

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

TSB-A-00(45)S
Sales Tax
October 19, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980330A

On March 30, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Company A, c/o Ernst & Young LLP, 99 Wood Ave., PO Box 751, Iselin, New Jersey 08830-0471.

The issues raised by Petitioner, Company A, are as follows:

- 1) Whether the activities of Company A require that it register for New York sales and use tax purposes.
- 2) If Company A is required to register for New York sales and use tax purposes, what filing period would be required (i.e., monthly, quarterly or annually)?

Petitioner submits the following facts as the basis for this advisory opinion.

Petitioner is a manufacturer and distributor of wholesale paper products used in a specialized industry. Petitioner's products are manufactured outside the State and are then sold to retailers and/or other distributors located both inside and outside the State. Petitioner never directly sells its products to the ultimate consumer. Therefore, Petitioner does not have any taxable sales.

The activities of Petitioner within the boundaries of New York State are limited to those conducted by only two employees. Both employees are sales representatives responsible for the solicitation of sales from within and without New York State. The first sales representative ("Rep #1") resides in or around Buffalo, New York while the second sales representative ("Rep #2") resides in the State of New Jersey. The sales territory of Rep #1 is inclusive of Western Pennsylvania and all the counties of upstate New York. The sales territory of Rep #2 is inclusive of New York City, Long Island, Westchester County, New Jersey and Eastern Pennsylvania. Both representatives are permitted to and do carry product samples. These product samples are used for display purposes in the solicitation of sales. At no time may these samples be sold to any individual or company.

Petitioner does not own or lease any real property within New York State. Personal property owned by Petitioner within New York State is limited to that of a company vehicle and general office equipment (i.e., fax machine, computer, etc.) needed by Rep #1 in performing his everyday duties. Office supplies (i.e., paper, pens, etc.) needed by Rep #1 are obtained through a local office supply store. Office supplies and other general expenses (i.e., phone bill, travel expenses, etc.) are reimbursed to Rep #1 through a periodic expense report. Petitioner does not provide any other remuneration to Rep #1 with regard to his home office expenses (i.e., rental reimbursement).

In addition, it can be presumed for purposes of this advisory opinion that Petitioner is properly complying with the payroll withholding and unemployment compensation tax laws of New York State.

The following is a listing of the job responsibilities of both Rep #1 and Rep #2:

- Fulfill assigned sales quotas for all company distributed products.
- Responsible to visit territorially designated customers for purposes of solicitation of sales orders.
- Confer with immediate supervisor (located outside State) on all matters affecting the assigned sales territory.
- Implement localized sales plan in order to meet annual sales quotas.
- Provide feedback to Petitioner regarding its sales programs (i.e., summary of sales by product) in order to better align itself for solicitation of future sales.
- Advise Petitioner of trends and competitive activity within their assigned sales territories.
- Remit customer purchase requests to Petitioner for credit check, order processing, shipping and billing.
- Attend nationwide trade show conventions when and as directed by the Vice President of Sales. These conventions are not held in New York State.

Applicable Law and Regulations

Section 1101(b)(8)(i) of the Tax Law defines "vendor," in part, as follows:

(A) A person making sales of tangible personal property or services, the receipts from which are 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....

Section 1131 of the Tax Law provides, in part:

Definitions—When used in this part IV,

(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....

* * *

(4) "Property and services the use of which is subject to tax" shall include: (a) all property sold to a person within the state, whether or not the sale is made within the state....

Section 1134(a)(1) of the Tax Law provides, in part:

(i) Every person required to collect any tax imposed by this article ... commencing business or opening a new place of business, (ii) every person purchasing or selling tangible personal property for resale ... shall file with the commissioner a certificate of registration, in a form prescribed by the commissioner, at least twenty days prior to commencing business....

Section 1136(a)(3) of the Tax Law provides, in part:

However, a person required to register with the commissioner as provided in section eleven hundred thirty-four only because such person is purchasing or selling tangible personal property for resale, and who is not required to collect any tax or pay any tax directly to the commissioner under this article, shall file an information return annually in such form as the commissioner may prescribe....

