

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

TSB-A-99(49)S
Sales Tax
November 17, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990421A

On April 21, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from sothebys.com, inc., 1334 York Avenue, New York, New York, 10021.

The issues raised by Petitioner, sothebys.com are as follows:

(1) Whether the activities of Petitioner as described herein result in a finding that Petitioner is a vendor under Section 1101(b)(8) of the Tax Law.

(2) Whether the selling dealers described below who are located outside of New York State and who do not otherwise have nexus with New York State, establish nexus with New York State based on selling goods over Petitioner's Web Site described below.

(3) Whether a credit card charge processing company (the Card Company) in the situation described in this Petition constitutes a vendor as defined in Section 1101(b)(8) of the Tax Law.

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

Petitioner, a Delaware corporation, is a newly created wholly-owned subsidiary of Sotheby's Holdings, Inc. ("Holdings"). Holdings owns all of the stock of Sotheby's, Inc., which operates a conventional auction business in New York and other cities. Petitioner's present intention is to have its principal office in New York State. Petitioner will establish and maintain an Internet Web site (the "Site") on which selected dealers in art, antiques, jewelry and other collectibles will offer property for sale. Petitioner's only activities will relate to the operation and administration of the Site. Petitioner states that it will not engage in sales on the Site or otherwise. It is not yet known whether the server (the "Server") on which the Site will be maintained will be located in New York State.

Selected dealers in art, antiques, jewelry and other collectibles will offer for sale on the Site, in an interactive auction format, property owned by or consigned to them. Sotheby's Inc. may also act as a seller on the Site of property owned by it or consigned to it.

The dealers who initially will be allowed to offer property for sale on the Site (each of whom will be referred to as a "Sotheby's Internet Associate") will have signed the Sotheby's Internet Associates Master Dealer Agreement (the Agreement), in which each of the dealers agrees that during the term of the Agreement it will not offer for sale on any other Internet "auction" site property that may be offered on the Site having a value in excess of \$300. Dealers who sign on by a specified date (who will be referred to as "Charter Members") will, for the two or three year initial term of the Agreement, not be charged an annual membership fee or selling commissions based on a percentage

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of the selling price of each item sold on the Site (which will be referred to as the “vendor’s commission”).

In connection with each item of property offered for sale on the Site, the selling dealer will prepare the photographs and descriptions of the item as well as the other information relating to the item, including low and high estimated selling prices and the reserve amount below which the item will not be sold, and will post all of that information directly on the Site. Petitioner will not participate in the preparation or posting of information by a selling dealer. The digital camera used to photograph the property and the computer used to post the information to the Site will be owned by the selling dealer.

The selling dealer will be obligated to warrant with respect to each item sold on the Site, generally to the extent and otherwise on terms customary for conventional auctions conducted by premier auctioneers, (a) the title to the property; (b) the authenticity of any statement in the property description as to (i) the creator or originator of the item, (ii) the date on which, or period during which, the item was created, or (iii) the culture or source of origin with which the item is identified; and (c) the physical condition of the property. Petitioner will not make any such warranties with respect to property sold on the Site. The identity of the selling dealer will be included in the information on the Site with respect to the particular item being auctioned.

The selling dealer will retain possession, control and care of the items being offered for sale on the Site.

A person desiring to bid on items offered on the Site will be required to first register with Petitioner and provide his or her credit card information.

At the time that the bidding on an item of property closes, the Server will automatically determine the highest bidder (the “successful bidder”) and cause the processing, through the Card Company which is unrelated to Petitioner, of an authorization against the successful bidder’s credit card for the total cost of the purchase. The total cost is the bid price, plus any applicable sales tax, Petitioner’s service charge to the buyer (which will be referred to as the “buyer’s premium”) and possibly the cost of shipping and insurance. It is not yet known whether the Card Company will have operations in New York State.

The Server will also notify the selling dealer of the identity of the buyer (and, possibly, of other bidders on the item) and the dealer will ship the item directly to the buyer. A separate invoice will be sent from the selling dealer to the successful bidder evidencing the sale of the item from the dealer to the successful bidder.

Upon receipt by the Server from the selling dealer of notice of shipment of the purchased item to the buyer, the Server will automatically process through the Card Company a charge to the buyer’s credit card for the amount previously authorized. The billing statement from the buyer’s credit institution will reflect that the payment is credited to Petitioner and will not identify the selling dealer.

