

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

TSB-A-02(52)S
Sales Tax
November 6, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010530A

On May 30, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Ernst & Young LLP, 370-17th Street, Suite 3400, Denver, Colorado, 80202.

The issue raised by Petitioner, Ernst & Young LLP, is whether a vendor who meets the nexus requirements for New York State sales and use tax purposes is required to collect and remit sales and use tax on the sale of candy and cookie dough to its customer as described below.

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

Petitioner's client, Company X (X), is a distribution company based outside New York. X is in the business of selling candy and cookie dough to its customer, Y, an unrelated wholesaler having no nexus with New York State. Y, in turn, resells the candy and cookie dough to its customer, Z. X drop ships the candy and cookie dough to Z at a location in New York on behalf of Y. X ships the orders by both common carrier and its own vehicles. Petitioner indicates that as a result of X's delivery activities, it has nexus with New York. Z has nexus with New York and makes retail sales of the candy and cookie dough to its customers.

Applicable Law and Regulations

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

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

* * *

(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:

* * *

(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

Section 1105(a) of the Tax Law provides for the imposition of sales tax upon:

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

Section 1115(a)(1) of the Tax Law provides an exemption from the sales and use tax for:

Food, food products, beverages, dietary foods and health supplements, sold for human consumption but not including (i) candy and confectionery

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

(1) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) or (k) of this section, unless (i) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe, signed by the purchaser and setting forth the purchaser's name and address and, except as otherwise provided by regulation of the commissioner, the number of the purchaser's certificate of authority, together with such other information as the commissioner may require, to the effect that the property or service was purchased for resale . . . the sale shall be deemed a taxable sale at retail. . . .

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

Every person required to collect any tax imposed by this article, other than a person who is a vendor solely by reason of clause (D), (E) or (F) of subparagraph (i) of paragraph eight of subdivision (b) of section eleven hundred one of this article, commencing business or opening a new place of business, (ii) every person purchasing or selling tangible personal property for resale commencing business or opening a new place of business . . . shall file with the commissioner a certificate of registration, in a form prescribed by the commissioner, at least twenty days prior to commencing business or opening a new place of business or such purchasing, selling or taking of possession or payment, whichever comes first. Every person who is a vendor solely by reason of clause (D) of subparagraph (i) of paragraph eight of subdivision (b) of section eleven hundred one of this article shall file with the commissioner a certificate of registration, in a form prescribed by such commissioner, within thirty days after the day on which the cumulative total number of occasions that such person came into the state to deliver property or services, for the immediately preceding four quarterly periods ending on the last day of February, May, August and November, exceeds twelve. . . .

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

(1) Every person required to register with the commissioner as provided in section eleven hundred thirty-four whose taxable receipts, amusement charges and rents total less than three hundred thousand dollars . . . in every quarter of the preceding four quarters, shall only file a return quarterly with the commissioner.

(2) Every person required to register with the commissioner as provided in section eleven hundred thirty-four whose taxable receipts, amusement charges and rents total three hundred thousand dollars or more . . . in any quarter of the preceding four quarters, shall, in addition to filing a quarterly return described in paragraph one of this subdivision, and except as otherwise provided in section eleven hundred two or eleven hundred three of this article, file either a long-form or short-form part-quarterly return monthly with the commissioner.

(3) 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 526.7(e) of the Sales and Use Tax Regulations provides, in part:

Transfer of possession. (1) Except as otherwise provided in paragraph (3) of this subdivision, a sale is taxable at the place where the tangible personal property

or service is delivered, or the point at which possession is transferred by the vendor to the purchaser or his designee.

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

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.

* * *

(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.

Opinion

Petitioner asks if its client, X, who has nexus with New York for sales tax purposes, is required to collect sales and use tax from its customer, Y, on sales of candy and cookie dough delivered by X to Y's customer, Z, at a location in New York State. Since X has nexus with New York State for sales tax purposes and intends to make sales of taxable property and/or services in New York, X is required to register as a vendor and obtain a Certificate of Authority to collect sales tax from the Department of Taxation and Finance. See Section 1134(a)(1)(i) of the Tax Law. Once X has obtained its validated Certificate of Authority it must file the required periodic sales and use tax returns regardless of whether it has made any taxable sales or incurred any liability for compensating use tax. As the holder of a valid Certificate of Authority, X is authorized to and may commence making taxable sales of property and services in the State and may issue and accept appropriate and properly completed sales tax exemption certificates.

Sales of cookie dough are exempt from sales and use tax pursuant to section 1115(a)(1) of the Tax Law as sales of an exempt food item. Accordingly, X need not collect any tax on its sales of cookie dough provided that it maintains records indicating that those sales were sales of exempt food items. See Technical Service Bureau Memorandum, *Records Required to Be Kept by Sales Tax Vendors*, July 15, 1981, TSB-M-81(9)S for additional information on record keeping requirements.

TSB-A-02(52)S
Sales Tax
November 6, 2002

Receipts from X's sales of candy are presumed to be subject to sales tax unless X receives documentation from its customer indicating that the candy was purchased for resale or some other exempt purpose or that the purchaser is an exempt organization under Section 1116 of the Tax Law. See Section 1132(c) of the Tax Law. In the instant case, it is indicated that X's customer, Y, is purchasing the candy for resale. Under these circumstances, Y must provide X with a properly completed *Resale Certificate*, Form ST-120, within ninety days of the date of sale of the candy in order to purchase the candy without payment of tax. Technical Service Bureau Memorandum, *Nonregistered Out-of-State Purchaser's Use of Resale Certificate Form ST-120*, June 5, 1998, TSB-M-98(3)S provides that, if Y is a qualified out-of-state purchaser, Y need not be registered for sales tax purposes in New York State in order to properly issue a *Resale Certificate*, Form ST-120 to X. That Memorandum states that a *qualified purchaser* is one who is not registered and is not required to be registered as a sales tax vendor with the New York State Tax Department and is registered with another state, the District of Columbia, a province of Canada, or other country, or has its only location in a state, province or country that does not require registration; and it is purchasing items for resale that will be either (1) delivered by the vendor to the purchaser's customer or unaffiliated fulfillment service provider located in New York State, or (2) delivered to the purchaser in New York State, but resold from a business located outside the state.

X must maintain a method by which its sales invoices to Y can be associated with the Resale Certificate issued to X by Y, so that X may substantiate that sales made to Y were for resale and, therefore, are not subject to tax.

If X only makes sales for resale, and is therefore not required to collect tax, it will only be required to file sales and use tax returns on an annual basis as set forth in Section 1136(a)(3) of the Tax Law and Section 533.3(d) of the Sales and Use Tax Regulations.

DATED: November 6, 2002

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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