

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

TSB-A-97(19)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960226A

On February 26, 1996, a Petition for Advisory Opinion was received from Lady Calston, 72 St. Regis Crescent North, North York, Ontario M3J123 Canada. Petitioner, Lady Calston, submitted additional information pertaining to the Petition on February 14, 1997.

The issue raised by Petitioner is whether it is liable for collecting sales and use tax within New York State.

Petitioner submits the following facts as the basis for this Advisory Opinion. Petitioner is a Canadian corporation whose only facilities, owned or rented, are in Canada. Petitioner sells tangible personal property via the mails, with its customers being in the United States (U.S.), Canada and abroad. Petitioner places advertisements in over twenty (20) nationally distributed magazines. The advertisements carry an "800" number, which is answered in Toronto, as well as a New York State street address for mail orders and checks. Interested parties can obtain a catalog of Petitioner's products via the "800" number or by clipping a coupon from the magazine advertisement and sending it to the address shown. The New York street address is that of an independent mail forwarding service, FSI, who receives Petitioner's mail and weekly forwards it to Canada. FSI's purpose is for the mailing convenience of U.S. customers to affix U.S. postage, rather than being concerned with the correct Canadian postage.

Petitioner maintains no stock in New York or any other state. All products are warehoused exclusively in, and distributed from, Canada. In the matter at hand, Calston's driver picks up the goods at the Canadian warehouse and drives the trucks across the Canadian border into New York State and delivers the goods and consigns all shipments to the United States Postal Service. The goods are then delivered to New York customers. There are no direct deliveries to New York customers by Petitioner's truck drivers but Petitioner does use its own trucks to deliver the goods into New York for mailing. Other than the trucks carrying goods in international commerce, Petitioner has no assets owned or rented that are used in New York State. Nor does Petitioner have any employees or representatives soliciting sales on its behalf in New York.

Section 1101(b)(8)(i) of the Tax Law defines "vendor," in part, as follows:

(A) A person making sales of tangible personal property or services, the receipts from which are 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

Section 526.10(a)(4) of the Sales and Use Tax Regulations defines "vendor" as follows:

(i) A person who solicits business by the 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 subject to tax, is a vendor.

(ii) For purposes of subparagraph (i) of this paragraph, the additional connection with the State a person may have in order to qualify as a vendor shall include, but not be limited to:

(a) the operation of retail stores in the State;

(b) the presence of traveling sales representatives in the State;

(c) the presence of employees, independent contractors or agents in the State;

(d) the presence of service representatives in the State;

(e) the maintenance of a post office box in the State for receiving responses to such person's solicitations; or

(f) the maintenance of an office in the State, even if such office performs no activities related to the sales solicited by such person. (emphasis added)

In this case, Petitioner through its advertising in magazines is selling tangible personal property in New York State. Petitioner makes available to customers a catalog which can be obtained by sending in a coupon to an address in New York State, or by calling Petitioner's "800" telephone number. Petitioner has the responding customer send the necessary orders and checks to a mailing service in New York State. The mailing service gathers the orders and checks and forwards them to Canada. The reason for the use of a mail forwarding service is to guarantee that the orders are properly sent to Petitioner, taking into account the difference in postal fees between the United States and Canada, thereby insuring that the customer's order will be processed by Petitioner and the merchandise delivered. Petitioner has its trucks pick up its product from a warehouse in Canada, cross the border and deliver the product in its trucks to a U.S. Post Office in New York State.

A person is a vendor under Section 1101(b)(8)(i)(C) of the Tax Law if it distributes catalogs or other advertising matter, has some additional connection with New York State which satisfies the nexus requirement of the United States Constitution, and as a result of its solicitation makes sales to persons within New York State of tangible personal property or services the use of which are subject to tax. Petitioner does distribute catalogs in New York State, and as a result makes sales to persons in the State of tangible personal property the use of which is subject to tax. Accordingly, Petitioner will qualify as a vendor under Section 1101(b)(8)(i)(C) if it has an additional connection with the State which satisfies constitutional nexus requirements.

Petitioner has a constitutionally sufficient nexus with New York State to be required to collect sales and use tax. Although Petitioner has no physical presence in the State such as salespersons, offices or independent salespersons (jobbers, wholesalers), the fact that customer orders are sent to a New York mailing address is evidence that nexus with New York State exists. (See: Clark Color Laboratories Division of District Photo, Inc., Dec St Tx Comm, March 28, 1980, TSB-H-80(88)S, Karl Brussel D/B/A/ Kalbrus, Det Tax App Trib, June 25, 1992, TSB-D-92(50)S, and Section 526.10(a)(4)(ii)(e) of the Sales and Use Tax Regulations.) Petitioner advertises a New York mailing address for the convenience of its customers. The New York based mailing service acts as a conduit between Petitioner and this State. The use by Petitioner of a New York mailing address is an additional connection with the State which satisfies the nexus requirement of the United States Constitution, and makes Petitioner a vendor under Section 1101(b)(8)(i)(C) of the Tax Law. The delivery of Petitioner's product into New York State in its own trucks further supports the conclusion that Petitioner has a nexus with New York State.

Accordingly, Petitioner is considered a vendor because it distributes catalogs in New York and sells tangible personal property that is subject to tax under Article 28 of the Tax Law, and uses a New York mailing address to receive its orders and payments. In addition, Petitioner uses its own trucks to bring the tangible personal property into New York for delivery to its customers. As a vendor, Petitioner is personally liable for and must collect the sales and use

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tax on its sales of tangible personal property into this State. (See Sections 1132 and 1133 of the Tax Law.) As a vendor, Petitioner must also register for the collection of tax with New York State as required by Section 1134 of the Tax Law.

DATED: March 28, 1997

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

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