

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(13)S
Sales Tax
February 29, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S991208A

On December 8, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from E. Parker Brown, II, Attorney at Law, 910 State Tower Building, Syracuse, New York 13202.

The issue raised by Petitioner, E. Parker Brown, II, is whether Credit Company may be liable for sales tax under the hypothetical facts set forth below.

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

Vendor is a New York retail merchant engaged in selling tangible personal property, the receipts from which are subject to New York sales tax (except in isolated instances when an exemption applies or delivery is made outside New York). Credit Company is a large national firm in the business of wholesale financing which contracts with Vendor to finance Vendor's inventory. As part of the financing agreement between Vendor and Credit Company (the "Financing Agreement"), Vendor grants to Credit Company a security interest in all of its accounts receivable and deposit accounts, as well as in a long list of other items. An additional requirement of the Financing Agreement is the use of a Lockbox at a Bank for the receipt of payments by Vendor's customers for merchandise purchased from Vendor. Under this agreement the Bank is to process payments flowing into the Lockbox and deposit them into a Special Account.

Vendor and Credit Company notify the Bank that Vendor has granted Credit Company all right, title and security interest in remittances sent to the Lockbox and deposited into the Special Account (including checks, drafts, notes, money, acceptances, cash and any other evidence of indebtedness) as proceeds of accounts receivable in which Credit Company has a perfected security interest. Additionally, they notify the Bank that Credit Company has a security interest in the Special Account itself. Under further terms of the Lockbox agreement between Vendor and Credit Company, Vendor agrees that Credit Company may, at any time, in its sole discretion, send the Bank a written notification that control over withdrawals from the Special Account is transferred from Vendor to Credit Company. Upon such notification, the Special Account is to be "blocked" in favor of Credit Company so that the only disbursements made against the Special Account are to be in favor of Credit Company.

After entering into the agreements summarized above, Credit Company finances Vendor's inventory, Vendor makes sales to customers, customers' remittances flow in the Lockbox at the Bank, and the Bank deposits such funds into the Special Account. Vendor separately states sales tax on its invoices to customers. Remittances from these customers flowing into the Lockbox and the Special Account consist of payment for both merchandise and sales tax.

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Credit Company is aware of Vendor's business operations, of the fact that merchandise sold by Vendor is subject to sales tax, and of the fact that Vendor charges sales tax (except in isolated instances when an exemption applies or delivery is made out of state). Vendor provides Credit Company with a monthly sales summary itemizing sales tax by day. Vendor draws freely on receipts from sales in the Special Account for daily operations and remits sales tax revenue to New York with periodic returns.

After months of operation in the fashion described above, Credit Company notifies the Bank to block the Special Account in its favor and transfer control of the account from the hands of the Vendor, which the Bank proceeds to do. When the Special Account is blocked it contains receipts both from the sale of merchandise and sales tax. Credit Company seizes both, maintaining that it has a security interest in the entire account. Credit Company converts the sales tax revenue it seizes to its own use and does not remit it to New York. Credit Company continues to convert sales tax revenue to its own use as remittances flow into the Lockbox and the Special Account.

Applicable Law

Section 1101(b)(8) of the Tax Law provides, in part:

Vendor. (i) The term "vendor" includes: (A) A person making sales of tangible personal property or services, the receipts which are taxed by this article. . . .

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....

Section 1132(a)(1) of the Tax Law provides, in part:

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. . . . The tax shall be paid to the person required to collect it as trustee for and on account of the state.

Section 1133(a) of the Tax Law provides, in part:

Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. . . .

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Opinion

Tilden Commercial Alliance, Inc., Adv Op St Tx Comm, May 11, 1981, TSB-H-81(105)S concluded that the petitioner, a commercial finance business, while it did not have the responsibility of a vendor to collect taxes, once having come into possession of money constituting State sales tax, acquires an obligation to remit such money, and is thus liable to the State for such amount.

In making its opinion in Tilden Commercial Alliance, Inc., *supra*, the Tax Commission relied upon the decision made in City of New York v. Advance Trading Corp., 202 Misc 208 (1952). In that case, the court held that a factoring corporation was liable for New York City sales taxes it had collected as a result of an assignment to it of accounts receivable by one of its debtors, a retail coal dealer. Although such case involved the New York City sales tax, the same result applies with respect to State sales tax. In making its decision, the court stated:

“Such moneys (the portion of payments received by the factor representing City sales tax payments) were the property of the plaintiff, the City of New York, and the defendant was under a legal obligation to pay the same to the city. It is settled law that where one receives money that rightfully belongs to another the law creates a debt and implies a promise on the part of the person who has received the money to pay it over to the rightful owner (Cohen v. City of New York, 283 NY 112-115).”

In the instant case, Credit Company blocks the Special Account, which contains sales tax revenue, in its favor and transfers control of the account from the Vendor. Accordingly, while the Credit Company did not have the responsibility of a vendor to collect taxes, once having come into possession of money constituting State sales tax, Credit Company acquires an obligation to remit such money. Both the Credit Company and Vendor become jointly and severally liable for the taxes collected by the Vendor and deposited in the Special Account now controlled by the Credit Company. See Tilden Commercial Alliance, Inc., *supra*, and Rolston Woltin, Adv Op Comm T&F, October 2, 1996, TSB-A-96(65)S.

DATED: February 29, 2000

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

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