

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-08(61)S
Sales Tax
November 12, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080811D

A petition received August 11, 2008 requests an advisory opinion about the following questions concerning The Gift Giant, Ltd. ("Petitioner"), 555 North Research Place, Central Islip, New York 11722:

- (1) Does Petitioner bear any responsibility for New York State and local sales and compensating use tax ("sales and use tax") reporting and payment on credit card receipts generated from sales made by a lessee-vendor but paid into Petitioner's account?
- (2) Does Petitioner bear any responsibility for sales and use tax reporting and payment on cash receipts generated from sales made by a lessee-vendor and collected by that lessee-vendor?
- (3) How should Petitioner collect, remit, and report any sales and use tax for which it is responsible?

Petitioner, as a co-vendor, is responsible for pre-collecting from its lessee-vendors and remitting to the New York State Department of Taxation and Finance (Department) the applicable retail sales and use tax on its sales of merchandise to the lessee-vendors. The amount of tax should be based upon the suggested retail price of that merchandise at the tax rate in effect where the lessee-vendor takes possession of the property. Petitioner is obligated to collect and remit that tax whether the lessee-vendor's retail sale involves a cash or credit card payment. Petitioner is responsible for filing the appropriate sales tax returns. Petitioner must also provide a copy of its Certificate of Authority to its lessee-vendors to be displayed on or in each of their kiosks, carts, or inline stores.

Facts

Petitioner, a registered New York State sales tax vendor, is a distributor of gift and novelty products ("merchandise") that maintains carts, kiosks, and inline stores in shopping malls. Petitioner has licensing agreements with unrelated independent contractors ("lessee-vendors") where the lessee-vendors purchase merchandise from and pay rent to Petitioner for the use of the carts, kiosks, or inline stores during the holiday season. Petitioner does not retain ownership of any goods it sells to lessee-vendors.

The licensing agreements require that all credit card receipts from sales generated by the lessee-vendors be directly deposited into Petitioner's account. Petitioner then deducts all amounts due, including the cost of goods sold, rent, and other fees specified in the licensing agreement, and remits the net amount of the credit card receipts back to the lessee-vendor. The credit card receipt names the lessee-vendor as the retail seller. The lessee-vendors retain all of their cash receipts.

Opinion

The receipts from every retail sale of tangible personal property are subject to sales and use tax unless otherwise exempted or excluded. (Tax Law § 1105[a]). Any person making sales of tangible personal property that are subject to sales and use tax is deemed to be a “vendor.” (Tax Law § 1101[b][8]). The term “person” includes, among others, an individual, partnership, limited liability company, and corporation. (Tax Law § 1101[a]). A “person required to collect tax” includes every vendor of tangible personal property. (Tax Law § 1131[1]). Every person required to collect tax is personally liable for the sales and use tax imposed, collected, or required to be collected. (Tax Law § 1133[a]). Every person required to collect tax must register with the Department and prominently display its Certificate of Authority in its place of business. (Tax Law §§ 1134[a][1],[2]).

A “co-vendor” includes any person supplying merchandise to an independent contractor who sells that supplier’s tangible personal property. (Sales Tax Regulations § 526.10[e][1]). A “co-vendor” must undertake all of the responsibilities of a “vendor,” including, but not limited to, collection of tax from customers, filing of returns and payment of tax. (Sales Tax Regulations § 526.10[e][2][i]). Co-vendors are jointly responsible for the collection and remittance of sales and use tax and the filing of the pertinent returns. (Sales Tax Regulations § 526.10[e][2][ii]). The supplier must collect in advance from the independent contractor a tax based upon the retail selling price of the merchandise at the tax rate in effect where possession of the property is taken by the independent contractor. (Sales Tax Regulations § 526.10[e][3][i]). An independent contractor whose supplier has registered and is complying with the responsibilities of a vendor is not required to register as a vendor. (Sales Tax Regulations § 526.10[e][3][ii]).

Petitioner is responsible under Article 28 of the Tax Law for pre-collecting from its lessee-vendors and remitting to the Department the applicable retail sales and use tax on its sales of merchandise to the lessee-vendors. Petitioner supplies its lessee-vendors, who are independent contractors, with merchandise for sale; thus, Petitioner and its lessee-vendors are “co-vendors.” (Sales Tax Regulations § 526.10[e][1]). As a co-vendor, Petitioner must pre-collect the retail sales and use tax on its sales of merchandise to the lessee-vendors based upon the suggested retail sale price at the tax rate in effect where the lessee-vendor takes possession of the property. (See Sales Tax Regulations § 526.10[e][3][i]). Petitioner’s obligation to collect that tax is not influenced by the form of payment, i.e., cash or credit card, used to purchase merchandise from the lessee-vendors at retail.

Petitioner is also responsible for reporting to the Department its sales of merchandise to its lessee-vendors. Petitioner must report those sales on a quarterly basis on Tax Form ST-100, *New York State and Local Quarterly Sales and Use Tax Return*, and simultaneously remit any tax due. If Petitioner’s total taxable receipts, however, are \$300,000 or more in a sales tax quarter, i.e., March-May, June-August, September-November, December-February, then Petitioner must contact the Department immediately to change its filing status to a monthly filer and to obtain the necessary forms. Subsequently, if Petitioner’s total taxable receipts are less than \$300,000 for four consecutive sales tax quarters, then Petitioner may request conversion back to quarterly filing. (See Tax Law § 1136).

The lessee-vendors are jointly responsible for collecting and remitting any sales and use tax due on their retail sales of Petitioner’s merchandise. The lessee-vendors, though technically “vendors” and “persons required to collect tax,” are not required to register as New York State sales tax vendors if they sell only Petitioner’s

merchandise. (See Sales Tax Regulations § 526.10[e][3][ii]). They are required, however, to pay the applicable sales and use tax on the suggested retail price of the merchandise they purchase from Petitioner. They are further required to display a copy of Petitioner's Certificate of Authority in each kiosk, cart, or inline store. (See Tax Law § 1134[a][2]). Also, if Petitioner fails to remit any of the sales and use tax due on those sales, then the Department may collect that amount from the responsible lessee-vendor. (See Tax Law § 1133[a], Sales Tax Regulations § 526.10[e][2][ii]).

DATED: November 12, 2008

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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.