

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

TSB-A-12(9)S
Sales Tax
May 3, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100809A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether it is required to register as a vendor for purposes of New York sales tax. It also asks whether a chocolate product it sells is subject to sales tax.

We conclude that the Petitioner's application does not provide adequate information to determine whether Petitioner has sufficient nexus with New York State to require it to register with the Tax Department. Petitioner's chocolate is a candy or confectionery product, which is subject to sales or use tax when sold at retail.

Facts

Petitioner is a network marketing company. "Network marketing" is a direct selling method in which independent persons serve as distributors of goods and services and are encouraged to build and manage their own sales force by recruiting and training other independent agents. In this method, commission is usually earned on the sales revenue of the sales force directly or indirectly recruited by the person. Petitioner does not set prices at which its product may be resold.

Petitioner claims that it has no physical presence in New York State. It does not have any paid employees in the State. Petitioner ships goods by common carrier to customers and independent sales representatives in New York State. Petitioner's application states that the independent sales representatives "don't work" for Petitioner and are not directed by Petitioner in any way. Some independent sales representatives resell products through stores, but Petitioner does not control any final use of the products it sells.

Petitioner sells a chocolate product that is marketed as promoting healthy weight and healthy lifestyle. While this chocolate product contains no natural sugar, it does contain glycemic xylitol, which is an artificial sweetener. The product also contains cocoa. The chocolate product has a sweet taste. The chocolate is sold in wrapped pieces.

Analysis

Section 1115(a)(1) exempts food and food products from sales tax. One of the exclusions from this exemption is "candy and confectionery." Section 528.2(a)(4) of the

Sales and Use Tax Regulations provides that “[c]andy and confectionery include, without limitation, candy of all types; chocolate (plain or mixed with other products); glazed or sugar-coated fruits, nuts, peanuts, popcorn, or other products and any similar product regarded as candy or confectionery based on its normal use or as indicated on the label or in advertising thereof.” Petitioner’s product is sweetened chocolate sold in wrapped pieces. As such, it qualifies as a candy or confectionery product subject to sales and use tax regardless of whether it contains a natural sugar ingredient.

Petitioner’s application lacks the sufficient information to determine whether Petitioner is required to register with the Tax Department for sales tax purposes. Its application states that Petitioner has independent sales representatives in the State, but these persons purchase Petitioner’s products for self-consumption or for resale.

A vendor does not have nexus with New York State merely because its products are resold in the State. Stated differently, wholesale sales made to retailers in New York do not *per se* create nexus for the wholesaler. However, the solicitation by sales representatives in New York of wholesale sales in the State may create nexus. *See Matter of Orvis*, Tax Appeals Tribunal, January 14, 1993, confirmed 86 NY2d 165 (1995).

Petitioner’s application suggests that its independent sales representatives operating New York solicit or recruit persons in New York to make purchases from Petitioner either at wholesale or retail and receive compensation for this activity. If Petitioner has independent sales representatives in New York soliciting sales of goods to be purchased from Petitioner or encouraging persons to enter other types of business relationships with Petitioner, it would have nexus with New York State. Petitioner would be required to register under section 1134 of the Tax Law and obtain a Certificate of Authority from the Tax Department. *See Tax Law* § 1101(b)(8)(i)(C)(I).

If Petitioner is required to obtain a valid Certificate of Authority, it is also required to collect and remit the applicable State and local sales and use taxes on all its New York taxable sales, including sales that were not solicited directly or indirectly by its sales representatives. *See Tax Law* § 1132(a). Further, Petitioner would be required to file periodic sales and use tax returns regardless of whether it has made any taxable sales or incurred any liability for compensating use tax. *See Tax Law* § 1136.

All of Petitioner’s New York sales of its chocolate product are presumed subject to New York sales tax. *See Tax Law* § 1132(c). If a customer purchases products from Petitioner exclusively for the purpose of reselling them, these purchases are for resale and are exempt from sales and use tax. *See Tax Law* § 1101(b)(4)(i); 20 NYCRR § 526.6(c). Petitioner is not required to collect sales and use tax on a sale of chocolate when it accepts in good faith from the customer a properly completed resale certificate within 90 days of the date of sale. *See Tax Law* § 1132(c). If Petitioner receives neither a resale certificate nor sales tax from a customer, Petitioner would be liable for sales tax on the sale unless it can

definitively prove that the customer did in fact resell all the products it purchased. A large volume of purchases by a customer is insufficient proof that the products are being resold. *See Savemart v State Tax Commission*, 105 AD2d 1001, (3rd Dep't, 1984).

DATED: May 3, 2012

/S/

DEBORAH R. LIEBMAN
Deputy 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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.