

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

TSB-M-96
(3)C Corporation Tax
(10)S Sales Tax
December 30, 1996

Counsel Opinion - October 3, 1996

This Opinion of Counsel, dated October 3, 1996, was issued to address whether certain activities of an out-of-state business related to printing and distributing promotional materials by businesses located within the state create nexus, for the purpose of requiring the out-of-state business to collect sales and use taxes or pay corporation franchise tax on its activities.

STEVEN U. TEITELBAUM, Counsel.--The Division of Taxation has received a number of inquiries regarding whether certain activities in this State related to the purchase by a business located outside the State of printing and the production of promotional materials from a New York vendor constitute sufficient contacts, or nexus, with the State to subject the purchaser engaged in the activities either to the requirement to register for and collect State and local sales and compensating use taxes imposed under or pursuant to the authority of Articles 28 and 29 of the Tax Law or to the franchise tax on business corporations imposed by Article 9-A of the Tax Law. Vendors of printing services, mailing list services and promotional materials have expressed concern that their out of state customers, which currently have no nexus with New York, will avoid making purchases in the State if the activities in question would cause the purchasers to have nexus and subject these customers to sales and use tax or corporate franchise tax obligations. The decision in Orvis Company, Inc. v Tax Appeals Tribunal, 86 NY2d 165, is said to be a source of this concern.

The inquiries of these vendors have in common the following facts.

A business entity, such as a corporation, limited liability company, partnership or sole proprietorship, is located outside New York. The business has no connection to this State; or, if it has any contacts with this State, the contacts are insufficient under the United States Constitution to subject it to requirements under the sales and use or corporate franchise taxes. For example, it does not maintain a place of business or office in this State, does not make sales in the State, does not have employees working in the State, does not use independent contractors, agents or other representatives in the State to make sales of tangible personal property or taxable services, and does not regularly or systematically deliver property or services in the State other than by the U.S. Postal Service or common carrier. In addition, if the business is a foreign corporation under Article 9-A of the Tax Law, it does not employ capital or own or lease property in New York in a corporate or organized capacity. The types of connections just listed are meant to be exemplary and not exhaustive. For purposes of this Opinion, such a business which has no such connections to the State will be referred to as a non-nexus business. An example would be a mail order seller of tangible personal property located outside this State, with no connection with this State other than that it solicits sales within the State by catalogs mailed to customers and prospective customers and delivers goods sold to customers by US Postal Service or common carrier.

TSB-M-96
(3)C Corporation Tax
(10)S Sales Tax
December 30, 1996

As indicated, the issue is whether such a non-nexus business creates nexus if it engages in certain activities, as follows. The non-nexus business wishes to purchase printing of or mailing services with respect to promotional materials or to purchase promotional materials themselves. For purposes of this Opinion, promotional materials means 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. Such other related tangible personal property includes, but is not limited to, free gifts, complimentary maps or other items given to travel club members, applications, order forms and return envelopes with respect to such advertising literature, annual reports, promotional displays and Cheshire labels but does not include invoices, statements and the like. (See Tax Law, section 1101(b)(12)). Promotional materials would include printed inserts and coupons and product samples, which are enclosed with billing statements or inserted in newspapers and the like.

The non-nexus business may also wish to purchase certain services to promotional materials or services related to printing or mailing of promotional materials, such as mailing list services. We understand that mailing list broker/managers may also print or produce certain kinds of promotional materials. The non-nexus business may also wish to purchase merge/purge or other related services with respect to mailing lists used in conjunction with such promotional materials.

We also understand from the inquiries that it is not uncommon for a non-nexus business which purchases promotional materials in this State to send an employee to the printer, printer/mailer or other producer of the promotional materials in this State or to other vendors here who provide related services to promotional materials or mailing services, to review and approve the quality of the production process and of the finished product. Also, the non-nexus business may furnish tangible or intangible personal property, such as mechanicals, negatives, separations, transparencies, computer discs or tape, raw paper, a computerized mailing list of the purchaser, software, digitalized pictures or other digitalized information (together, "utilized property"), to the New York printer, to be used in the printing process or otherwise used in producing the promotional materials. Further, once the promotional materials are printed or produced, the printer or producer may hold the promotional materials at its place of business, or ship or mail them to customers or prospective customers of the non-nexus business, or deliver them to a mailer in this State, who will likewise either mail or ship them or hold them for further instructions, all on behalf of the non-nexus business. The printer or producer may also hold the purchaser's utilized property during the production process or from job to job.

By itself, the purchase of promotional materials or services to promotional materials by a non-nexus business would not cause the business to have nexus with this State for sales tax or corporate franchise tax purposes, provided that the seller of the promotional materials or the services to the promotional materials delivers the promotional materials (or causes them to be

delivered) either to customers or prospective customers of the non-nexus business in New York, to a mailer in New York who will likewise so deliver them, or to anyone located outside New York (Tax Law, sections 1101(b), 1105, 1110, 1115(d) and (n)). Nor would the seller's or mailer's holding of the promotional materials on behalf of the non-nexus business purchasing them, for a reasonable period of time, as they await delivery, cause the purchaser to have nexus. Nor would the seller's holding of such utilized property of the non-nexus business during and after the printing or production process or between jobs, for a reasonable period of time, cause the purchaser to have nexus, provided that the utilized property is then either discarded or returned to the non-nexus business.

Likewise, the use of the utilized property of the non-nexus business by the New York printer or other producer of promotional materials for the purpose of printing or otherwise producing the promotional materials for the non-nexus business does not give rise to nexus. However, the presence of other property of the non-nexus business in the State in addition to the utilized property may not, depending on the facts, be considered de minimis and could give rise to nexus sufficient to subject the business to sales and use tax and/or corporate franchise tax requirements.

Nor does sending an employee into the State for the limited purposes of meeting with the New York printer, printer/mailer or other producer of promotional materials (1) to review and approve the quality of the promotional materials and services rendered to the promotional materials or (2) to tour the printing/production facilities of the New York printer, printer/mailer or other producer of promotional materials in order to determine whether such facilities are likely to be able to produce promotional materials of a satisfactory quality give rise to nexus. The employees' trips into New York should be no longer in duration and no more frequent than is necessary (1) to conduct essential review and approval tasks with respect to current, existing promotional materials purchases or (2) to tour such facilities for the limited purpose described above, in order to retain the protection of this opinion. An excess number of trips or trips of longer duration than is necessary to conduct such tasks would not be considered de minimis and could well give rise to nexus, as could trips other than for the limited purposes of essential review and approval of the printing or promotional material work or touring such facilities as described above, for example, trips where the employee solicits sales or performs warranty or repair work in New York. (The reference to soliciting sales in the prior sentence is not meant to apply to situations covered by Public Law 86-272.) If there is nexus for one or more of these reasons, the business would be subject to sales and use tax or corporate franchise tax requirements or both.

In conclusion, the activities described in this Opinion with respect to promotional materials are not, in my opinion, considered to be sufficient to warrant the exercise of New York's taxing jurisdiction under or pursuant to the authority of Article 9-A, 28 or 29 of the Tax Law (as well as Article 9, 32 or 33 thereof) over the non-nexus business so described.