

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

TSB-A-03(41)S  
Sales Tax  
November 19, 2003

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S030523A

On May 23, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Monarch Towel Company, Inc., 737 Cortlandt Street, Perth Amboy, NJ 08861. Petitioner, Monarch Towel Company, furnished additional information with respect to the Petition on June 30, 2003.

The issue raised by Petitioner is whether there is sufficient nexus between Petitioner and the state of New York to require Petitioner to register as a vendor and collect sales and use tax on sales to New York customers.

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

Petitioner is located in Perth Amboy, NJ. Petitioner has no offices in New York State. Petitioner manufactures and distributes bathrobes and towels. During the tax period of 1993-1999, Petitioner's New York sales were as follows: 74% of Petitioner's products were sold to adult and children's retail stores; 20% of Petitioner's products were sold to wholesale distributors; and 6% of Petitioner's products were sold to spas and hotels.

Other than direct Internet sales, which started in 1999, and account for less than 6% of total sales volume, Petitioner does not market goods directly to consumers. In New York City, an independent salesman for children's bathrobes and coverups shows at least four children's clothing lines including the children's bathrobes and coverups manufactured by Petitioner. The salesman shows the clothing lines to children's retail stores in New York. The salesman is paid a commission for orders from these stores. Other than showing the products to these stores, the salesman performs no other functions with regard to Petitioner's products for children. Furthermore, the salesman does not report his business activities to Petitioner, nor does Petitioner request such reports. The salesman is only paid a commission on orders placed by stores that he visits or that have visited him. The salesman does not receive a commission from sales to other children's retail stores in New York that he has not contacted or have not contacted him. The majority of Petitioner's business comes from displaying products at various trade shows located throughout the country. The salesman does not participate in these trade shows or any other trade shows on behalf of Petitioner.

**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. . . .

\* \* \*

(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;

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. . . .

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 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. . . .

Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

*Resale exclusion.* (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

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

*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.

Section 532.4 of the Sales and Use Tax Regulations provides, in part:

(a) *General.*

(1) It is presumed that all receipts for property or service of any type mentioned in subdivisions (a), (b), (c) and (d) of section 1105 of the Tax Law, . . . are subject to tax until the contrary is established.

\* \* \*

(b) *Burden of proof.*

(1) The burden of proving that any receipt, . . . is not taxable shall be upon the person required to collect the tax and the customer.

(2) A vendor who in good faith accepts from a purchaser a properly completed exemption certificate or, as authorized by the Department, other documentation evidencing exemption from tax not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate or documentation itself will satisfy the

TSB-A-03(41)S  
Sales Tax  
November 19, 2003

vendor's burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer.

(i) A certificate or other document is "accepted in good faith" when a vendor has no knowledge that the exemption certificate or other document issued by the purchaser is false or is fraudulently presented. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller required to collect the tax.

## **Opinion**

Petitioner is located in New Jersey and has no office in New York State. Petitioner manufactures and distributes bathrobes and towels. An independent salesman in New York City shows some of Petitioner's clothing lines for children to retail stores in New York. The salesman is paid a commission for orders from these stores. Other than showing the products to these stores, the salesman performs no other functions with regard to Petitioner's products for children.

The presence of independent contractors or agents of an out-of-state corporation in the state is sufficient nexus to require the corporation to collect tax on its sales shipped and delivered into the state. See *Scripto, Inc. v. Carson*, 362 US 207; *International Shoe Co. v. Washington*, 326 US 310; *The Ohio Table Pad Co., Inc.*, Dec Tax App Trib, April 22, 1999, TSB-D-99(7)S.

Under section 1101(b)(8)(i)(C)(I) of the Tax Law and section 526.10 of the Sales and Use Tax Regulations, since Petitioner, an out-of-state corporation, is soliciting business in New York by means of an independent salesman, Petitioner has nexus with New York State and is a vendor required to register under section 1134 of the Tax Law. Therefore, Petitioner will be required to collect and remit the applicable State and local sales and use taxes on all sales, including sales that were not solicited by its salesman such as sales via the Internet, which are delivered to customers in New York. See *National Geographic Society v. California Board of Equalization*, 430 US 551.

However, where Petitioner's customers are purchasing products exclusively for the purpose of being resold, these purchases are for resale and are exempt from tax. See section 1101(b)(4)(i) of the Tax Law and section 526.6(c) of the Sales and Use Tax Regulations. Purchases by wholesalers and retail stores would appear to be made for resale. Purchases by spas and hotels would appear to be retail purchases subject to tax. Generally, such purchases by spas and hotels are not purchases for resale since such items are deemed to be consumed in the course of the operation of the spa or hotel and are not considered to be sold to the spa patron or the hotel occupant. See *Matter of Helmsley Enterprises, Inc. v. Tax Appeals Tribunal*, 187 AD2d 64; *Jim Axford*, Adv Op Comm T&F, November 30, 1999, TSB-A-99(54)S.

Petitioner is not required to collect sales and use tax where it accepts in good faith a properly completed resale certificate within 90 days of the date of sale. A vendor could not accept a resale certificate in good faith, and would be required to collect tax on the sale of tangible personal property or services, if the vendor had "actual knowledge" that such purchases were not for resale,

TSB-A-03(41)S  
Sales Tax  
November 19, 2003

even though a resale or exemption certificate had been timely furnished by the purchaser. See section 532.4(b)(2)(i) of the Sales And Use Tax Regulations.

It should be noted that bathrobes are articles of clothing, and, if sold for less than \$110, a bathrobe would qualify for the applicable clothing exemption, if any, from state and/or local sales and use taxes, in effect at the time of the sale in the locality where it is delivered.

DATED: November 19, 2003

/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.