

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-86(3)S
Sales Tax
January 9, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S841109A

On November 9, 1984 a Petition for Advisory Opinion was received from Touche Ross & Co., 1633 Broadway, New York, New York 10019.

Petitioner describes a hypothetical situation involving the sale of goods by an importer registered as a sales tax vendor in New York State and inquires as to the sales and use tax obligations and liabilities of such importer.

X Company, an importer of manufactured goods, has an office and is registered to do business in California, New York and other states throughout the United States.

Buyer 1 is a Delaware corporation registered to do business in California but does not maintain a place of business in, and has no other nexus with, New York.

Buyer 2 is a corporation which regularly conducts business in New York through its New York office.

X Company, Buyer 1 and Buyer 2 are unrelated parties and are not subject to an agency relationship.

The California office of X Company sells goods to Buyer 1. Negotiations for the sale, including the purchase price, terms of delivery, credit, terms of payment, billing and other correspondence are conducted entirely by X Company and Buyer 1 in their California offices. X Company's New York office is not involved in any facet of the transaction.

Subsequent to the sale by X Company, Buyer 1 sells the goods to Buyer 2. At the request of Buyer 1, X Company ships the goods via common carrier from their initial location outside of New York to Buyer 2 inside New York. The contract between X Company and Buyer 1 requires the goods to be shipped under a C.I.F. arrangement. Section 2-320 of the Uniform Commercial Code defines C.I.F. to mean an arrangement whereby the contract price includes the cost of the goods and the insurance and freight to the named destination. Delivery of the goods to the common carrier is deemed to be delivery to the buyer for purposes of risk and title. The sale from Buyer 1 to Buyer 2 is shipped Free on Board (F.O.B.) at the New York delivery point such that both risk of loss and title pass to Buyer 2 in New York.

Petitioner inquires whether X Company is required to collect and remit the New York sales and use tax with regard to the above transaction.

Section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property with certain exceptions.

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Section 1110 of the Tax Law imposes a use tax on the use within New York State of tangible personal property, except to the extent such property has already been subject to sales tax.

Section 1101(b)(4)(i) of the Tax Law defines the term "retail sale" to include "[a] sale of tangible personal property to any person for any purpose, other than (A) for resale as such. ..."

Section 1101(b)(5) of the Tax Law defines the term "sale", in pertinent part, as "[a]ny transfer of title or possession or both. . . in any manner or by any means whatsoever for a consideration. ..."

In accordance with Section 1132(c) of the Tax Law, all sales are deemed to be taxable sales at retail unless the vendor has received a properly completed resale certificate from the purchaser. In order to issue such a certificate, the purchaser must be registered with the New York State Department of Taxation and Finance as a vendor. (20 NYCRR 532.4(c) and (d)).

In describing the nature of the sales tax, the Sales and Use Tax Regulations state in part:

"The sales tax is a 'destination tax', that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate. ..." (20 NYCRR 525.2(a)(3)). In other words, a sale is taxable at the place where the tangible personal property is delivered or the point at which possession is transferred by the vendor to the purchaser or his designee.

In the instant case, the manufactured goods are being delivered by the vendor (X Company) to the purchaser's (Buyer 1) designee (Buyer 2) in New York State. Absent the receipt of a properly completed resale certificate, X Company is required to collect the New York State and local sales and use tax from Buyer 1 at the tax rate in effect where delivery is made to Buyer 2.

Petitioner's reliance on the provisions of the C.I.F. contract to relieve X Company of its obligation to collect the tax from Buyer 1 is misplaced. The purpose of the C.I.F. contract ". . . is to give the seller protection against the buyer's unjustifiable rejection of the goods at a distant port of destination which would necessitate taking possession of the goods and suing the buyer there." (Comment 12. to UCC 2-320). The Provision of UCC 2-320, regarding delivery of the goods to the common carrier being deemed delivery of the goods to the buyer, is not controlling in determining sales and use tax liability.

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Petitioner also inquires whether the requirement to collect and remit tax would change if Buyer 1 were to request delivery of the goods to a public warehouse in New York rather than being delivered to Buyer 2. Inasmuch as the point of delivery would still be in New York State, X Company would still be required to collect the New York State and local sales and use tax from Buyer 1. The tax would be required to be collected at the State and local rate in effect where the warehouse is located. (20 NYCRR 526.7(e)(1)).

DATED: January 9, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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