Petitioner posts the payment to an account from which the net payment to the selling dealer will be distributed. Petitioner will then remit to the selling dealer the total purchase price, plus any applicable sales tax, less the buyer's premium, the Card Company's fee and any vendor's commission. The selling dealer will be responsible for remitting any collected sales tax to the appropriate taxing authority.

Applicable Law

Section 12(c) of the Tax Law provides:

A person, as such term is defined in subdivision (a) of section eleven hundred one of this chapter, shall not be deemed to be a vendor, for purposes of article 28 of this chapter [sales and compensating use taxes], solely by reason of (1) having its advertising stored on a server or other computer equipment located in this state (other than a server or other computer equipment owned or leased by such person), or (2) having its advertising disseminated or displayed on the internet by an individual or entity subject to tax under section one hundred eighty-three, one hundred eighty-four or one hundred eighty-six, or article nine-a, twenty two, thirty-two or thirty-three of this chapter.

Section 1101(b) of Article 28 of the Tax Law provides, in part:

(b) When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax....

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor,

including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

* * *

(8) Vendor. (i) 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;

* * *

(ii)(A) In addition, when in the opinion of the commissioner 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 commissioner may, in his 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. An unaffiliated person providing fulfillment services to a purchaser shall not be treated as a vendor by the commissioner under this paragraph with respect to such activity....

* * *

(v) Notwithstanding any other provision of law, the term vendor shall not include:

(A) A person who is not otherwise a vendor who purchases fulfillment services carried on in New York by a person other than an affiliated person;...

* * *

(18) Fulfillment services. Any of the following services performed by an entity on its premises on behalf of a purchaser: (i) The acceptance of orders electronically or by mail, telephone, telefax or internet; (ii) Responses to consumer correspondence and inquiries electronically or by mail, telephone, telefax or internet; (iii) Billing and collection activities; or (iv) The shipment of orders from an inventory of products offered for sale by the purchaser.

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax.-On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

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

Section 1131 of the Tax Law provides, in part:

(1) "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....

Opinion
Issue #1

Petitioner enters into the Agreement with dealers in collectibles such as art, antiques, and jewelry which provides such dealers with the media upon which they, in effect, advertise their items for sale to potential purchasers in an interactive auction-like format on the Site owned by Petitioner. In order for the potential purchasers to participate in a sale, they must first register with Petitioner and provide Petitioner with their credit card information. When the bidding on a particular item closes, Petitioner's Server determines the potential purchaser who had the highest bid and begins processing the sale by notifying the Card Company to execute an authorization against the purchaser's credit card for an amount which includes the bid price, any applicable sales tax, Petitioner's service charge to the buyer and the cost of shipping and insurance.

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Petitioner's Server then notifies the selling dealer of the identity of the purchaser and the dealer ships the item purchased to the purchaser.

When Petitioner's Server is notified of the shipment of the item purchased to the purchaser, Petitioner receives credit for the amount authorized to be charged to the purchaser's account through the Card Company and remits to the selling dealer the amount so charged plus any applicable sales tax less the buyer's premium, the Card Company's fee and any vendor's commission.

Petitioner's activities with respect to the sale by the dealer to the purchaser constitute the combination of the provision of Internet advertising services and fulfillment services. See Sections 12 and 1101(b)(8)(v)(A) and (18) of the Tax Law. These activities do not make Petitioner a vendor or co-vendor under Section 1101(b)(8)(i)(A) or (ii)(A) of the Tax Law.

Issue #2

When a selling dealer enters the information on Petitioner's Site regarding a particular item which the dealer plans to sell under the format described above, the dealer is, in effect, storing advertising and having its advertising disseminated and displayed on the Internet. Such activity, in and of itself, does not cause the dealer to be considered a vendor under Article 28 of the Tax Law, in accordance with Section 12(c) of the Tax Law. Also, the use of Petitioner's collection and charge processing services by a selling dealer does not cause the dealer to be considered a vendor under Article 28. See Sections 1101(b)(8)(v)(A) and 1101(b)(18) of the Tax Law. Therefore, a selling dealer who does not otherwise have nexus with New York State does not become a vendor required to collect tax because of selling an item through Petitioner's Site.

Issue #3

To the extent of the activities described in this Petition, the Card Company does not constitute a vendor under Section 1101(b)(8) of the Tax Law.

DATED: November 17, 1999

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

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