

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

TSB-A-02(49)S
Sales Tax
September 24, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010921A

On June 26, 2001 the Department of Taxation and Finance received a Petition for Advisory Opinion from Yvonne Greenberg, 800 Liberty Building, Buffalo, New York 14202-3508.

The issues raised by Petitioner, Yvonne Greenberg, for the period 9/1/98 to 5/30/01, are:

- (1) Whether, under the circumstances presented, Petitioner's Client, Company X, has sufficient nexus with New York State to satisfy the Due Process and Commerce Clauses of the U.S. Constitution.
- (2) Whether Company X is a vendor for purposes of New York State sales and compensating use tax and therefore, required to collect tax on its sales to New York customers.

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

Company X is headquartered in Canada and produces a product using sand and other ingredients for its customers throughout the United States and Canada. Its products are manufactured in Canada. What is typically sold in New York State is a specialty product to maintain golf courses. The product is delivered by common carrier. Company X does not install its product or perform any service for its customers in New York. Company X has a blending machine that it uses to blend sand for its products. The blender is used mainly in Canada, and sometimes in the United States, but it has never performed any work in New York. The blender has crossed the border and has been transported through New York.

Company X had a one-time transaction in New York where it supplied its product for an international volleyball event in New York City and hired a third party New York based contractor to place Company X's product at the site. This type of activity is not a common practice for Company X, but an exception.

Company X does not maintain an office in New York State or have property, independent representatives or salespersons located in New York. Company X attends two trade shows in New York a year, each with a two day duration, but does not accept orders. The purpose of the trade shows is to provide technical information. Literature about Company X's product is available at the shows, but no promotional materials such as t-shirts or other items are distributed. Follow-ups for sales leads are accomplished over the phone, or by visits from one or two salespersons into the State one to two times per year. A salesperson may visit 5 to 10 customers in one visit depending on where the potential customer may be. The duration of the salesperson's visit is approximately one

to two days. Other leads come from "cold calls" and referrals. The customer can also call an 800 number that is answered by personnel in Canada who are authorized to take orders. There are no blanket mailings or blanket solicitations of customers in New York. There are approximately 35 existing customers located in New York, each receiving three loads of product per year. Apart from the sales visits described above, Company X does not come into the New York to solicit orders; nor does it otherwise enter into New York to inspect or service any of its customers.

Applicable Law and Regulations

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

(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 (emphasis added)

(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)(i) of the Tax Law provides, in part:

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 or opening a new place of business. . . .

Section 526.10(a)(3) of the Sales and Use Tax Regulations provides, in part:

A person who solicits business by employees, independent contractors, agents or other representatives 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. (emphasis added)

Example 5: A California based company uses independent manufacturers' representatives, who are residents of New York State, to sell its product in New York. The California company is a vendor.

Opinion

Company X does not maintain an office in New York State, or have property, independent representatives or salespersons located in New York. Company X attends two trade shows a year, each with a two day duration, but does not accept orders. Follow-ups for leads are accomplished over the phone, or by sales visits from one or two salespersons into New York one to two times per year. A salesperson may visit 5 to 10 customers in one visit depending on where the potential customer may be. The duration of the salesperson's visit is approximately one to two days. Other leads come from "cold calls" and referrals. The customer can also call an 800 number that is answered by personnel in Canada who are authorized to take orders. There are no blanket mailings or blanket solicitations of customers in New York. There are approximately 35 existing customers located in New York, each receiving three loads of product per year.

While participation in a trade show in New York State alone would not necessarily establish nexus, Company X also sends salespersons into New York to solicit sales from potential or existing customers. See ESP, Inc., Adv Op Comm T&F, December 26, 1996, TSB-A-96(83)S.

As a result of these activities, Company X makes sales which are subject to tax. As stated in Section 1101(b)(8)(i) of the Tax Law, the definition of "vendor" includes a person who solicits business by employees, independent contractors, agents or other representatives and by reason thereof makes such sales to persons within New York State.

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As indicated by the New York Court of Appeals in Orvis Company, Inc. v Tax Appeals Tribunal, 86 NY2d 165, 178, cert den 630 US 989, 133 LEd2d 426, the Due Process clause requires that there be “some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.” The Commerce Clause, according to Orvis, supra, requires “demonstrably more than a 'slightest presence’” of the vendor in a state in order for nexus to exist and that presence may be established by the conduct of economic activities within the state by the vendor's personnel or other representatives on its behalf. Thus, the solicitation of sales by Company X's employees within New York State establishes a connection with New York which satisfies both nexus requirements of the U. S. Constitution.

Whether the one-time transaction where Company X’s product was installed at the site of an international volleyball event in New York City by a third party New York based contractor is sufficient presence for nexus is not pivotal to the discussion here since Company X has sufficient nexus with New York for the period in question through its other activities. It is, however, another instance of Company X’s connection with and presence in New York State.

The movement of Company X’s blending machine through New York State to reach other destinations would not, by itself, establish nexus, provided that the equipment is not used to deliver product, or for any other purpose, in New York or leased or licensed for use in New York.

Since Company X has more than the slightest presence in New York State as a result of its solicitation activities in New York, Company X is required to register with New York as provided by Section 1134(a)(1) of the Tax Law and collect any tax due on all of its sales to New York customers.

DATED: September 24, 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.