

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

TSB-A-06(14)S  
Sales Tax  
May 5, 2006

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040507A

On May 7, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from The Sourcing Business (US), Inc, 1938 NW 96th Street, Seattle, Washington, 98117.

The issues raised by Petitioner, The Sourcing Business (US), Inc., are:

1. Whether Petitioner 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.
2. Whether Petitioner's sales of promotional items to its client delivered by common carrier are exempt from sales and use tax.

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

Petitioner is located and registered to do business in Seattle, Washington and asserts that it has no physical presence in New York State. Petitioner sells promotional materials to businesses. Petitioner contracts with third parties to produce the promotional materials and the third parties deliver the materials directly to Petitioner's clients or to the client's customers or prospective customers. For example, Business A purchases 50,000 baseball caps imprinted with Business A's logo from Petitioner. Petitioner will contract with a third party to produce the baseball caps and the third party will ship them directly to Business A or Business A's customers or prospective customers via common carrier.

Currently, Petitioner has a client located in New York State. The client offers a camera free of charge as a promotional gift to customers who sign up for the client's online service. The client purchases the cameras from Petitioner who has a third party ship the cameras directly to the client's customers in New York, New Jersey and Connecticut. Petitioner indicates that the client's logo may be permanently attached to the camera or, alternatively, may be placed on the camera without being permanently attached.

Petitioner contracts with a third party located outside New York State to package and ship the camera, along with a cover letter, to the client's customers. The camera package is shipped, at no charge to the customers, via U.S. Postal Service directly to the client's customers located in New York, New Jersey and Connecticut. The letter to the customer states that the camera is delivered to the customer by the client to thank the customer for signing up for the client's online service.

It is presumed in all cases that the above-mentioned items are promotional items or free gifts and that the ultimate recipient has not purchased such items from the client.

**Applicable law 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:

\* \* \*

(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, . . .

\* \* \*

(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;

\* \* \*

(F) A person making sales of tangible personal property, the use of which is taxed by this article, where such person retains an ownership interest in such property and where such property is brought into this state by the person to whom such property is sold and the person to whom such property is sold becomes or is a resident or uses such property in any manner in carrying on in this state any employment, trade, business or profession;

(G) Any other person making sales to persons within the state of tangible personal property or services, the use of which is taxed by this article, who may be authorized by the commissioner of taxation and finance to collect such tax by part IV of this article;

\* \* \*

(12) Promotional materials. Any advertising literature, other related tangible personal property (whether or not personalized by the recipient's name or other information uniquely related to such person) and envelopes used exclusively to deliver the same. Such other related tangible personal property includes, but is not limited to, free gifts, complimentary maps or other items given to travel club members, applications, order forms and return envelopes with respect to such advertising literature, annual reports, prospectuses, promotional displays and Cheshire labels but does not include invoices, statements and the like. Promotional materials shall also include paper or ink furnished to a printer for use in providing the services of producing, printing or imprinting promotional materials or in producing, printing or imprinting promotional materials, where such paper and ink become a physical component part of the promotional materials and such printer sells such services or such promotional materials to the person who furnished the paper and ink to such printer.

\* \* \*

(15) Clothing and footwear. (i) Clothing and footwear to be worn by human beings, but not including costumes or rented formal wear, and (ii) fabric, thread, yarn, buttons, snaps, hooks, zippers and like items which are used or consumed to make or repair such clothing (other than such costumes or rented formal wear) and which become a physical component part of such clothing, but not including such items made from pearls, precious or semi-precious stones, jewels or metals, or imitations thereof.

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:

\* \* \*

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed.

Section 1115 of the Tax Law provides, in part:

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

\* \* \*

(30) Clothing and footwear for which the receipt or consideration given or contracted to be given is less than one hundred ten dollars per article of clothing, per pair of shoes or other articles of footwear or per item used or consumed to make or repair such clothing and which becomes a physical component part of such clothing.

\* \* \*

(n) (1) Except as otherwise provided in this subdivision, promotional materials mailed, shipped or otherwise distributed from a point within the state, by or on behalf of vendors or other persons to their customers or prospective customers located outside this state for use outside this state shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article.

