

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

TSB-A-90(49)S
Sales Tax
October 22, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900514A

On May 14, 1990, a Petition for Advisory Opinion was received from Biosearch Medical Products, Inc., 35 Industrial Parkway, P.O. Box 1700, Somerville, New Jersey 08876.

The issues raised by Petitioner, Biosearch Medical Products, Inc., are:

1) Whether the products sold by Petitioner are prosthetic aids, exempt from the imposition of sales tax pursuant to Section 1115(4) of the Tax Law.

2) Whether Petitioner is a "vendor" for the purposes of New York State sales tax and therefore is required to collect said tax on retail mail order sales made to New York customers.

Petitioner sells Nose Gastric Tubes, food bags, plastic tubes, and feeding pumps. The products are sold to distributors for resale or sold directly to hospitals and nursing homes. Orders are taken by phone and accepted in New Jersey. The products are shipped into New York using a common carrier. Petitioner has no sales person residing in New York or offices within New York. However, from time to time representatives or out of state employees may travel to New York for the purposes of soliciting business or product education.

Section 1115 of the Tax Law contains the following two exemptions which pertain to Petitioner's products.

(3) Drugs and medicines intended for use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses or diseases in human beings, medical equipment (including component parts thereof) and supplies required for such use or to correct or alleviate physical incapacity and products consumed by humans for the preservation of health but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein or medical equipment (including component parts thereof) and supplies, other than such drugs and medicines, purchased at retail for use in performing medical and similar services for compensation. (Emphasis supplied)

(4) Prosthetic aids, hearing aids, eyeglasses and artificial devices and component parts thereof purchased to correct or alleviate physical incapacity in human beings.

Petitioner's feeding pumps are medical equipment as described in paragraph "(3)" and not prosthetic aids as described in paragraph "(4)". Likewise, those items used in conjunction with the feeding pumps such as Nose Gastric Tubes, food bags and plastic tubes are supplies within the meaning of paragraph "(3)".

Paragraph "(3)" is not a total exemption. Therefore, when a vendor sells products which are described in this paragraph to someone who purchased the products at retail for use in performing medical and similar services for compensation, the vendor must collect the sales tax due from the purchaser. However if the sale is to an organization exempt under Section 1116(a) of the Tax Law then no sales tax would be due. In such a case the vendor should obtain the appropriate exemption certificate from the purchaser.

Under Article 28 of the Tax Law every person who makes retail sales of tangible personal property in New York (which includes sales where the property is delivered to the customer in New York) is required to register with the Commissioner of Taxation and Finance and to collect the sales tax due with respect to such sales.

Section 1101(b)(8) of the Tax Law provides in part:

(i) The term "vendor" includes:

* * *

(C) A person who solicits business either:

(I) by employees, independent contractors, agents or other representatives; or

Section 526.10 of the Sales and Use Tax Regulations provides in part:

(a) Persons included. The term "vendor" includes: (1) (i) A person making sales of tangible personal property or services, the receipts of which are subject to tax.

* * *

(3) A person who solicits business either by or through employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the State of tangible personal property or services the use of which is taxed. See subdivision (e) of this section.

* * *

(d) Soliciting business. (1) A person is deemed to be soliciting business if he has employees, salesmen, independent contractors, promotion men, missionary men, service representatives or agents soliciting potential customers in the State.

* * *

(e) Interstate vendors. (1) A person outside of this State making sales to persons within the State, who solicits the sales in New York, as defined in subdivision (d) of this section, or who maintains a place of business as defined in subdivision (c) of this section, is required

to collect the sales tax on the tangible personal property delivered in New York or the services performed in New York.

Section 1131(1) of the Tax Law provides in part that "'persons required to collect any tax imposed by this article' . . . shall include: every vendor of tangible personal property or services; . . ."

Section 1131(4) of the Tax Law provides in part that "'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) of the Tax Law further provides in part that "Every person required to collect any tax imposed by this article . . . commencing business, or opening a new place of business, . . . shall file with the commissioner of taxation and finance a certificate of registration, in a form prescribed by him, at least twenty days prior to commencing business. . . ."

A state can require an out of state seller to collect the state's sales and use tax only when there is a sufficient nexus between the seller and the taxing state, as required by the commerce clause (Art. I, §8, cl. 3) and the due process clause of the Fourteenth Amendment. National Geographic v. California Equalization Board, 430 U.S. 551.

In most general terms, the due process clause requires that there be some minimum relationship between the taxpayer or collector and the taxing state that provides a taxable "nexus". The commerce clause, on the other hand, mandates that there must not be an unreasonable burden on the free flow of goods across state lines. Rowe-Genereux, Inc. v. Vermont Department of Taxes, 411 A. 2d 1345 (1980). The test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a state's compliance with the requirements of due process in this area, are similar. National Bellas Hess, Inc. v. Department of Revenue, 386 US 753.

"The relevant constitutional test to establish the requisite nexus for requiring an out of state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate some definite link, some minimum connection, between [the State and] the person it seeks to tax: National Geographic Society v. California Board of Equalization, 430 US 551, (quoting Miller Bros. v. Maryland, 347 US at 344-345. (Emphasis added). The basic question is "whether the state has given anything for which it can ask in return." National Bellas Hess, Inc. v. Illinois Rev. Dept., 386 U.S. 753, 756 (quoting Wisconsin v. J.C. Penney Co., 311 US 435, 444).

Petitioner's contacts with New York State are not slight and inconsequential. Promotional materials are sent into New York State for the purpose of soliciting orders and stimulating sales. Representatives or out of state employees of Petitioner travel to New York for the purpose of soliciting business or for product education.

In consideration of the numerous contacts with and benefits derived from carrying on business in New York State, it is evident a sufficient nexus exists between Petitioner and the state. The existence of this nexus satisfies the requirements of the commerce clause and due process clause, thereby making the requirement to collect the sales and use taxes constitutional.

Furthermore inasmuch as Petitioner has representatives or out of state employees soliciting potential customers in New York State and providing product education, Petitioner falls within the definition of a "vendor" as defined in Section 1101(b)(8)(i)(C)(I) of the Tax Law and Section 526.10(a)(1)(i), (a)(3), (d)(1) and (e)(1) of the Sales and Use Tax Regulations.

Accordingly Petitioner is required to collect New York State sales tax on its retail mail order sales made to customers in New York, unless such customers are otherwise exempt for the payment of said tax.

DATED: October 22, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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