

Taxpayer Services Division
Technical Services Bureau

TSB-A-98(66)S
Sales Tax
September 9, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980217B

On February 17, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from DJ & J Software Corporation, d/b/a Egghead Computer, 22705 East Mission, Liberty Lake, WA 99019.

The issue raised by Petitioner, DJ & J Software Corporation, d/b/a Egghead Computer, is whether, under the circumstances presented, a mail-order company which closes its retail stores in New York is relieved of any future sales and compensating use tax collection obligations.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a retailer of tangible personal property. In the past, Petitioner has generated sales through a variety of different business activities. Petitioner has operated retail stores and sales offices located throughout the United States and Canada, including New York. Petitioner has also employed direct salespeople who solicited sales from corporate, government and educational organizations. These salespeople were based throughout the country and made sales to companies in New York. In addition, Petitioner sells its products via mail order and solicits mail order sales primarily through catalogs and other promotional materials which are sent directly to consumers. Mail order sales are also accepted through Petitioner's Internet Web page. All items sold through the mail order division are delivered to customers by common carrier. All orders are accepted at its corporate headquarters, located in another state, and are delivered from inventory stored in a warehouse also in another state. Petitioner is currently registered as a vendor with the State of New York for sales and use tax purposes.

Petitioner is closing numerous retail stores located throughout the country. Petitioner indicated that it would close all retail stores that it operates in New York in March, 1998. Petitioner indicates that it has in fact closed these stores. The stores have varying lease termination dates. The longest running lease ends July 31, 1999. Petitioner is currently negotiating with the landlords of the stores scheduled for closing to reach mutually acceptable settlements with respect to the lease termination. If a settlement agreement is reached, Petitioner plans to immediately pay the landlord the agreed upon amount to terminate the lease. Petitioner will not sublease the unoccupied stores if it is unable to reach a settlement agreement with the landlord.

Petitioner sold its direct sales division effective May 13, 1996. As a result, Petitioner no longer operates sales offices (other than its corporate headquarters in another state) or employs direct salespeople, and has not employed direct salespeople or independent sales representatives since May of 1996. Since that time, Petitioner did not have a physical presence in New York, except for the retail stores noted above.

Petitioner will continue to operate its mail order business and anticipates that sales in New York may exceed \$100,000 on an annual basis. These mail order sales will be solicited only through catalogs, similar promotional mailings, or Petitioner's Internet Web page. All mail order sales will be delivered via common carrier or electronically via the Internet. Petitioner would like to formally withdraw its sales tax registration in New York because it no longer conducts business through in-state retail outlets or in-state salespeople.

Applicable Laws and Regulations

Section 1101(b)(8)(i) of the Tax Law define the term "vendor" as follows:

The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

(B) A person maintaining a place of business in the state and 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 by this article;

(C) A person who solicits business either:

(I) by employees, independent contractors, agents or other representatives; or

(II) by distribution of catalogs or other advertising matter, without regard to whether such distribution is the result of regular or systematic solicitation, if such person has some additional connection with the state which satisfies the nexus requirement of the United States constitution; 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;

(D) A person who makes sales of tangible personal property or services, the use of which is taxed by this article, and who regularly or systematically delivers such property or services in this state by means other than the United States mail or common carrier;

(E) A person who regularly or systematically solicits business in this state by the distribution, without regard to the location from which such distribution originated, of catalogs, advertising flyers or letters, or by any other means of solicitation of business, to persons in this state and by reason thereof makes sales to persons within the state of tangible personal property, the use of which is taxed by this article, if such solicitation satisfies the nexus requirement of the United States constitution;

(F) A person making sales of tangible personal property, the use of which is taxed by this article, where such person retains an ownership interest in such property and where such property is brought into this state by the person to whom such property is sold and the person to whom such property is sold becomes or is a resident or uses such property in any manner in carrying on in this state any employment, trade, business or profession;

(G) Any other person making sales to persons within the state of tangible personal property or services, the use of which is taxed by this article, who may be authorized by the commissioner of taxation and finance to collect such tax by part IV of this article; and

(H) The state of New York, any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions when such entity sells services or property of a kind ordinary sold by private persons.

Section 1131(1) of the Tax Law provides, in part:

"Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel.

Section 533.1(f) of the Sales and Use Tax Regulations provides, in part:

Surrender of certificates and permits. (1) Certificates of authority must be surrendered to the New York State Department of Taxation and Finance, Sales Tax Registration Unit, W.A. Harriman Campus, Albany, NY 12227 within 20 days of the registrant's ceasing to do business, and must accompany the final return. Ceasing to do business means that the registrant is no longer operating the business even though the business may continue.

(2) Upon surrendering the certificate of authority, the vendor must complete the reverse side of the certificate and indicate the details of the sale or other disposition of the business. Where a certificate of authority has been lost, stolen, destroyed or is otherwise unreturnable to the department, the owner, partner or responsible officer of a vendor which was issued such certificate is required to notify the Sales Tax Registration Unit that such certificate cannot be returned, setting forth the specific reasons for such failure. The notification must be in written form, signed by the owner, partner or responsible officer and received within 20 days of the registrant's ceasing to do business.

Section 533.3(e) of the Sales and Use Tax Regulations provides, in part:

Final returns. (1) A vendor who ceases operation, sells his business, or changes the organizational form of the business must file a final return within 20 days after the occurrence of such event.

(2) The return must indicate the actual period covered by the return, calculated from the first day of the period in which the event occurred to the final day of business.

(3) The final return is to be on a return for the period in which such event occurs, and must be clearly marked at the top, "FINAL RETURN". Monthly filers are also required to file a final quarterly return.

* * *

(4) The final return is to be completed as set forth in paragraph (b)(3) of this section.

(5) The final return must be accompanied with payment of all taxes due, from the first day of the period to the final day of business, as well as any tax collected on a bulk sale, penalties and interest due, and must be accompanied by the certificate of authority to collect taxes.

Opinion

Petitioner has closed all retail stores that it operates in New York. The stores have varying lease termination dates, with the longest running lease ending July 31, 1999. Petitioner is currently negotiating with the landlords of the stores scheduled for closing to reach mutually acceptable settlements with respect to the lease termination. Petitioner will not sublease the property. Petitioner will continue to operate its mail order business and anticipates that sales in New York may exceed \$100,000 on an annual basis. These mail order sales will be solicited only through catalogs, similar promotional mailings, or Petitioner's Internet Web page. All mail order sales will be delivered via common carrier or electronically via the Internet. Petitioner would like to formally withdraw its sales tax registration in New York, as it no longer conducts business through in-state retail outlets or in-state salespeople.

Since Petitioner solicits sales in New York State by the distribution of catalogs and other advertising materials, Petitioner would qualify as a vendor under Section 1101(b)(8)(i)(C)(II) of the Tax Law if it has an additional connection with New York State which satisfies the nexus requirement of the United States Constitution. It is the Department's position that, under the circumstances, Petitioner's nexus with New York ended when it closed all of its retail stores, assuming Petitioner has no other physical presence in New York.

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Petitioner may surrender its Certificate of Authority and file its final sales and use tax return in accordance with the guidelines set forth in Sections 533.1 and 533.3 of the Sales and Use Tax Regulations.

DATED: September 9, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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