

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(43)S
Sales Tax
October 16, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980224B

On February 24, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Emerald Reed Company, Inc., P.O. Box 1422, Port Townsend, WA 98368-0032.

The issue raised by Petitioner, Emerald Reed Co. Inc., is whether it is required to register under Article 28 of the Tax Law.

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

Petitioner manufactures reeds for musical instruments at its offices in Washington State. Petitioner has recently hired three employees who are residents of New York State to test and pack the reeds. Petitioner is registered to withhold New York State income tax. Petitioner's completed reeds are shipped to its employees in New York State to be tested and, if needed, packed for sale. The reeds are then returned to Petitioner's offices in Washington State. Any reeds which do not pass testing, are also returned to Washington State where they are either recycled or disposed of if not recyclable.

Petitioner has neither sales offices nor representatives in New York State. All sales are handled through the offices in Port Townsend, Washington. Any product sold in New York State is obtained by the New York retailer through normal wholesale distribution channels. Petitioner does not contemplate any changes to these procedures. Once a year, Petitioner distributes price lists of its products and post cards soliciting sales of its products to prospective customers in New York.

Applicable Law and Regulations

Section 1134(a)(1) of the Tax Law provides, in part:

(i) Every person required to collect any tax imposed by this article ... commencing business or opening a new place of business, (ii) every person purchasing or selling tangible personal property for resale ... shall file with the commissioner a certificate of registration, in a form prescribed by the commissioner, at least twenty days prior to commencing business....

Section 1136(a)(3) of the Tax Law provides, in part:

However, a person required to register with the commissioner as provided in section eleven hundred thirty-four only because such person is purchasing or selling tangible personal property for resale, and who is not required to collect any tax or pay any tax directly to the commissioner under this article, shall file an information return annually in such form as the commissioner may prescribe....

Section 526.10(a)(4) of the Sales and Use Tax Regulations provides, in part:

(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:

* * *

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

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

Section 533.3(d) of the Sales and Use Tax Regulations provides, in part:

Annual return. (1) Every person required to register with the Department of Taxation and Finance (see section 533.1 of this Part and Parts 539 and 540 of this Title) only because such person is purchasing or selling tangible personal property for resale, and who is not required to collect any tax or pay any tax directly to the Department of Taxation and Finance, must file a return annually in accordance with the schedule provided in paragraph (4) of this subdivision.

(2) Any person required to file quarterly returns whose total tax due for the four most recent quarterly periods for which data is available for such person within the most recent six quarters for which data is available did not exceed \$3,000, may be notified by the department or may elect to file returns annually in lieu of quarterly.

* * *

(4) An annual return is to be filed in accordance with the following schedule.

(i) Annual filers for years commencing on or after June 1, 1998, including those persons who are not required to collect any tax or pay any tax directly to the department, shall file their returns:

(a) For the short annual period of nine months beginning June 1, 1998, and ending on February 28, 1999, on or before March 20, 1999.

(b) For annual periods beginning on or after March 1, 1999, which annual periods shall begin on March 1st and end with the last day of February in the subsequent year, on or before March 20th of each such subsequent year.

(ii) Quarterly filers who are notified by the department that they shall file annually must file annual returns (unless they timely notify the department in accordance with subparagraph [3][ii] of this subdivision that they wish to continue filing quarterly returns) as follows:

(a) For the short annual period of nine months beginning June 1, 1998, and ending on February 28, 1999, on or before March 20, 1999.

(b) For annual periods beginning on or after March 1, 1999, the annual period shall begin on March 1st and end with the last day of February in the subsequent year, with the annual return being due on or before March 20th of each such subsequent year.

(c) Quarterly filers who become annual filers shall file their last quarterly return for the quarterly period which ends immediately prior to the date on which the annual period begins and in accordance with instructions provided in the notification issued pursuant to paragraph (3) of this subdivision and in accordance with such other applicable instructions. Annual returns must then be filed for subsequent annual periods succeeding this last quarterly period.

(5) A properly completed annual return is to be prepared in accordance with the instructions provided by the Department of Taxation and Finance. It must include completed schedules, if required, and must show:

(i) the name, address and identification number of the vendor, recipient of amusement charges, or operator of a hotel;

(ii) gross amount, to the nearest whole dollar, of sales of tangible personal property and services, food and drink, amusement charges, and rents;

(iii) amount, to the nearest whole dollar, of taxable sales of tangible personal property and services, food and drink, amusement charges and rents for each jurisdiction, and totals of all jurisdictions;

(iv) amount, to the nearest whole dollar, of purchases subject to use tax, for each jurisdiction, and totals of all jurisdictions;

(v) amount of sales and use taxes for each jurisdiction, and totals of all jurisdictions;

(vi) credits claimed and prepayments, if any;

(vii) sales and use taxes due;

(viii) late filing charge, penalties and interest, if any, and total amount due;

(ix) the signature of the vendor, officer or employee of the vendor signing the return and the individual's title;

(x) the signature and address of a preparer, if other than the vendor; and

(xi) the date prepared.

(6) If, at any time during the course of the annual periods described in paragraph (4) of this subdivision, the total tax due from a person required to file returns is in excess of \$3,000, such person must commence filing a quarterly or monthly return as required by section 1136 of the Tax Law and the preceding provisions of this section. On the first quarterly return so required, such person must report and pay any tax due for the period commencing with the beginning of the abridged annual period. Failure to do so may result in penalty and interest being charged from the date a quarterly or monthly return should have been filed.

Opinion

Petitioner has three employees in New York State. The employees are New York residents. Petitioner also distributes advertising materials in New York State once a year. Based on the facts submitted, Petitioner has a nexus with New York State. If any of Petitioner's sales are to wholesalers or retailers located in this State, and Petitioner delivers its product to them in this State by mail, common carrier or other means, it would be required to register even though such sales may

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be for resale. See Section 1134(a)(1)(ii) of the Tax Law. Under these circumstances, Petitioner would be required to file an annual return under section 1136(a)(3) of the Tax Law and Section 533.3(d) of the Sales and Use Tax Regulations.

DATED: October 16, 2000

/s/
Jonathan Pessen
Tax Regulations Specialist III
Technical Services Division

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