

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

TSB-A-04(3)S
Sales Tax
February 24, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030625B

On June 25, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Boat America Corporation, 880 South Pickett Street, Alexandria, Virginia, 22304. Petitioner, Boat America Corporation, provided additional information pertaining to the Petition on August 26, 2003 and December 30, 2003. On September 5, 2003, BoatU.S., 880 South Pickett Street, Alexandria, Virginia, 22304 joined Petitioner as co-Petitioner. In the interest of clarity, Boat America Corporation (Boat America) and BoatU.S. are referred to throughout this Advisory Opinion by name.

The issues raised by Boat America and BoatU.S. are:

1. Whether dues paid for membership in a club which, among other things, provides boat towing services to its members are subject to sales tax.
2. Whether either Boat America or BoatU.S. has nexus with New York State for sales tax purposes and is therefore required to register for sales tax purposes and collect tax on its retail sales.

Boat America and BoatU.S. submit the following facts as the basis for this Advisory Opinion.

Boat America and BoatU.S. are separate legal entities. BoatU.S. is a not-for-profit corporation organized under the laws of the District of Columbia. Boat America is a Virginia for profit corporation. Boat America and BoatU.S. entered into a licensing agreement giving Boat America exclusive contractual rights to use and sublease the trade name and logo "BoatU.S." Boat America contracts to provide BoatU.S. with administrative services and to provide assistance to the members of BoatU.S. in all areas of activity related to non-commercial boating in the United States. Boat America does not act on its own behalf but administers the towing contracts on behalf of BoatU.S. Boat America acts as agent for BoatU.S. in dealing with towing providers and other entities, and does not perform towing or other services itself or have such services performed on its behalf. Boat America is empowered by BoatU.S. to screen independent contractors who provide the services for BoatU.S. Boat America also collects membership dues by mail on behalf of BoatU.S. for renewal of membership in BoatU.S.'s club. Boat America derives no revenue from these dues. The funds are passed through to BoatU.S. in their entirety.

BoatU.S. memberships are for a one year term. At the time for renewal, the member is billed by mail. These bills are mailed directly by BoatU.S. from outside New York.

Each member pays an annual membership fee of between \$19 and \$99, depending on the selected service level, and is then entitled to membership privileges. All members, regardless of their selected service level, enjoy the following privileges.

- Marina discount program provides discounts for fuel, overnight slips and repairs at participating marinas nationwide.
- Representation for boat owners through federal lobbying efforts.
- A free subscription to the member magazine, *BoatU.S.*
- 24-hour nationally dispatched boat towing services including battery jumps, fuel delivery, prop disentanglement, and soft groundings at sea. The basic membership dues provide members with emergency towing service up to \$50 value per incident. Payment of dues at the top (\$99) service level allows members unlimited per incident emergency towing service.
- Theft reward program.
- Access to low cost boat insurance programs.

BoatU.S. promotes boating safety to its members and to the general public through its on-line boating safety course. All members receive access to all privileges whether they use them or not. Members do not control any activities of BoatU.S.'s organization, participate in the selection of members or the management of BoatU.S.'s organization, or possess any proprietary interest in BoatU.S.

Boat America owned four retail stores in New York State trading as BoatU.S. Marine Centers. Boat America sold its retail stores to West Marine, Inc. on January 13, 2003. Boat America asserts that neither it nor BoatU.S. has had any physical presence in New York since the sale date, that neither it nor BoatU.S. has had any employees, independent contractors, agents or other representatives in New York, and that the only sales of taxable property or services by Boat America in New York consist of *de minimus* sales of tangible personal property in the form of boat lettering sold through BoatU.S.'s Web site. BoatU.S. makes sales of tangible personal property through its own catalog and Web site. West Marine, Inc. continues to operate the four retail stores purchased from Boat America using the BoatU.S. Marine Center name.

West Marine, Inc., operating under the BoatU.S. name, is currently collecting dues for BoatU.S. memberships sold in West Marine, Inc. retail stores in New York. West Marine, Inc. has been collecting sales tax on these dues. Persons purchasing a membership in BoatU.S. in the

BoatU.S. Marine Centers owned and operated by West Marine, Inc. receive a receipt showing BoatU.S. as the seller of these memberships.

Applicable law and regulations

Section 1101 of the Tax Law provides, in part:

(a) When used in this article the term "person" includes an individual, partnership, limited liability company, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee, and any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of the foregoing.

(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:

* * *

(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.

(6) Tangible personal property. Corporeal personal property of any nature. . . .

* * *

(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;

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

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

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property. . . not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith . . .

Section 1105(f)(2)(i) of the Tax Law provides, in part:

The dues paid to any social or athletic club in this state if the dues of an active annual member, exclusive of the initiation fee, are in excess of ten dollars per year, and on the initiation fee alone, regardless of the amount of dues, if such initiation fee is in excess of ten dollars. Where the tax on dues applies to any such social or athletic club, the tax shall be paid by all members, other than honorary members, thereof regardless of the amount of their dues, and shall be paid on all dues or initiation fees for a period commencing on or after August first, nineteen hundred sixty-five. . . .

