

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(36)S
Sales Tax
August 6, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070430A

On April 30, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Gems TV USA Limited, 1190 Trademark Drive, Suite 107, Reno, Nevada 89521.

The issue raised by Petitioner, Gems TV USA Limited, is whether Petitioner's relationships with a satellite television provider, a television airtime procurer, and various cable television operators will cause Petitioner to be required to register for sales tax purposes in New York State and collect the New York State and local sales tax on its sales of tangible personal property within the State.

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

Petitioner, a Delaware corporation, is a retailer of gemstone jewelry. The jewelry is sold directly to customers via television and the Internet. Petitioner has no locations or employees in New York State and does not itself or through an agent maintain or occupy a place of distribution, sales, or storage, or a warehouse in the State. All of Petitioner's products are warehoused in Nevada and are shipped from a location outside New York State to New York customers via UPS and UPS-Mail Innovations. Petitioner's shopping programs are transmitted from its studio located outside New York State. Petitioner reaches a television audience via the following agreements:

- Petitioner executed an agreement with a satellite television provider ("STP") that provides that STP will distribute Petitioner's programming via its satellite system. Petitioner's products are thus available through a dedicated television home shopping channel owned by STP. Viewers of this channel are able to place orders through the use of a toll-free telephone number.

Petitioner negotiated the contract at STP's primary location outside New York. STP's equipment is also located outside New York. STP does not maintain an office or other storage place for Petitioner's products. STP is not an affiliate of Petitioner.

- Petitioner executed an agreement with Procurer, a Florida corporation, to purchase airtime and distribute Petitioner's programming on various cable television networks. Procurer negotiates and purchases airtime for Petitioner's use on cable systems and in markets specified by Petitioner. Petitioner then makes payment to Procurer equal to Procurer's cost for acquiring the airtime, plus a percentage finder's fee. In reaching agreements with cable operators, Procurer may use, or allow cable operators to use,

Petitioner's marketing and promotional materials in connection with the distribution, marketing, promotion, or advertising of Petitioner's programming.

Neither STP, Procurer, nor the cable operators solicit orders for or sell Petitioner's products. STP and the cable operators broadcast Petitioner's programming. Orders are sent to Petitioner through the Internet or through toll-free telephone numbers. The orders are received and accepted at Petitioner's facility in Nevada.

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:

* * *

(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;

(E) A person who regularly or systematically solicits business in this state by the distribution, without regard to the location from which such distribution originated, of catalogs, advertising flyers or letters, or by any other means of solicitation of business, to persons in this state and by reason thereof makes sales to persons within the state of tangible personal property, the use of which is taxed by this article, if such solicitation satisfies the nexus requirement of the United States constitution;

(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; . . .

* * *

(v) Notwithstanding any other provision of law, the term vendor shall not include:

(A) a person who is not otherwise a vendor who purchases fulfillment services carried on in New York by a person other than an affiliated person; or

(B) a person who is not otherwise a vendor who owns tangible personal property located on the premises of an unaffiliated person performing fulfillment services for such person.

For purposes of this subparagraph, persons are affiliated persons with respect to each other where one of such persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of such persons by another person or by a group of other persons which are affiliated persons with respect to each other.

(vi) For purposes of subclause (I) of clause (C) of subparagraph (i) of this paragraph, a person making sales of tangible personal property or services taxable under this article ("seller") shall be presumed to be soliciting business through an independent contractor or other representative if the seller enters into an agreement with a resident of

this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods ending on the last day of February, May, August, and November. This presumption may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution during the four quarterly periods in question. Nothing in this subparagraph shall be construed to narrow the scope of the terms independent contractor or other representative for purposes of subclause (I) of clause (C) of subparagraph (i) of this paragraph.

Subparagraph (vi) of section 1101(b)(8) was recently added to the Tax Law by Chapter 57 of the Laws of 2008.

Section 1110 of the Tax Law provides, in part:

Imposition of compensating use tax. (a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail, . . .

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

Vendor. (a) Persons included.

* * *

(4)(i) A person who solicits business by the 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 subject to tax, is a vendor.

(ii) For purposes of subparagraph (i) of this paragraph, the additional connection with the State a person may have in order to qualify as a vendor shall include, but not be limited to:

(a) the operation of a [sic] retail stores in the State;

(b) the presence of traveling sales representatives in the State;

(c) the presence of employees, independent contractors or agents in the State;

(d) the presence of service representatives in the State;

(e) the maintenance of a post office box in the State for receiving responses to such person's solicitations; or

(f) the maintenance of an office in the State, even if such office performs no activities related to the sales solicited by such person.

