Tax Law or this Title, has certain obligations with respect to registration, collection of tax from customers, filing of returns and payment of tax. See parts 532, 533, 539 and 540 of this Title.

Section 526.11 of the Regulations states, in part:

Persons required to collect tax. [Tax Law, §1131(1)]

(a) General. Persons required to collect tax includes:

(1) Every person who makes sales of tangible personal property as a vendor. See section 526.10 of this Part.

(2) Every person who makes sales of services which are taxed under section 1105(b), (c) or (d) of the Tax Law.

Part 532 of the Regulations states, in part:

COLLECTION OF TAX

(Statutory authority: Tax Law, §§1131[1], 1132[a], 1132[c], 1133[a]-[d], 1144)

Section 532.1 Collection of tax from customer. (a) Time of collection.

TSB-A-94 (39)S
Sales Tax
September 9, 1994

(1) Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies.

(2) Where a vendor makes a sale for which payment is not received at the time of delivery, such sale must be reported on the return covering the period in which the sale is made. Thus, if the sale is a taxable sale, the full amount of tax must be remitted with the return whether or not any money was collected at the time of sale.

(3) Any person willfully failing to collect the tax from a customer may be subject to the criminal penalties prescribed by section 1817 of the Tax Law and the Penal Law. See Part 536 of this Title.

(b) Statement of and reference to tax. (1) Whenever the customer is given any sales slip, invoice, receipt, or other statement or memorandum of the price, amusement charge, or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him.

(2) Whenever the sales and use tax is separately stated on such document, it may be referred to as tax.

(3) The words tax included or words of similar import, on a sales slip or other document, do not constitute a separate statement of the tax, and the entire amount charged is deemed the sales price of the property sold or services rendered.

532.2 Trustee liability. (a) Every person required to collect any tax imposed by article 28 and pursuant to the authority of article 29 of the Tax Law acts as a trustee for and on account of the State with respect to taxes collected by such person.

(b) The taxes collected by or paid to such trustee shall be held in trust for and on account of the State.

(c) Every trustee is required to:

(1) maintain supporting records which will properly account for such taxes;

(2) make the records available for examination or audit at any time;

(3) properly safeguard the interests of the State with regard to such taxes; and

(4) remit the taxes with timely filed returns.

TSB-A-94 (39)S
Sales Tax
September 9, 1994

Section 1105(a) of the Tax Law states, in part:

Imposition of sales tax. - ...there is hereby imposed and there shall be paid a tax ... upon:

- (a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1101(b)(5) of the Tax Law defines "[s]ale, selling or purchase" as "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume ... conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor....

Technical Service Bureau memorandum TSB-M-93(3) S, State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software, states in part:

Effective September 1, 1991, State and local sales and compensating use taxes are imposed on the sale or use of prewritten computer software and certain related services.

...

Prewritten computer software is any computer software that is not designed and developed by the author or other creator to the specifications of a specific purchaser.

The sale of prewritten software includes any transfer of title or possession, any exchange, barter, rental, lease or license to use, ... for consideration....

Petitioner is registered with the New York State Department of Taxation and Finance as a vendor for sales tax purposes. Petitioner currently maintains a place of business within New York State, makes taxable sales of tangible personal property to customers located within New York State and collects sales tax on such sales. Therefore, Petitioner falls within the definition of vendor as defined under Section 526.10(a) of the New York State Sales and Use Tax Regulations; incurs the responsibilities of a vendor as discussed under Section 526.10(b) of the Regulations; and is a person required to collect tax as discussed under Section 526.11 of the Regulations.

In the instant matter, where Petitioner orders merchandise for a customer from a third party supplier and instructs the third party supplier to drop ship the merchandise directly to the customer's location, Petitioner is considered to be purchasing the merchandise from the third party supplier for the purpose of reselling such merchandise to Petitioner's customer. Accordingly, Petitioner may purchase the merchandise tax exempt by giving the third party supplier a properly completed form ST-120, Resale Certificate. When Petitioner bills the customer for the merchandise Petitioner will be liable for collecting the appropriate State and local sales tax from the customer as discussed under

TSB-A-94 (39)S
Sales Tax
September 9, 1994

Section 532.1 of the Regulations. Petitioner will also be required to maintain proper supporting records and will be required to remit the sales tax collected with timely filed returns as discussed in Section 532.2 of the Regulations.

A customer's payment of a "vendor taxes charged" item appearing on Petitioner's billing invoice will not be considered as a payment of the appropriate sales tax due. When Petitioner bills a customer for merchandise, the sales tax due from the customer must be stated separately and should be identified as sales tax. The term "vendor taxes charged" should not be used.

Since Petitioner is considered to be purchasing merchandise from third party suppliers for resale purposes, the billing invoice to a customer should not include any sales tax charged by such third party supplier. However, in accordance with Section 532.1 of the Regulations, Petitioner's billing invoice to the customer should separately state the amount of State and local sales tax to be collected from the customer by Petitioner.

The receipts from Petitioner's charges to customers for a one-time license fee for Petitioner's software will be considered to be receipts from the sale, rental, lease or license to use or consume of prewritten software and will be subject to the tax imposed under Section 1105(a) of the Tax Law. (See TSB-M-93(3)S, State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software, Supra.

Petitioner's ordering/invoicing service will be considered to be a function of Petitioner's retail operation. The fee charged to the customer for the ordering/invoicing service will be considered to be part of the receipts from Petitioner's sales of merchandise to the customer and will be subject to the tax imposed under Section 1105(a) of the Tax Law. (see Costco Wholesale Corporation, Adv Op Comm T & F, September 17, 1992, TSB-A-92(66)S).

DATED: September 9, 1994

/s/

PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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