

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

TSB-A-09(52)S
Sales Tax
November 13, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090817A

Petitioner [REDACTED], asks whether its registration and listing fees for its proposed on-line auction service are subject to New York State and local sales taxes.

We conclude that petitioner's "on-line auction" buyers' registration fees and its sellers' listing fees are not subject to State and local sales tax.

Facts

Petitioner, an auctioneer engaged in live and on-line auctions, is currently developing a new multi-seller website where individual sellers can list personal merchandise that they want to sell and where buyers can submit bids to purchase the listed merchandise. Each seller will be charged a registration fee of \$20, which will entitle it to participate on Petitioner's websites as both a seller and a buyer. Petitioner proposes that sellers will also be charged a flat rate of \$5 or \$2 per listing (depending on the type/quantity of item(s) listed). Buyers will be charged a registration fee of \$10, which will allow them to submit bids for the purchase of the listed merchandise.

Petitioner's registration application requests the registrant's name, credit card information (card number, expiration date, verification code, billing address), business information (company name, address, etc.), if applicable, and day and evening phone contact numbers. Petitioner describes its registration fees as nonrefundable, one-time fees. The website indicates that valid credit card information is mandatory for registration. Petitioner represents that it uses the registration fee to cover its cost in verifying the registrants' identities. A buyer's registration fee is not applied as payment, in whole or in part, of the cost of any property purchased by the buyer and is not reduced or refunded if the buyer fails to make any purchases.

Though potential purchasers (buyers) will be required to register in order to bid for the purchase of the listed merchandise, any person with access to the Internet may, without charge (i.e., they do not have to be registered), view auction information on Petitioner's website, such as the merchandise descriptions and photographs, current bid prices, opening/closing dates for the sale, final sales prices, minimum bids, reserve price, etc.

Analysis

The Tax Law imposes sales tax on sales, unless for resale or otherwise exempt, of tangible personal property and certain enumerated services (Tax Law section 1105).

Section 1105(c)(1) of the Tax Law imposes sales tax on the service of:

[t]he furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, and excluding the services of advertising or other agents, or other persons acting in a representative capacity...

Also included among the enumerated services subject to tax are entertainment or information services furnished or provided electronically (Tax Law section 1105(c)(9)).

Charges for advertising on Internet websites are generally considered receipts from the sale of advertising in the media (media placement) and constitute nontaxable advertising services. (*See Matter of Jones Day*, Adv Op Comm Tx & Finance, September 24, 2009, TSB-A-09(44)S.) Petitioner's charges to its sellers to register and list their goods for sale on Petitioner's website are charges for advertising services and thus are not receipts subject to sales tax.

Because Petitioner is not in fact selling tangible personal property, the facts in this Advisory Opinion are distinguishable from the facts in *Costco Wholesale Corporation*, Adv Op Comm Tx & Fin, September 17, 1992, TSB-A-92(66)S. The *Costco* Advisory Opinion advised that the annual membership fee paid by members for access to Costco's warehouse sales facilities was subject to sales tax pursuant to section 1105(a) of the Tax Law because, in substance, the membership fee was a prepayment for the merchandise sold by Costco. (*See also John L. Buono*, Adv Op Comm Tx & Fin, March 17, 1994, TSB-A-94(10)S.) In the present case, Petitioner's charges for *registration* of potential buyers do not relate to and are not made in conjunction with the sale by Petitioner of any tangible personal property or enumerated services subject to tax under section 1105 of the Tax Law. Thus, Petitioner's charges to buyers for registration, after which the buyers may participate in auctions to purchase property from third-party sellers, are not subject to sales tax.

However, Petitioner is engaged in furnishing information of a kind that may be subject to sales tax under the provisions of section 1105(c)(1) and section 1105(c)(9) of the Tax Law. The information as to what items are offered for sale, the descriptions and photographs of the items offered for sale, the terms of the sale (delivery, pick up, etc.), the prices (opening, reserve, buy now, current bid price, and final sale price), number of bids, amount of time left in the auction, etc., all constitute information of a kind that is neither personal nor individual to the persons viewing such materials on Petitioner's website. The furnishing of that information would be subject to tax if a charge were made for accessing that information. However, since any person with access to the Internet may view Petitioner's auction site (and the information posted thereon) without charge by Petitioner, there is no receipt or sale of that information.

Please note that we make no determinations on Petitioner's responsibility for the collection of any sales taxes due on sales of taxable property and services via its auctions, whether online or otherwise. *See Norman Levy Associates, Inc.*, Adv Op Comm Tx & Fin, April 22, 1996, TSB-A-96(23)S for a discussion of auctioneers' responsibilities for collection of sales tax when they are the seller or agent of the seller of tangible personal property sold at auction.

Though the registration fees paid by purchasers to Petitioner are not receipts subject to sales tax, we note that, to the extent Petitioner uses the fees to purchase credit/identity verification services from third-party vendors, Petitioner's purchases may be subject to the taxes imposed under Tax Law sections