Section 526.10(a)(4) of the Sales and Use Tax Regulations provides, in part:

(i) A person who solicits business by the 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 subject to tax, is a vendor.

(ii) For purposes of subparagraph (i) of this paragraph, the additional connection with the State a person may have in order to qualify as a vendor shall include, but not be limited to:

* * *

(b) the presence of traveling sales representatives in the State;

(c) the presence of employees, independent contractors or agents in the State

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

(a) *General.* (1) Every person who is required to register with the Department of Taxation and Finance, or who voluntarily registers, is required to file returns in accordance with the provisions set forth herein.

* * *

(b) *Part quarterly filing.* Part quarterly is hereinafter referred to as *monthly*. Every person required to register whose taxable receipts, amusement charges, rents, and purchases subject to use tax, total \$300,000 or more in any quarter of the preceding four quarters must file a monthly return each month. This monthly return shall be long-form unless a person is eligible to use, and elects to use the short form. Paragraph (1) of this subdivision discusses the long-form, and the short-form is discussed in paragraph (2) of this subdivision. In both long form filing and short form filing, the monthly return for the third month of a quarter must be combined with the quarterly return as a single return.

(1) Long-form. A long-form return is based on the actual figures for each month. Monthly long-form returns shall be filed on or before the 20th day of the month following the month for which the tax is due. A properly completed monthly long-form return must be prepared in accordance with the instructions provided by the Department of Taxation and Finance. It shall include completed schedules, if required. The return must show:

(i) the name, address and identification number of the vendor, recipient of amusement charges or operator of a hotel;

(ii) gross amount, to the nearest whole dollar, of sales of tangible personal property and services, food and drink, amusement charges and rents;

- (iii) amount, to the nearest whole dollar, of taxable sales of tangible personal property and services, food and drink, amusement charges and rents;
- (iv) amount, to the nearest whole dollar, of purchases subject to use tax;
- (v) amount of sales and use taxes;
- (vi) credits claimed and prepayments, if any;
- (vii) sales and use taxes due;
- (viii) late filing charge, penalties and interest, if any, and total amount due;
- (ix) the signature of the vendor, officer or employee of the vendor signing the return and the individual's title;
- (x) the signature and address of a preparer, if other than the vendor; and
- (xi) the date prepared.

The quarterly return serves as a monthly return for the last month of a quarter and a reconciliation for the quarter. A properly completed quarterly return shall be prepared in accordance with the instructions provided. It shall include completed schedules, if required. It shall include the same information as in the monthly return, except that subparagraph (vi) of this paragraph shall include credits claimed, amount remitted on monthly return for the first two months in a quarter, and prepayment, if any.

(2) Short-form. Persons who are required to file a monthly return may elect to use a monthly return, short-form, only if they have filed returns for each of the four quarters immediately preceding the month covered. The short-form method requires the taxpayer to file two monthly returns and a quarterly reconciling return. An amount equal to one third of the total amount of the tax paid in the corresponding quarter of the previous year, adjusted for rate changes, is to be paid for each of the first two months of the quarter. For the third and final month of the quarter, a quarterly return must be filed reporting actual figures for the quarter. On this quarterly return credit may be taken for amounts paid in the previous two months. Monthly short-form returns must be filed on or before the 20th day of the month following the month for which the tax is due. A properly completed monthly short-form return, filed for each of the first two months of the quarter, is to be prepared in

accordance with the instructions available from the Department of Taxation and Finance and must show:

(i) the name, address and identification number of the vendor, recipient of amusement charges, or operator of a hotel;

(ii) total State and local taxes due in the comparable quarter of the prior year, adjusted for rate changes;

(iii) tax due, computed as one third of the amount in (ii) of this paragraph;

(iv) credits claimed and prepayments, if any;

(v) sales and use taxes due;

(vi) late filing charge, penalties and interest, if any, and total amount due;

(vii) the signature of the vendor, officer or employee of the vendor signing the return and the individual's title;

(viii) the signature and address of preparer, if other than the vendor;

(ix) the date prepared; and

(x) the names of the localities for which adjustments were made, and the amount of each adjustment.

