

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

TSB-A-00(20)S
Sales Tax
April 25, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000201A

On February 1, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Kahn, Hoffman, Nonenmacher & Hochman, LLP, 10 Esquire Road, New City, NY 10956.

The issue raised by Petitioner, Kahn, Hoffman, Nonenmacher & Hochman, LLP, is whether an out-of-state seller may accept a Resale Certificate from an out-of-state purchaser where merchandise is shipped directly to the purchaser's customer in New York.

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

The seller is a fully integrated printing facility located in New Jersey. The integrated operations begin with receiving text, artwork, and instructions from a purchaser. Through various processes, the seller produces a finished product (i.e., book, poster, advertising material, etc.) packaged and ready for shipment. The purchaser in this case is located outside of New Jersey and New York, and is neither registered with the New York State Tax Department as a sales tax vendor nor required to be registered. The finished product is shipped directly by the seller to the purchaser's customer who is located in New York. The seller is a business registered under the New York/New Jersey Reciprocal Tax Agreement, and files a combined New York/New Jersey sales tax return pursuant to such Agreement.

Applicable Law and Authority

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. . . .(emphasis added)

Section 1105(a) of the Tax Law imposes a sales tax upon "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

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Technical Services Bureau Memorandum TSB-M-98(3)S, June 5, 1998, entitled Nonregistered Out-of-State Purchaser's Use of Resale Certificate Form ST-120 provides, in part:

The New York State Tax Department has changed its policy regarding the use of sales tax resale certificate, Form ST-120, by out-of-state vendors not registered in New York State. Prior to this change in policy, Form ST-120 could only be used by vendors registered in New York State.

Effective immediately, any qualified out-of-state purchaser (see definition below) can use Form ST-120, *Resale Certificate (print date 5/98)* to make tax-exempt purchases for resale when:

- the vendor will drop-ship the item(s) purchased for resale to the out-of-state purchaser's customer in New York State,
- the vendor will drop-ship the item(s) purchased for resale to the out-of-state purchaser's unaffiliated fulfillment service provider in New York State, or
- the out-of-state purchaser takes delivery of the items in New York for resale from a business located outside New York State.

The Department has revised Form ST-120 (print date 5/98) to reflect this new policy. There is no change in the use of the certificate by registered vendors; and registered vendors may continue to accept and issue previous versions of Form ST-120 until they have acquired the latest edition (print date 5/98).

Users of Form ST-128, Out-of State Resale Permit

Please note that along with this change in policy, the Department is also discontinuing its out-of-state resale permit program. Form ST-120, *Resale Certificate*, is replacing Form ST-128, *Out-of-State Resale Permit*. Holders of Form ST-128 are no longer required to use their permit or to apply for a replacement when the current permit expires. Although the Form ST-120 is for immediate use, we will continue to recognize Form ST-128 as a legitimate exemption document until the expiration date of the current permit.

A qualified out-of-state purchaser is one who:

- **is not registered and is not required** to be registered as a sales tax vendor with the New York State Tax Department, and
- **is** registered with another state, the District of Columbia, a province of Canada, or other country, or has its only location in a state, province or country that does not require registration; and
- is purchasing items for resale that will be either (1) delivered by the vendor to the purchaser's customer or unaffiliated fulfillment service provider located in New York State, or (2) delivered to the purchaser in New York State, but resold from a business located outside the state.

If, among other things, a purchaser has any place of business or salespeople in New York State, or owns or leases tangible personal property in New York State, that purchaser is required to be registered in New York State. If you need help determining if you are required to register because you engage in some other activity in the State, contact the Department (See the "Need Help Section" of Form ST-120, Resale Certificate). However, a purchaser who is not otherwise required to be registered in New York may purchase fulfillment services from an unaffiliated New York fulfillment service provider and have its tangible personal property located on the premises of the provider without being required to be registered in New York.

The term *drop-shipment* as used in this memorandum means a shipment that occurs when a purchaser purchases merchandise from a vendor who delivers the merchandise to the purchaser's customer or unaffiliated fulfillment service provider.

Qualified out-of-state purchasers may issue Form ST-120 either as a single-use certificate or as a blanket certificate. Certificates issued as blanket certificates will cover the first and any subsequent purchases of the same general type of property or service purchased for resale. (emphasis added)

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In a drop shipment situation, a purchaser purchases merchandise from a vendor who delivers the merchandise to the purchaser's customer. If the vendor is presented with a properly completed New York State sales tax exemption document, such as a Resale Certificate, Form ST-120, the vendor does not have to collect sales or use tax. An out-of-state purchaser does not have to be registered with the New York State Tax Department as a sales tax vendor in order to use a Resale Certificate to make purchases for resale in a drop shipment transaction. See TSB-M-98(3), supra. The out-of-state purchaser should indicate on the Resale Certificate its registration number issued

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by the state in which it is registered to collect tax, or indicate that it is located in a state that does not require registration.

Accordingly, if the purchaser is registered with the New York State Tax Department and holds a current, valid Certificate of Authority; or if the purchaser is neither registered with New York nor required to be registered with New York, as indicated in the facts of this Advisory Opinion, and is registered with another state or is located in a state that does not require registration, the purchaser may present the seller with a properly completed Resale Certificate, Form ST-120, for the product being drop shipped into New York. Upon acceptance of a properly completed Resale Certificate within ninety days of the sale, the seller is protected from liability for sales or use tax. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations.

DATED: April 25, 2000

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

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