

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

TSB-A-99(19)S
Sales Tax
April 8, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S981103G

On, November 3, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Reliv, Inc., P.O. Box 405, Chesterfield, Mo. 63006-0405.

The issues raised by Petitioner, Reliv, Inc., are whether its annual renewal charge and its shipping and handling charges are subject to sales and use tax.

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

Petitioner, a multi-level marketer, sells nutritional, dietary and skin care products through a multi-level network of independent distributors. Petitioner's physical location is in Chesterfield, Missouri. Petitioner collects sales tax from its distributors based on the retail selling price of the products at the rate in effect where the distributor takes delivery. Petitioner files one New York State sales tax return rather than each distributor filing a return with New York State.

Distributors renew their status annually. The annual renewal fee of \$20.00 is due on the anniversary date of enrollment. This fee entitles distributors to a one-year subscription to a monthly newsletter, as well as distributor support service (which includes questions answered about the company, products etc.).

Petitioner charges the distributors a shipping and handling charge. This charge is based on the type of purchase, such as cans or cases of product. The cans ordered have a 9.5% shipping/handling charge with a minimum charge of \$4.50. The cases of product ordered have a 7.5% shipping/handling charge.

Applicable Laws 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:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery is provided by such vendor or a third party....

* * *

(8)(ii)(A) In addition, when in the opinion of the commissioner it is necessary for the efficient administration of this article to treat any salesman, representative, peddler or canvasser as the agent of the vendor, distributor, supervisor or employer under whom he obtains tangible personal property sold by him or for whom he solicits business, the commissioner may, in his discretion, treat such agent as the vendor jointly responsible with his principal, distributor, supervisor or employer for the collection and payment of the tax. An unaffiliated person providing fulfillment services to a purchaser shall not be treated as a vendor by the commissioner under this paragraph with respect to such activity.

Section 526.5(g) of the Sales and Use Tax Regulations provides, in part:

Shipping or delivery.

(1) Shipping or delivery charges by a vendor to its customer for the cost of transporting tangible personal property to the customer are part of the vendor's receipt subject to tax where the sale of the property is subject to tax or where taxable services were performed on the property. This is so regardless of whether the vendor separately states such charges in a written contract or on an invoice and regardless of whether the vendor ships or delivers the property itself or hires a third party to ship or deliver the property. Similarly, charges by a vendor to its customer for picking up the customer's property upon which the vendor is to perform taxable services are part of the vendor's receipt from the sale of the services subject to tax.

(2) A charge by a vendor to its customer for the cost of transportation of the property from the supplier, manufacturer, warehouse or catalog or other distribution point to the vendor's place of business is also part of the vendor's receipt from the sale of the property to the customer subject to tax, whether the charge is designated as transportation, shipping, handling or in some other manner.

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(3) A charge for transporting or delivering property by a transportation or delivery company to the person or business requesting that the property be transported or delivered is not a receipt subject to tax, since transportation and delivery are not themselves services subject to tax.

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

Co-vendor. (1) Every person operating a club or similar merchandising plan, or operating as an independent contractor representing a particular supplier selling tangible personal property is a vendor for sales tax purposes and must collect tax on merchandise sold by him.

(2)(i) Such person shall undertake all the responsibilities of a vendor, as listed in subdivision (b) of this section. The person supplying the merchandise to him is also deemed to be a vendor, and shall undertake all the responsibilities, as listed in subdivision (b) of this section.

(ii) Both the representative and his supplier shall be jointly responsible for the collection and remitting of the taxes and filing of returns.

(3)(i) A person supplying merchandise to a club plan secretary or independent vendor shall collect in advance from the club plan secretary or independent contractor a tax based on the retail selling price of the property at the tax rate in effect where possession of the property is taken by the club plan secretary or contractor.

(ii) A club plan secretary or independent contractor whose supplier has registered and is complying with the responsibilities of a vendor shall not be required to register as a vendor.

Opinion

Multi-level marketers, like Petitioner, and their distributors may at the discretion of the Commissioner of Taxation and Finance be treated as co-vendors jointly liable for the collection and payment of tax. See Section 1101(b)(8)(ii)(A) of the Tax Law. Assuming Petitioner has received the necessary authorization from the Commissioner, it would be a co-vendor within the meaning of Section 526.10(e) of the Sales and Use Tax Regulations who also charges its distributors an annual renewal fee on the anniversary date of their enrollment. Essentially, co-vendor arrangements provide that a vendor collect sales tax on the suggested retail selling price of their products when making sales to their distributors. The purpose of a co-vendor arrangement is to have the vendor register and remit all state and local sales tax collected by its distributors rather than have each of its distributors register, file returns and pay their taxes individually.

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Under this unique arrangement that allows a distributor to make retail sales of tangible personal property without being required to register (sales tax is remitted through Petitioner), Petitioner must pre-collect the sales tax due on its distributors' taxable sales at retail. If the amount a distributor charges his or her customers for Petitioner's products includes Petitioner's shipping and handling charges, in addition to the suggested retail selling price, then such additional amount will be part of the distributor's receipts subject to tax. Petitioner, therefore, must pre-collect the sales tax on any shipping and handling charges that are added to the suggested retail selling price by distributors when selling Petitioner's products.

The sales and use tax is imposed on retail sales of tangible personal property and sales of certain enumerated services in Section 1105(c) of the Tax Law. Petitioner's renewal fee is not a charge for any of the enumerated services, nor is it related to any retail sales of tangible personal property to Petitioner's distributors. Thus, Petitioner's renewal fee is not subject to sales and use tax.

DATED: April 8, 1999

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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