

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

TSB-A-98(18)C
Corporation Tax
TSB-A-98(68)S
Sales Tax
September 16, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z980901C

On September 1, 1998, a Petition for Advisory Opinion was received from Distribution Unlimited, Inc., P.O. Box 98, Guilderland Center, New York 12085.

The issues raised by Petitioner, Distribution Unlimited, Inc., for transactions occurring after September 1, 1997, are:

1. Whether Petitioner's services qualify as fulfillment services for purposes of Article 9-A of the Tax Law (the Business Corporation Franchise Tax) pursuant to section 208.19 of the Tax Law, effective September 1, 1997.
2. Whether, under section 209.2 of the Tax Law, effective September 1, 1997, a foreign corporation that is not deemed to be doing business, employing capital, owning or leasing property or maintaining an office in New York State for purposes of Article 9-A of the Tax Law, will be deemed to be doing business, employing capital, owning or leasing property or maintaining an office in New York State by reason of purchasing Petitioner's services and having inventory stored on Petitioner's premises.
3. Whether Petitioner's services qualify as fulfillment services for purposes of the Sales and Use Taxes pursuant to section 1101(b)(18) of the Tax Law, effective September 1, 1997.
4. Whether, under section 1101(b)(8)(v) of the Tax Law, effective September 1, 1997, an out-of-state entity that is not otherwise a vendor for purposes of the Sales and Use Taxes will become a vendor by reason of purchasing Petitioner's services and having inventory stored on Petitioner's premises.
5. Whether Petitioner's out-of-state customers that otherwise do not have nexus with New York state, will be deemed to have nexus with New York State for Article 9-A and Sales and Use Taxes purposes solely by reason of purchasing Petitioner's services and having inventory stored on Petitioner's premises.

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

Petitioner, a New York State corporation, provides public warehousing in Albany and Schenectady Counties. Manufacturers and wholesale distributors (Purchasers) contract with Petitioner to store their inventory in Petitioner's facilities. Petitioner accepts product either by rail or truck (normally common

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carrier basis). Inventory is held in Petitioner's facilities until the Purchaser directs/orders (electronically or by mail, telephone, telefax) Petitioner to select its product for shipment to its customers. Petitioner ships the product selected by common carrier.

Petitioner is totally independent and conforms to the rules under the Uniform Commercial Code for public warehousing. There is no affiliation between any of the Purchasers and Petitioner.

Petitioner was previously issued an advisory opinion regarding its activities as a fulfillment services provider (Distribution Unlimited, Inc., Adv Op T&F, February 19, 1998, TSB-A-98(2)C, TSB-A-98(6)S). The facts submitted for the present advisory opinion include those activities previously addressed, as described above, and additional activities conducted in connection with the use of Petitioner's fulfillment services. Specifically, certain steps must be accomplished in order to ensure economic viability, of both Petitioner and Purchaser, in Petitioner's performance as a fulfillment services provider. The steps are:

Step 1: Contract Negotiations

- a. Purchaser meets Petitioner for on site evaluation of storage and handling services.
- b. Price is negotiated.

Step 2: Contract Signed

Step 3: Commencement of Product Start-up Phase of Fulfillment Services

- a. Purchaser reviews on-site services to ensure that both storage and handling services are consistent with its initial evaluation and/or its standards.
- b. Purchaser may consult Petitioner to ensure that standards are met.

Step 4: Continuity of Operation Phase

- a. Purchaser periodically visits site for:
 - (1) physical inventory verification,
 - (2) quality control review, and
 - (3) witnessing that Petitioner properly disposes of Purchaser's products (e.g., perishable or damaged items) when necessary.

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Applicable Law

Section 208.19 of the Tax Law, effective September 1, 1997, provides:

The term "fulfillment services" shall mean any of the following services performed by an entity on its premises on behalf of a purchaser:

- (a) the acceptance of orders electronically or by mail, telephone, telefax or internet;
- (b) responses to consumer correspondence or inquiries electronically or by mail, telephone, telefax or internet;
- (c) billing and collection activities; or
- (d) the shipment of orders from an inventory of products offered for sale by the purchaser.

Section 209.2(f) of the Tax Law, effective September 1, 1997, provides that a foreign corporation shall not be deemed to be doing business, employing capital, owning or leasing property, or maintaining an office in New York State, for purposes of Article 9-A of the Tax Law, by reason of "the use of fulfillment services of an entity other than an affiliated entity and the ownership of property stored on the premises of such entity in conjunction with such services". For purposes of such section 209.2(f), an affiliated entity is an entity that either owns or controls a majority interest in the foreign corporation, either directly or indirectly, or an entity the majority interest in which is owned and controlled by the foreign corporation, either directly or indirectly.

Section 1101(b)(8)(v) of the Tax Law, effective September 1, 1997, provides:

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; or
- (B) a person who is not otherwise a vendor who owns tangible personal property located on the premises of an unaffiliated person performing fulfillment services for such person.

An affiliated person means any person who owns or controls a majority interest in the purchaser, either directly or indirectly, or a person the majority interest in which is owned and controlled by the purchaser, either directly or indirectly.

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Section 1101(b)(18) of the Tax Law, effective September 1, 1997, provides:

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.

Note that, with respect to fulfillment services, the definition of an "affiliated person" was amended by Chapter 75 of the Laws of 1998, enacted on June 2, 1998, effective on September 1, 1998 for purposes of Article 28 of the Tax Law, and applicable to taxable years beginning on or after August 1, 1998 for purposes of Article 9-A of the Tax Law. The amendments modify the definition of "affiliated person" by including "sibling entities" (brother/sister), and by utilizing a five percent ownership test, rather than a majority interest test.

Conclusions

The additional activities described in Steps 1 through 4 above, do not change the answers provided in Petitioner's previously issued advisory opinion. Accordingly, the following conclusions are reached.

Issue 1. Petitioner's activities, as described above including Steps 1 through 4, qualify as fulfillment services pursuant to section 208.19 of the Tax Law, effective September 1, 1997.

Issue 2. Pursuant to section 209.2(f) of the Tax Law, effective September 1, 1997, a foreign corporation that is not otherwise deemed to be doing business, employing capital, owning or leasing property or maintaining an office in New York State, will not be deemed to be doing business, employing capital, owning or leasing property or maintaining an office in New York State by reason of purchasing Petitioner's fulfillment services, performing Steps 1 through 4 in New York, as described above, and having its inventory stored on Petitioner's premises.

Issue 3. Petitioner's activities, as described above including Steps 1 through 4, qualify as fulfillment services pursuant to section 1101(b)(18) of the Tax Law, effective September 1, 1997.

Issue 4. Pursuant to section 1101(b)(8)(v) of the Tax Law, effective September 1, 1997, an out-of-state entity that is not otherwise a vendor under

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any other provision of the Tax Law, will not become a vendor for purposes of Sales and Use Taxes by reason of purchasing Petitioner's fulfillment services, performing Steps 1 through 4 in New York, as described above, and having its inventory stored on Petitioner's premises.

Issue 5. Petitioner's out-of-state customers that otherwise do not have nexus with New York State, will not be deemed to have nexus with New York State for Article 9-A of the Tax Law and Sales and Use Taxes purposes solely by reason of purchasing Petitioner's fulfillment services, performing Steps 1 through 4 in New York, as described above, and having its inventory stored on Petitioner's premises in connection with the rendition of such service, effective September 1, 1997.

DATED: September 16, 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.