

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

TSB-A-96 (76) S  
Sales Tax  
December 13, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960209A

On February 9, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from International Factoring Institute, Inc., P.O. Box 1511, Orlando, Florida 32802. Petitioner, International Factoring Institute, Inc., provided additional information pertaining to the Petition on August 27, 1996.

The issue raised by Petitioner is whether a sufficient nexus exists between Petitioner and New York State to satisfy the Commerce Clause of the United States Constitution to require Petitioner to collect the State and local sales and compensating use taxes on its shipments of nonresidency programs to students in New York. Petitioner's inquiry relates specifically to a period ending August 31, 1995.

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

Petitioner began business in 1993 and is incorporated under the laws of Florida. It maintains its place of business in Orlando, Florida. Except as described in the facts Petitioner submitted, Petitioner does not own or lease any property or employ anyone within New York State.

Petitioner offers residency and nonresidency (i.e., home study) training programs in factoring as an investment and as a broker. Petitioner trains students to evaluate, structure and place accounts receivable or invoices with companies that purchase or factor these receivables at discounts. Students use these skills to act as brokers to earn commissions by identifying buyers and sellers or to purchase these receivables at discounts for their own investment purposes.

All residency training programs are held primarily in Florida and Nevada. Nonresidency programs are only made available to students who cannot attend residency training programs. If students are enrolled in residency programs and later determine that they cannot attend these residency programs, they are, at that time, offered the nonresidency programs. All enrollments are approved in Florida. There is no solicitation of the nonresidency programs within New York State.

Petitioner does, however, conduct free informational workshops regarding the factoring industry. Petitioner conducted five of these workshops in New York State in 1993, six in 1994 and nine in 1995. Other than these introductory workshops, Petitioner does not have any other activities in New York State. Potential students are invited to the workshops via direct mail. The workshops are held in hotels and conducted by independent contractors who are hired by Petitioner and domiciled in Florida. The workshops are approximately three hours in duration.

Petitioner does not sell any products or perform any training at these workshops. Persons who wish to attend a residency training program can enroll in such program at the workshops. Enrollees in residency programs receive orientation packages at the workshops. These packages contain orientation materials that explain the terminology that will be used in the training programs as well as preliminary business tips. The potential students keep the orientation packages whether or not they actually attend the residency programs. Sales tax is paid in the State of Florida on the promotional materials given out at the workshops in New York. Potential students who enroll in the residency programs receive no further solicitations, but are invited to contact Petitioner with any questions that they may have. Enrollees are also contacted to confirm attendance dates and any special arrangements. Once the students graduate, there is no further contact.

All nonresidency programs are shipped from Florida. These programs are delivered to students in New York via common carrier (e.g., United Parcel Service, Federal Express, U.S. Mail). Petitioner sold approximately 12 nonresidency programs to New York students during the period of February 1, 1993 through January 31, 1995. These nonresidency programs consist of a manual, a set of 24 tapes, a calculator, an orientation package and an introduction package. There are no interactions between New York students and instructors as part of the nonresidency programs, for example by personal computers. The programs are strictly home study programs. Students may, however, contact Petitioner's instructors for clarification of content or Petitioner's Student Services Department regarding materials via telephone or the mail. Petitioner's instructors and Student Services Department are located in Orlando, Florida.

#### 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:

(1) Purchase at retail. A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision.

\* \* \*

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property ....

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume .... conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor

....

(6) Tangible personal property. Corporeal personal property of any nature ....

(7) Use. The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property. Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials.

(8) Vendor. (i) The term "vendor" includes:

\* \* \*

(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 ....

\* \* \*

(12) Promotional materials. Any advertising literature, other related tangible personal property (whether or not personalized by the recipient's name or other information uniquely related to such person) and envelopes used exclusively to deliver the same ....

Section 1110(a) of the Tax Law imposes the compensating use tax, in part, as follows:

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 ... except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail ....