\* \* \*

(4) Notwithstanding any contrary provisions of paragraph one of this subdivision, promotional materials which are printed materials and promotional materials upon which services described in paragraph two of subdivision (c) of section eleven hundred five

have been directly performed shall be exempt from tax under this article where the purchaser of such promotional materials mails or ships such promotional materials, or causes such promotional materials to be mailed or shipped, to its customers or prospective customers, without charge to such customers or prospective customers, by means of a common carrier, United States postal service or like delivery service.

Section 1134(a)(1)(i) of the Tax Law provides, in part:

Every person required to collect any tax imposed by this article, other than a person who is a vendor solely by reason of clause (D), (E) or (F) of subparagraph (i) of paragraph eight of subdivision (b) of section eleven hundred one of this article, commencing business or opening a new place of business . . . shall file with the commissioner a certificate of registration, in a form prescribed by the commissioner, at least twenty days prior to commencing business or opening a new place of business or such purchasing, selling or taking of possession or payment, whichever comes first. . . .

## Opinion

Petitioner is located and registered to do business in Seattle, Washington, and asserts that it has no physical presence in New York State. A state can 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. See *National Geographic Society v California Bd. of Equalization*, 430 US 551; *National Bellas Hess, Inc. v Illinois*, 386 US 753; *Quill Corp. v North Dakota*, 504 US 298. While a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a "slightest presence." Such presence may be manifested by the vendor's property in the taxing state or the conduct of economic activities in the taxing state performed by the vendor's personnel or on its behalf. See *Orvis Company, Inc. v Tax Appeals Tribunal*, 86 NY2d 165, 178, cert den 630 US 989.

Under section 1101(b)(8)(i) of the Tax Law, an out-of-state business making sales of tangible personal property or services subject to sales or use tax to persons within New York State is a vendor required to register and collect New York's sales and use tax if it:

- maintains a place of business in the State;
- solicits business in the State either by employees, independent contractors, agents or other representatives;
- regularly or systematically delivers its property or services in the State by means other than the United States mail or common carrier;
- makes sales of tangible personal property, the use of which is subject to sales tax, where the seller retains an ownership interest in the property and where the property is brought

into the State by the purchaser and the purchaser becomes or is a resident or uses such property in any manner in carrying on in this State any employment, trade, business or profession; or

- solicits business by distribution of catalogs or other advertising matter, and otherwise has an additional connection with the State that establishes more than the slightest physical presence in the State.

(Section 1101[b][8][i] of the Tax Law sets forth other criteria for qualifying as a vendor that are not relevant to the present case.)

Accordingly, Petitioner cannot be required to register in New York State for sales tax purposes or be held liable for collecting sales tax if Petitioner does not engage in any of the activities described above in New York State or otherwise have more than the slightest presence in the State.

Petitioner purchases tangible personal property, such as baseball caps and cameras, from a third party supplier with the intent of reselling such property to its clients. Sales of tangible personal property exclusively for resale are not retail sales subject to sales or use tax. See sections 1101(b)(4)(i) and 1110 of the Tax Law. If Petitioner purchases such property for resale from a vendor who is registered in New York State for sales and use tax purposes and who delivers the property on behalf of Petitioner to locations in the State, Petitioner may issue such vendor a properly completed New York State *Resale Certificate* (Form ST-120) in order to purchase such property without the payment of sales tax. See *Kahn, Hoffman, Nonenmacher & Hochman, LLP*, Adv Op Comm T & F, April 25, 2000, TSB-A-00(20)S; and Technical Services Bureau Memorandum entitled *Nonregistered Out-of-State Purchaser's Use of Resale Certificate, Form ST-120*, June 5, 1998, TSB-M-98(3)S.

Petitioner further inquires as to whether sales to its clients of promotional items, such as baseball caps and cameras, that are delivered by common carrier directly to the client or the client's customers or prospective customers are exempt from sales and compensating use taxes. Such sales of tangible personal property will be subject to tax under section 1105(a) of the Tax Law if delivery occurs in New York State and the property is not otherwise exempt. Section 1115(n)(1) of the Tax Law provides an exemption from sales and use taxes for the sale of promotional materials as defined in section 1101(b)(12) of the Tax Law that are mailed, shipped or otherwise distributed from a point within New York State by or on behalf of vendors or other persons to their customers or prospective customers located outside New York State for use outside this State. Section 1115(n)(4) provides an exemption from sales and use taxes for sales of promotional materials that are printed materials and promotional materials upon which services described in section 1105(c)(2) of the Tax Law have been directly performed where the purchaser of such promotional materials mails or ships such promotional materials, or causes such promotional materials to be mailed or shipped, to its customers or prospective customers without charge to such customers or prospective customers by means of a common carrier,

United States postal service or like delivery service. The exemption under section 1115(n)(4) applies to printed promotional materials mailed or shipped to customers or prospective customers in New York.