(3) The quarterly return serves as a monthly return for the last month of a quarter and a reconciliation for the quarter. A properly completed quarterly return is to be prepared in accordance with the instructions provided by the Department of Taxation and Finance. It must include completed schedules, if required. The return must show:

(i) the name, address, identification number and type of business of the vendor, recipient of amusement charges, or operator of a hotel;

(ii) gross amount, to the nearest whole dollar, of sales of tangible personal property and services, food and drink, amusement charges and rents;

(iii) amount, to the nearest whole dollar, of taxable sales of tangible personal property and services, food and drink, amusement charges and rents for each jurisdiction, and totals of all jurisdictions;

(iv) amount, to the nearest whole dollar, of purchases subject to use tax, for each jurisdiction, and totals of all jurisdictions;

(v) amount of sales and use taxes for each jurisdiction, and totals of all jurisdictions;

(vi) credits claimed, amount remitted on monthly returns for the first two months in a quarter, and prepayments, if any;

(vii) sales and use taxes due;

(viii) late filing charge, penalties and interest, if any, and total amount due;

(ix) the signature of the vendor, officer or employee of the vendor signing the return and the individual's title;

(x) the signature and address of a preparer, if other than the vendor; and

(xi) the date prepared.

(c) *Quarterly filing.* (1) Every person required to register with the Department of Taxation and Finance, including show vendors, who have taxable receipts, amusement charges, rents and purchases subject to use tax that total less than \$300,000 in each of the four preceding quarters, must file a quarterly return. However, such persons may elect to file monthly returns in accordance with subdivision (b) of this section.

(2) A quarterly return shall be filed as follows:

(i) March 20-for the period December 1 of the prior year to the last day of February;

(ii) June 20-for the period March 1 through May 31;

(iii) September 20-for the period June 1 through August 31;

(iv) December 20-for the period September 1 through November 30.

(3) A properly completed quarterly return is to be prepared in accordance with the instructions provided by the Department of Taxation and Finance. It must include completed schedules, if required. The return must show:

(i) the name, address, identification number and type of business of the vendor, recipient of amusement charges, or operator of a hotel;

(ii) gross amount, to the nearest whole dollar, of sales of tangible personal property and services, food and drink, amusement charges and rents;

(iii) amount, to the nearest whole dollar, of taxable sales of tangible personal property and services, food and drink, amusement charges and rents for each jurisdiction, and totals of all jurisdictions;

(iv) amount, to the nearest whole dollar, of purchases subject to use tax, for each jurisdiction, and totals of all jurisdictions;

(v) credits claimed and prepayments, if any;

(vi) sales and use taxes due;

(vii) late filing charge or penalties and interest, if any, and total amount due;

(viii) the signature of the vendor, officer or employee of the vendor signing the return and the individual's title;

(ix) the signature and address of a preparer, if other than the vendor; and

(x) the date prepared.

(d) *Annual return.* (1) Every person required to register with the Department of Taxation and Finance (see section 533.1 of this Part and Parts 539 and 540 of this Title) only because such person is purchasing or selling tangible personal property for resale, and who is not required to collect any tax or pay any tax directly to the Department of Taxation and Finance, must file a return annually in accordance with the schedule provided in paragraph (4) of this subdivision.

(2) Any person required to file quarterly returns whose total tax due for the four most recent quarterly periods for which data is available for such person within the most recent six quarters for which data is available did not exceed \$3,000, may be notified by the department or may elect to file returns annually in lieu of quarterly.

* * *

(4) An annual return is to be filed in accordance with the following schedule.