Section 1137 of the Tax Law provides, in part:

Payment of tax (a) Every person required to file a return under the preceding section whose total taxable receipts, amusement charges and rents are subject to the tax imposed pursuant to subdivisions (a), (c), (d), (e) and (f) of section eleven hundred five of this article shall, at the time of filing such return, pay to the tax commission the total of the following:

(i) Four and one-quarter percent of the total of all receipts, amusement charges and rents subject to tax under this article, and if any of such receipts, amusement charges and rents are subject to local tax imposed pursuant to article twenty-nine of this chapter, an additional percentage of the total thereof equal to the percentage rate of such local tax;

(ii) All taxes imposed by section eleven hundred ten or pursuant to article twenty-nine of this chapter upon such person's use of property or services; and

(iii) All moneys collected by such person, purportedly as tax imposed by this article or pursuant to article twenty-nine, with respect to any receipt, amusement charge or rent not subject to tax, and all moneys collected with respect to any receipt, amusement charge or rent subject to tax, purportedly in accordance with a schedule prescribed by the tax commission but actually in excess of the amount stated in such schedule as the amount to be collected.

Section 1139 of the Tax Law provides, in part:

Refunds (a) In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or

paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article. . . . Such application shall be in such form as the tax commission shall prescribe. No refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission, under such regulations as it may prescribe, that he has repaid such tax to the customer. . . .

Section 526.10 of the 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.

* * *

(2) (i) A person maintaining a place of business in the State 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 tax [sic], is a vendor.

(ii) A person shall be considered to be maintaining a place of business in the State if it, either directly or through a subsidiary, has a store, salesroom, sample room, showroom, distribution center, warehouse, service center, factory, credit and collection office, administrative office or research facility in the State.

(3) 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.

* * *

(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 has 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.

* * *

(b) Responsibilities of vendors. Every vendor, unless specifically excluded by a section of the Tax Law or this Title, has certain obligations with respect to registration, collection of tax from customers, filing of returns and payment of tax. See Parts 532, 533, 539 and 540 of this Title.

(c) Interstate vendors. (1) A person outside this State making sales to persons within the State, who maintains a place of business in the State as described in paragraph (2) of subdivision (a) of this section . . . is required to collect the tax on any taxable property or services delivered in New York.

Opinion

BoatU.S. is a membership organization similar to the Automobile Club of America. BoatU.S.'s members pay an annual membership fee of between \$19 and \$99, depending on the selected service level. BoatU.S. offers members, free of any additional charge, a number of services, including on-the-water assistance, a marina discounts program and theft reward program, and a free subscription to the member magazine, *BoatU.S.*

BoatU.S.'s membership fee is not a charge for an enumerated taxable service or for the sale of tangible personal property. BoatU.S. is not a social or athletic club for purposes of section 1105(f)(2) of the Tax Law. Its membership fees, accordingly, are not club dues subject to tax under section 1105(f)(2). Thus, BoatU.S.'s membership fee is not subject to sales tax. However, BoatU.S. is required to pay sales or use tax on its purchases of any taxable services or tangible personal property used in providing its members with their privileges. See *Sea Tow Services International, Inc.*, Adv Op Comm T & F, July 31, 2001, TSB-A-01(23)S.

Accordingly, neither Boat America nor West Marine, Inc. is required to collect New York State or local sales tax on charges for renewals of club memberships. Where sales tax has been collected from members and is subsequently refunded to those members, and where sales tax has been remitted to the Tax Department by Boat America or West Marine, Inc. even though it was not collected from members, Boat America and West Marine, Inc. are eligible for a refund or credit of such tax upon timely application therefor. See sections 1137 and 1139 of the Tax Law.

West Marine, Inc. currently operates the four retail stores previously owned by Boat America under the BoatU.S. Marine Center name and sells memberships for BoatU.S.'s membership organization in New York. Persons purchasing a membership in BoatU.S. in the BoatU.S. stores owned and operated by West Marine, Inc. receive a receipt showing BoatU.S. as the seller of these memberships. In this capacity, West Marine, Inc. is considered an independent contractor, agent or other representative of BoatU.S. In addition, independent contractors retained by BoatU.S. may provide towing assistance to BoatU.S.'s members in New York. Accordingly, BoatU.S. is considered to have sufficient nexus with New York State to require it to register for sales tax purposes and to collect the sales or use tax on any sales of taxable property which it may make by catalog or other means in New York State. See section 1101(b)(8)(i) of the Tax Law; and section 526.10(a)(4)(ii) of the Sales and Use Tax Regulations.

Boat America asserts that it has no physical locations in New York, and that it has no employees, independent contractors, agents or other representatives in New York. A state can

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require an out-of-state seller to collect the state's sales or use tax only when there is a sufficient nexus between the seller and the taxing state, as required by the Commerce Clause of the United States Constitution. See *National Bellas Hess, Inc. v. Illinois*, 386 US 753; *National Geographic Society v. California board of Equalization*, 430 US 561 (1977); *Quill Corp. v. North Dakota*, 504 US 298. In *Orvis Company, Inc. v Tax Appeals Tribunal*, 86 NY2d 165, 178, the court stated with respect to the requirements for nexus, "While a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a 'slightest presence'. . . And it may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf."

Provided that Boat America has no other connection with New York State, it is not required to register or collect sales or use tax on its sales. This conclusion presumes that Boat America acts as a disclosed agent of BoatU.S. in dealing with towing providers and is not a party to the towing contracts in its own right, and that no employees or agents of Boat America are physically present and performing services within the State on a temporary or other basis. Boat America's customers in New York are liable for any tax that was not collected from them at the time of sale. Boat America may, however, voluntarily register to collect sales tax.

The above analysis presumes treatment of Boat America and BoatU.S. as separate legal entities. However, if the activities of either Boat America or BoatU.S. were so dominated and controlled by the other, or their activities were so commingled, that they would be considered to be operating as alter egos of each other rather than separate legal entities, then the corporate structures would be disregarded and the conclusions reached in this opinion regarding responsibility for collection of tax would be different. See *Harfred Operating Corporation*, Adv Op St Tx Comm, July 18, 1986, TSB-A-86(28)S.

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