

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-96 (62)S
Sales Tax
October 1, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S960529B

On May 29, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Electron Fusion Devices, Inc., 977 Waterman Avenue, East Providence, Rhode Island, 02914.

The issue raised by Petitioner, Electron Fusion Devices, Inc., is whether Petitioner, a Rhode Island corporation, is liable to collect New York State and local sales tax on goods that are delivered via U.S. mail or common carrier to New York customers.

Petitioner submits the following facts as the basis for this Advisory Opinion. Petitioner is a manufacturer of precision liquid dispensing equipment. Petitioner does not maintain a place of business in New York State nor does it have an ownership interest in property in New York. Petitioner states that it does not solicit business by employees, independent contractors, agents or other representatives in New York State. Petitioner may, however, participate in a trade show in New York for two or three days no more than once a year, at which its products are demonstrated, but not sold or offered for sale. Also, Petitioner does not send maintenance personnel into New York to service equipment. The equipment is serviced outside of New York. Petitioner does not regularly or systematically deliver property or services in New York by means other than U.S. mail or common carrier.

Petitioner advertises in national trade publications and as a result of these advertisements is contacted by telephone and mail by customers worldwide who wish to order Petitioner's products. The telephone is answered outside of New York State. Also, the mailing address is located outside of New York State.

Section 1101(b) of the Tax Law provides, in part:

(b) 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.

Section 1131 of the Tax Law provides, in part:

(1) "Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of this article; and any member of a partnership or limited liability company. Provided, however, that any person who is a vendor solely by reason of clause (D) or (E) of subparagraph (i) of paragraph (8) of

subdivision (b) of section eleven hundred one shall not be a "person required to collect any tax imposed by this article" until twenty days after the date by which such person is required to file a certificate of registration pursuant to section eleven hundred thirty-four.

* * *

(4) "Property and services the use of which is subject to tax" shall include: (a) all property sold to a person within the state, whether or not the sale is made within the state, the use of which property is subject to tax under section eleven hundred ten or will become subject to tax when such property is received by or comes into the possession or control of such person within the state; (b) all information services, protective and detective services and interior decorating and design services as such services are described in subdivision (c) of section eleven hundred five, rendered to a person within the state, whether or not such services are rendered from or at a location within the state; (c) all services rendered to a person within the state, whether or not such services are performed within the state, upon tangible personal property the use of which is subject to tax under section eleven hundred ten or will become subject to tax when such property is received by or comes into possession or control of such person within the state; (d) all property sold by a person making sales described in clause (F) of subparagraph (i) of paragraph eight of subdivision (b) of section eleven hundred one of this article to a person described in such clause (F) who purchases such property at retail, whether or not the sale is made within the state; and (e) all telephone answering service rendered to a person within the state, whether or not such services are performed within the state, the use of which is subject to tax under section eleven hundred ten or will become subject to tax when such service is received by or comes into possession or control of such person within the state.

In Matter of Orvis Co. v Tax Ap Deals Tribunal of State of NY (86 NY2d 165, 178, cert den US, 133 LEd2d 426), the Court of Appeals indicated that the Commerce clause requires a presence of the vendor "demonstrably more than a 'slightest presence'"

In this case, Petitioner does not maintain a place of business in New York State nor does it have ownership interest in property in New York. Petitioner may participate at a trade show in New York for two or three days no more than once a year, at which Petitioner's products are demonstrated, but not sold. Petitioner does not otherwise solicit business by employees, independent contractors, agents or other representatives in New York State. Also, Petitioner does not send maintenance personnel into New York to service equipment. Petitioner does not regularly or systematically deliver property or services in New York by means other than U.S. mail or common carrier. Petitioner does advertise in national trade publications and as a result of these advertisements is contacted by telephone and mail by customers worldwide who wish to order Petitioner's products.

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Under the facts presented above and assuming no other activities by Petitioner sufficient to satisfy the statutory and constitutional provisions, Petitioner is not required to register as a vendor and is not liable to collect New York State and local sales tax on its goods that are delivered via U.S. mail or common carrier to New York customers.

DATED: October 1, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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