

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

TSB-A-00(42)S
Sales Tax
October 13, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980618A

On June 18, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Mark S. Klein, Esq., Hodgson, Russ, Andrews, Woods & Goodyear, LLP, 1800 One M & T Plaza, Buffalo, New York 14203.

The issue raised by Petitioner, Mark S. Klein, Esq., is whether the use by its client of an independent computer repair service to visit its client's New York customers creates sufficient nexus to require its client to collect New York State sales and use taxes on its New York mail order sales.

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

Petitioner's client is an out-of-state company that manufactures computer systems which it sells through mail order. Petitioner's client has no office or sales force in New York and does not send representatives into New York for any type of solicitation. The company solicits sales through advertisements in national computer publications and allows customers to place orders through an 800 number or through its website on the Internet. Advertising notices are mailed to customers who have previously made purchases from Petitioner's client.

All of the computer components (keyboards, monitors, etc.) are stored out of state, assembled out of state, and are shipped by Petitioner's client to its New York customers through the mail or via common carrier (e.g., Federal Express or UPS).

In addition to a standard hardware/software warranty, Petitioner's client offers its customers a one-year "on site" warranty. This warranty provides that during the first year of the warranty, Petitioner's client may hire an independent company to visit a New York customer's place of business to diagnose and repair certain computer hardware problems. The warranty is a manufacturer's warranty, i.e., the warranty of Petitioner's client. The independent company hired to perform the warranty work will be located in New York.

Applicable Laws and Regulations

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;

* * *

(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(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. . . .

Section 526.10 of the New York State Sales and Use Tax Regulations provides, in part:

Vendor (a) Persons included. (1)(i) A person making sales of tangible personal property the receipts from which are subject to tax is a vendor.

* * *

(4)(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:

- (a) the operation of retail stores in the State;
- (b) the presence of traveling sales representatives in the State;
- (c) the presence of employees, independent contractors or agents in the State;
- (d) the presence of service representatives in the State;
- (e) the maintenance of a post office box in the State for receiving responses to such person's solicitations; or
- (f) the maintenance of an office in the State, even if such office performs no activities related to the sales solicited by such person.

Example 6: Company K is engaged in the mail-order retail sale of computer hardware and software in New York State. Sales are solicited in New York by means of direct mail advertising sent from the company's Oregon headquarters. Company K has no property or employees in New York State. The hardware and software are sent to New York customers via common carrier. Customers of Company K who experience problems using a product purchased may contact the company by phone in Oregon for assistance. In certain instances, and at no charge to the customer, Company K will send a computer expert employed by it in Oregon to New York State and provide technical assistance at the customer's premises. Company K is a vendor because of its having service representatives in the State. The result would be the same if, alternatively, Company K had an independent contractor or agent based in New York State or elsewhere provide technical assistance at the customer's premises on Company K's behalf. (Emphasis added)

Opinion

As previously stated, Petitioner's client is an out-of-state company that has no office, sales force or sales representatives in New York. It solicits sales through advertisements in national computer publications and advertising notices mailed to customers who have previously purchased its products, and allows customers to place orders through an 800 number or through its Web site on the Internet. Computers are shipped by Petitioner's client to its New York customers through the mail or via

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common carrier. Petitioner's client, under its "on site" warranty program, may hire an independent company located in New York to visit a New York customer's place of business to diagnose and repair certain computer hardware problems.

A person qualifying as a vendor under Section 1101(b)(8) of the Tax Law which has established a nexus with New York must collect sales and use taxes on its sales made in New York. A mail-order computer sales company which hires an independent contractor or agent to provide technical assistance to the mail order computer company's customers at the customers' premises on the company's behalf will have nexus for purposes of collecting New York State and local sales and use taxes. Customer awareness that representatives for the vendor will service the computers it sells, serves as an inducement to make purchases from the vendor. See Section 526.10 of the Sales and Use Tax Regulations. Accordingly, if Petitioner's client hires an independent company to visit its New York customers at their place of business to diagnose and repair computer hardware problems, Petitioner's client will have sufficient nexus with New York. Since Petitioner's client mails advertising notices to customers in New York, Petitioner's client will qualify as a vendor under Section 1101(b)(8)(i)(C)(II) of the Tax Law and will be required to collect sales and use taxes on its mail order sales to customers in New York.

DATED: October 13, 2000

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

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