(i) Annual filers for years commencing on or after June 1, 1998, including those persons who are not required to collect any tax or pay any tax directly to the department, shall file their returns:

(a) For the short annual period of nine months beginning June 1, 1998, and ending on February 28, 1999, on or before March 20, 1999.

(b) For annual periods beginning on or after March 1, 1999, which annual periods shall begin on March 1st and end with the last day of February in the subsequent year, on or before March 20th of each such subsequent year.

(ii) Quarterly filers who are notified by the department that they shall file annually must file annual returns (unless they timely notify the department in accordance with subparagraph [3][ii] of this subdivision that they wish to continue filing quarterly returns) as follows:

(a) For the short annual period of nine months beginning June 1, 1998, and ending on February 28, 1999, on or before March 20, 1999.

(b) For annual periods beginning on or after March 1, 1999, the annual period shall begin on March 1st and end with the last day of February in the subsequent year, with the annual return being due on or before March 20th of each such subsequent year.

(c) Quarterly filers who become annual filers shall file their last quarterly return for the quarterly period which ends immediately prior to the date on which the annual period begins and in accordance with instructions provided in the notification issued pursuant to paragraph (3) of this subdivision and in accordance with such other applicable instructions. Annual returns must then be filed for subsequent annual periods succeeding this last quarterly period.

(5) A properly completed annual return is to be prepared in accordance with the instructions provided by the Department of Taxation and Finance. It must include completed schedules, if required, and must show:

(i) the name, address and identification number of the vendor, recipient of amusement charges, or operator of a hotel;

(ii) gross amount, to the nearest whole dollar, of sales of tangible personal property and services, food and drink, amusement charges, and rents;

(iii) amount, to the nearest whole dollar, of taxable sales of tangible personal property and services, food and drink, amusement charges and rents for each jurisdiction, and totals of all jurisdictions;

(iv) amount, to the nearest whole dollar, of purchases subject to use tax, for each jurisdiction, and totals of all jurisdictions;

(v) amount of sales and use taxes for each jurisdiction, and totals of all jurisdictions;

(vi) credits claimed and prepayments, if any;

(vii) sales and use taxes due;

(viii) late filing charge, penalties and interest, if any, and total amount due;

(ix) the signature of the vendor, officer or employee of the vendor signing the return and the individual's title;

(x) the signature and address of a preparer, if other than the vendor; and

(xi) the date prepared.

(6) If, at any time during the course of the annual periods described in paragraph (4) of this subdivision, the total tax due from a person required to file returns is in excess of \$3,000, such person must commence filing a quarterly or monthly return as required by section 1136 of the Tax Law and the preceding provisions of this section. On the first quarterly return so required, such person must report and pay any tax due for the period commencing with the beginning of the abridged annual period. Failure to do so may result in penalty and interest being charged from the date a quarterly or monthly return should have been filed.

Opinion

Petitioner has two employees who solicit business in New York State as sales representatives. Due to the activities of the two sales representatives in New York State, Petitioner has a connection with New York State which satisfies the nexus requirement of the United States Constitution consistent with the meaning and intent of Section 526.10(a)(4) of the Sales and Use Tax Regulations.

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Therefore, Petitioner is required to register with New York State as provided in Section 1134(a)(1) of the Tax Law.

In addition, in accordance with Section 1136(a)(3) of the Tax Law, Petitioner, as a person making sales to persons within New York State for resale, is required to file an annual sales tax return. Also, Petitioner may have to file monthly or quarterly returns based on its purchases of tangible personal property subject to use tax. If the use tax due from Petitioner during an annual reporting period exceeds \$3,000, Petitioner will have to begin filing returns on a quarterly basis. See Section 533.3(d)(6) of the Sales and Use Tax Regulations. If Petitioner's purchases subject to use tax are \$300,000 or more in any quarter of the preceding four quarterly reporting periods, Petitioner will have to file monthly returns. See Section 533.3(b) of the Sales and Use Tax Regulations.

DATED: October 19, 2000

/s/
Jonathan Pessen
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Technical Services Division

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