Section 1118 of the Tax Law provides in part:

The following uses of property shall not be subject to the compensating use tax imposed under this article:

\* \* \*

(7)(a) In respect to the use of property or services to the extent that a retail sales or use tax was legally due and paid thereon, without any right to a refund or credit thereof, to any other state or jurisdiction within any other state but only when it is shown that such other state or jurisdiction allows a corresponding exemption with respect to the sale or use of tangible personal property or services upon which such a sales tax or compensating use tax was paid to this state. To the extent that the tax imposed by this article is at a higher rate than the rate of tax in the first taxing jurisdiction, this exemption shall be inapplicable and the tax imposed by section eleven hundred ten of this chapter shall apply to the extent of the difference in such rates, except as provided in paragraph (b) of this subdivision.

(b) To the extent that the compensating use tax imposed by this article and a compensating use tax imposed pursuant to article twenty-nine are at a higher aggregate rate than the rate of tax imposed in the first taxing jurisdiction, the exemption provided in paragraph (a) of this subdivision shall be inapplicable and the taxes imposed by this article and pursuant to article twenty-nine shall apply to the extent of the difference between such aggregate rate and the rate paid in the first taxing jurisdiction ....

Section 1131(1) of the Tax Law defines "persons required to collect tax," in part, to include "every vendor of tangible personal property .... " Section 1131(3) defines "tax," in part, to include "any tax imposed by sections eleven hundred five, or eleven hundred ten .... "

See, also, Parts 526, 531 and 533 of the Sales and Use Tax Regulations. The local sales and compensating use taxes are imposed pursuant to the authority of Article 29 of the Tax Law.

### Opinion

Petitioner's sales of nonresidency programs (consisting of manuals, tapes, calculators, orientation packages and introduction packages) to students who are residents of New York State constitute sales to persons within this State of tangible personal property, the use of which is subject to the compensating use tax under Section 1110(a) of the Tax Law. Students purchase this tangible personal property at retail for use within New York. Accordingly, tax is due on the consideration given or contracted to be given for the property at the combined State and local sales tax rate in effect in the taxing jurisdiction where the property is delivered. However, the question remains whether the activities of the independent contractors hired by Petitioner to conduct the free informational workshops concerning factoring are a sufficient connection to this State to satisfy the Commerce Clauses of the U.S. Constitution to require Petitioner to register as a vendor and to collect and remit this tax.

The extent of the activities in New York State of the independent contractors on behalf of Petitioner is sufficient to impose the obligation to collect and remit to this State the compensating use tax on Petitioner's sales of nonresidency programs to persons in New York.

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Petitioner's representatives have made regular visitations into this State for the intended purpose of enrolling people in Petitioner's training programs and thereby promoting Petitioner's sales and maintaining a market for Petitioner in New York. Also, Petitioner's mail distribution of workshop invitations to potential students in conjunction with the presence in New York of Petitioner's independent contractors conducting workshops on Petitioner's behalf, buttresses the finding of sufficient nexus to require Petitioner to register and collect New York State tax, at least through the period at issue. A determination of whether or not Petitioner has sufficient nexus with New York for subsequent periods is beyond the scope of this Advisory Opinion.

It is also noted that the distribution of the orientation packages at the informational workshops in New York constitutes a taxable use of promotional materials in this State. However, in accordance with Section 1118(7) of the Tax Law, if Florida or another state's sales or use taxes were legally due and paid on these materials without any right to a refund or credit and if Petitioner can show that Florida or the other state, respectively, allows a corresponding exemption, the New York State and local compensating use taxes would apply only to the extent that the New York aggregate rate of tax exceeded Florida's or the other state's rate. It is further noted that Chapter 309 of the Laws of 1996 amended the Tax Law in relation to the exemption for promotional materials under Section 1115(n) of the Tax Law. However, such amendments are not pertinent to this Opinion.

DATED: December 13, 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.