Tangible personal property such as baseball caps and cameras may qualify as promotional materials under section 1101(b)(12) of the Tax Law. However, such tangible personal property does not qualify as *printed* promotional materials as contemplated by section 1115(n)(4) of the Tax Law. Rather, section 1115(n)(4) applies to items printed in the traditional sense, such as printed annual reports, brochures, paper, and envelopes. See *AdvantEdge Television Advertising, Inc.*, Adv Op Comm T & F, January 23, 2003, TSB-A-03(1)S. Accordingly, baseball caps, cameras and similar items, whether a logo is permanently or temporarily affixed, do not qualify as printed promotional materials pursuant to section 1115(n)(4) of the Tax Law. Therefore, the sales and use tax exemption provided by such section 1115(n)(4) does not apply to the sale or use of such items.

If Petitioner delivers promotional items, such as baseball caps, cameras and similar items, in bulk directly to its client in New York State, the client is liable for tax on the portion of Petitioner's charge for items intended for delivery to the client's customers or prospective customers in New York. The client will not be liable for tax on the charge for those promotional items intended to be shipped to its customers or potential customers at locations outside New York State provided that such items are ultimately shipped outside the State. See section 1115(n)(1) of the Tax Law. If Petitioner is a vendor required to register and collect tax, the client should give Petitioner a properly completed *Certificate of Exemption for Purchases of Promotional Materials* (Form ST-121.2) indicating the portion of promotional items to be shipped outside New York State. The sale of such promotional items by Petitioner to its client where such property is delivered directly to the client's customers or prospective customers within New York State is subject to sales tax under section 1105(a) of the Tax Law.

If Petitioner also sells traditional printed promotional materials as contemplated by section 1115(n)(4) of the Tax Law (e.g., coupons, catalogs, etc.), separate charges to its client for such printed matter may be exempt from the sales and use tax provided that the client will mail or ship such printed promotional materials, or cause such printed promotional materials to be mailed or shipped by Petitioner, to the client's customers or prospective customers without charge by means of a common carrier, United States postal service or like delivery service. When purchasing exempt printed promotional materials, the client should give Petitioner a properly completed *Certificate of Exemption for Purchases of Promotional Materials*.

Petitioner's provision of cover letters shipped with the cameras, baseball caps, etc., may be the sale of either tangible personal property or printing services subject to tax pursuant to the provisions of section 1105(a) or 1105(c) of the Tax Law unless delivered to a location outside New York State or such sale is otherwise exempt. A separate charge by Petitioner for the cover letter is not subject to tax if the letter itself is promotional advertising literature as defined in

TSB-A-06(14)S  
Sales Tax  
May 5, 2006

section 1101(b)(12) of the Tax Law and otherwise qualifies for exemption pursuant to section 1115(n)(4) of the Tax Law.

Presuming that Petitioner does not have a physical presence in New York sufficient to require it to register for sales tax purposes, it cannot be required to collect the sales or use tax on its taxable sales of promotional materials to its clients. Therefore, its clients will be liable for any tax Petitioner fails to collect, and the clients will be required to file the appropriate tax return and remit any tax due. If Petitioner's client is registered for New York State sales and use tax purposes, the client will be required to remit any tax due on its next periodic sales tax return.

In the alternative, Petitioner may voluntarily register to collect New York State sales and use tax pursuant to section 1134 of the Tax Law and collect and remit the applicable sales and use tax on its sales of promotional materials for use inside New York.

It is noted that effective April 1, 2006, certain articles of clothing and footwear are exempt from the statewide portion of the sales and use tax and, where the locality has so elected, from the local portion of the sales tax. See Technical Services Bureau Memoranda entitled *Year-Round Sales and Use Tax Exemption of Clothing, Footwear, and Items Used to Make or Repair Exempt Clothing (Effective April 1, 2006)*, March 29, 2006, TSB-M-06(6), (6.1)S for additional information regarding this exemption.

DATED: May 5, 2006

/s/  
Jonathan Pessen  
Tax Regulations Specialist IV  
Technical Services Division

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