Example 6: Company K is engaged in the mail-order retail sale of computer hardware and software in New York State. Sales are solicited in New York by means of direct mail advertising sent from the company's Oregon headquarters. Company K has no property or employees in New York State. The hardware and software are sent to New York customers via common carrier. Customers of Company K who experience problems using a product purchased may contact the company by phone in Oregon for assistance. In certain instances, and at no charge to the customer, Company K will send a computer expert employed by it in Oregon to New York State and provide technical assistance at the customer's premises. Company K is a vendor because of its having service representatives in the State. The result would be the same if, alternatively, Company K has an independent contractor or agent based in New York State or elsewhere provide technical assistance at the customer's premises on Company K's behalf.

Opinion

Petitioner is a retailer of gemstone jewelry. The jewelry is sold directly to customers via television and the Internet. Petitioner states that it has no locations or employees in New York State and does not itself or through an agent maintain a place of distribution, sales, or storage, or a warehouse in the State. All of Petitioner's products are shipped from a location outside New York State to New York customers.

A state can require an out-of-state seller to collect the state's sales or use tax only when the seller has "sufficient nexus" with the taxing state, i.e., some physical presence as required by the Commerce Clause of the United States Constitution. See *National Geographic Society v California Board of Equalization*, 430 US 561 (1977); *Quill Corp. v North Dakota*, 504 US 298 (1992). In *Orvis Company, Inc. v Tax Appeals Tribunal*, 86 NY2d 165, 178, the court stated

with respect to the requirements for nexus, “While a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a ‘slightest presence.’”

If an out-of-state seller maintains a place of business in New York State; solicits business by employees, independent contractors, agents or other representatives in New York; regularly or systematically delivers property or services in New York by means other than U.S. mail or common carrier; has ownership interest in property in New York; maintains a post office box in New York for receiving responses to such seller's solicitations; maintains an office in New York, even if such office performs no activities related to the sales solicited by the seller; or engages in any other activity which might be construed as providing a physical presence in New York, it is considered to have nexus with New York. The seller in such case is, therefore, required to register for sales tax purposes in New York and to undertake all of the obligations of persons required to collect tax in New York including, but not limited to, collection of sales tax from its customers in New York and filing periodic sales and use tax returns. In addition, an out-of-state seller may be presumed to be a vendor required to be registered for sales tax purposes if it, or a third party acting on the seller's behalf, enters into an agreement with a New York State resident under which, for a commission or other consideration, the resident representative directly or indirectly refers potential customers to the seller, whether by link on an Internet Web site or otherwise. A resident representative would be indirectly referring potential customers to the seller where, for example, the resident representative refers potential customers to its own Web site, or to another party's Web site which then directs the potential customer to the seller's Web site. However, an agreement to place an advertisement does not give rise to the presumption described above. For this purpose, placing an advertisement does not include the placement of a link on a Web site that, directly or indirectly, links to the Web site of a seller, where the consideration for placing the link on the Web site is based on the volume of completed sales generated by the link. See section 1101(b)(8) of the Tax Law, section 526.10(a)(4) of the Sales and Use Tax Regulations, and Taxpayer Guidance Division memorandum entitled *New Presumption Applicable to Definition of Sales Tax Vendor*, May 8, 2008, TSB-M-8(3)S.

If an out-of-state seller merely advertises on satellite and cable television stations in New York State, this activity would not by itself create nexus with New York State. Contractual relationships for the purchase of airtime or advertising of the kind described by Petitioner with STP, Procurer, and the cable operators also do not appear by themselves to give an out-of-state seller the physical presence in New York that would require it to register for sales tax purposes or collect sales tax on its sales. This presumes that STP, Procurer, and the cable operators have no economic interests or stake in Petitioner's sales and their relationships with Petitioner are strictly related to the sale of advertising and airtime in arm's length transactions. (See Taxpayer Guidance Division memorandum entitled *Additional Information on How Sellers May Rebut the New Presumption Applicable to the Definition of Sales Tax Vendor as Described in TSB-M-08(3)S*, June 30, 2008, TSB-M-8(3.1)S.)

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A determination as to whether an out-of-state seller has nexus with New York, however, depends on all the facts and circumstances of a case. It is beyond the scope of this Opinion to conclusively determine whether Petitioner has nexus with New York.

It should be noted that the jewelry sold to Petitioner's customers in New York State is subject to sales and compensating use tax. See sections 1105(a) and 1110(a) of the Tax Law. The fact that Petitioner does not collect tax from its New York customers does not relieve those customers of their liability for the tax.

DATED: August 6, 2008

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.