

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

TSB-A-00(1)S
Sales Tax
January 21, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S991019A

On October 19, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from National Telecommuting Institute, 1505 Commonwealth Avenue, Boston, MA 02135. Petitioner, National Telecommuting Institute, provided additional information with respect to the Petition on November 17, 1999.

The issue raised by Petitioner is whether use by out- of-state companies of homebased, New York independent contractors to perform order taking and customer service work over the telephone will require such companies to collect New York State sales and use taxes on their New York sales.

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

Petitioner is a nonprofit disability organization working with the New York State Department of Vocational Rehabilitation Services to train and place selected individuals with disabilities into homebased jobs. Several companies, including a mail order catalog company and a television home shopping network channel, have indicated an interest in hiring Petitioner's homebased population of independent contractors to perform work that involves taking orders over the telephone or in some cases, providing customer service to callers over the telephone.

The independent contractors will only take inbound telephone calls. They do no outbound solicitation. The independent contractors accept no checks or money on their premises, although they do accept credit card numbers over the telephone which they input into the appropriate field on their computer. All credit card transactions are actually processed at the location of the home company selling the merchandise. None of the merchandise sold by these companies is ever stored at, or shipped from, the homes of the independent contractors. The independent contractors just take the order information on behalf of the companies.

Applicable Laws

Section 1101(b) 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:

* * *

(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;

(E) A person who regularly or systematically solicits business in this state by the distribution, without regard to the location from which such distribution originated, of catalogs, advertising flyers or letters, or by any other means of solicitation of business, to persons in this state and by reason thereof makes sales to persons within the state of tangible personal property, the use of which is taxed by this article, if such solicitation satisfies the nexus requirement of the United States constitution;

(F) A person making sales of tangible personal property, the use of which is taxed by this article, where such person retains an ownership interest in such property and where such property is brought into this state by the person to whom such property is sold and the person to whom such property is sold becomes or is a resident or uses such property in any manner in carrying on in this state any employment, trade, business or profession;

(G) Any other person making sales to persons within the state of tangible personal property or services, the use of which is taxed by this article, who may be authorized by the commissioner of taxation and finance to collect such tax by part IV of this article; and

(H) The state of New York, any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions when such entity sells services or property of a kind ordinary sold by private persons.

* * *

(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; 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.

For purposes of this subparagraph, persons are affiliated persons with respect to each other where one of such persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of such persons by another person or by a group of other persons which are affiliated persons with respect to each other.

* * *

(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

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(iv) the shipment of orders from an inventory of products offered for sale by the purchaser.

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; every recipient of amusement charges; and every operator of a hotel. . . .

Opinion

Pursuant to Section 1101(b)(8) of the Tax Law, an out-of-state company could be considered to be a vendor in New York and required to collect sales and compensating use tax on sales to persons within New York if it meets the requirements of such section. The use of independent contractors by an out-of-state company to receive inbound telephone calls and take orders or provide customer service at the independent contractor's home on behalf of the out-of-state company is the purchase of a fulfillment service under Section 1101(b)(18) of the Tax Law. The use of such fulfillment services by an out-of-state company is not sufficient, by itself, to make the company a vendor in New York required to collect tax on its New York sales. See Section 1101(b)(8)(v) of the Tax Law. It should be noted, however, that a determination as to whether an out-of-state company qualifies as a vendor required to collect tax is a question of fact based on all the factors and circumstances in each instance and cannot be made in this Advisory Opinion solely on the basis of the use of the aforementioned independent contractors.

DATED: January 21, 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.