

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

TSB-A-03(25)S
Sales Tax
June 11, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030422A

On April 22, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Bass Pro Outdoor World, L.L.C., 2500 East Kearney, Springfield, Missouri 65898.

The issues raised by Bass Pro Outdoor World, L.L.C., is whether the opening of a retail store in New York will require a related partnership currently making mail order sales to New York residents to register and collect New York State and local sales and use taxes.

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

Petitioner is a Missouri limited liability company currently operating retail stores in Missouri, Michigan, Georgia, Florida, Texas, Illinois, North Carolina, Tennessee, Ohio and Maryland. Petitioner is exploring the opportunity of opening a retail store in New York. BPS Catalog, L.P. ("Catalog L.P.") is a Missouri limited partnership, operating a mail order catalog business. A Delaware corporation, Bass Pro, Inc., is a 99% limited partner of Catalog L.P. and is the sole owner of Petitioner. Mail order sales are made by Catalog L.P. to New York residents by catalog solicitation and fulfillment by the use of common carriers and the United States Postal Service. If Petitioner opens a retail store in New York it would register and remit to New York all applicable sales and use taxes owed by Petitioner. Petitioner represents that it is operated as a separate and distinct entity from Catalog L.P.

Petitioner represents that Catalog L.P. currently does not have nexus with New York. It is assumed for purposes of this Advisory Opinion that prior to the commencement of Petitioner's activities in New York that Catalog L.P. does not have employees or representatives, or any other physical presence, in New York that creates nexus with the state.

Applicable Law and Regulations

Section 1101 of the Tax Law provides, in part:

(a) When used in this article the term "person" includes an individual, partnership, limited liability company, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee, and any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of the foregoing.

* * *

(b)(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 (Emphasis added)

(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;

* * *

(ii) (A) In addition, when in the opinion of the commissioner it is necessary for the efficient administration of this article to treat any salesman, representative, peddler or canvasser as the agent of the vendor, distributor, supervisor or employer under whom he operates or from whom he obtains tangible personal property sold by him, or for whom he solicits business, the commissioner may, in his discretion,

treat such agent as the vendor jointly responsible with his principal, distributor, supervisor or employer for the collection and payment over of the tax. . . .

Section 1131(1) of the Tax Law provides, in part:

“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

Section 526.10 of the Sales and Use Tax Regulations provides, in part:

(a) Persons included. (1)(i) A person making sales of tangible personal property the receipts from which are subject to tax is a vendor.

* * *

(2)(i) A person maintaining a place of business in the State 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 tax[ed], is a vendor.

(ii) A person shall be considered to be maintaining a place of business in the State if it, either directly or through a subsidiary, has a store, salesroom, sample room, showroom, distribution center, warehouse, service center, factory, credit and collection office, administrative office or research facility in the State.

(3) A person who solicits business by employees, independent contractors, agents or other representatives 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.

Opinion

Petitioner, a Missouri limited liability company wholly owned by Bass Pro, Inc., currently operates retail stores in ten other states across the country and is contemplating opening a retail store in New York. Catalog L.P. is a Missouri limited partnership, which includes Bass Pro, Inc. as a 99% limited partner, and currently operates a mail order catalog business. Catalog L.P. currently does not have nexus with New York. In order to determine if the opening of a retail store in New York by Petitioner will create a sales and use tax liability for Catalog L.P., the facts must be examined to establish whether sufficient “nexus” will exist between Catalog L.P. and New York State to satisfy the Commerce Clause of the United States Constitution.

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A state can require an out-of-state seller to collect the state's sales or use tax only when there is a sufficient nexus between the seller and the taxing state, as required by the Commerce Clause of the United States Constitution. National Bellas Hess, Inc. v. Illinois, 386 US 753; Quill Corp. v. North Dakota, 504 US 298.

The operation of in-state retail stores of an out-of-state corporation is sufficient nexus to require the out-of-state corporation to collect state taxes on its catalog sales to persons within such state. See Nelson v. Sears, Roebuck and Co., 312 US 359; Nelson v. Montgomery Ward, 312 US 373. Likewise, the presence of independent contractors or agents of an out-of-state corporation in the state is sufficient nexus to require the corporation to collect tax on its sales shipped and delivered into the state. See Scripto, Inc. v. Carson, 362 US 207; International Shoe Co. v. Washington, 326 US 310.

A corporation operating in-state offices is responsible to collect and remit sales tax on its mail order sales to persons within that state, even though the activities in those in-state offices are unrelated to the corporation's mail order activities. See National Geographic Society v. California Board of Equalization, 430 US 551. In addition, if the affairs of affiliated corporations are so dominated and controlled by their parent or by each other that the dominated and controlled company is the alter ego of the other, then the nexus of one with New York State for sales tax jurisdiction purposes provides sufficient nexus with New York State for the other. See Franklin Mint Corp. v. Tully, 94 AD2d 877, aff'd, 61 NY2d 980; Aldens, Inc. v. Tully, 49 NY2d 525; Spencer Gifts, Inc., Adv Op St Tx Comm, September 18, 1986, TSB-A-86(37)S; Harfred Operating Corporation, Adv Op St Tx Comm, July 18, 1986, TSB-A-86(28)S.

Activities in a state that have been held insufficient to establish the necessary nexus to impose the duty to collect sales tax include: mail order sales where the solicitation of sales (by catalogs and other advertising materials) and the delivery of the goods were made from out-of-state by common carrier or United States mail; and over the counter sales made in a bordering state to state residents with only occasional deliveries being made into that state. See Quill Corp. v. North Dakota, *supra*; National Bellas Hess, Inc. v. Illinois, *supra*; and Miller Brothers Co. v. Maryland, 347 US 340. Such activities alone failed to establish the requisite relationship between the state and the out-of-state seller to permit the state to impose sales tax registration and collection requirements upon the out-of-state entity.

In Orvis Company, Inc. v Tax Appeals Tribunal, 86 NY2d 165, 178, the court stated with respect to the requirements for nexus:

“While a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a ‘slightest presence’ . . . And it may be manifested by the presence in the taxing State of the vendor’s property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf.”

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Petitioner, as a result of the proposed retail store operation in New York, will have an interest in real property (by lease or otherwise) in New York, employees (sales clerks, cashiers, stock clerks, managers, etc.) within the state, and will be making sales at a location in the state. Petitioner, therefore, will clearly have nexus with New York. Petitioner will be a vendor for purposes of New York State's sales and use taxes and will be required to register to collect New York State and local sales and use taxes on all its sales delivered in New York. Section 1101(b)(8)(i) of the Tax Law.

Catalog L.P. will not operate directly in New York State. It will not have any offices or other physical presence in this state and all of its sales will be made from an out-of-state location to be delivered to New York by common carrier or U.S. mail.

The question, however, is whether Catalog L.P. will have established a physical presence in New York through the retail store operation of Petitioner in New York. For example, if Petitioner acts as a salesperson or independent contractor for Catalog L.P., Catalog L.P. would then have sales representatives (whether as agents, independent contractors or otherwise) within the state and would be required to register as a vendor and collect New York's sales and use tax. (See section 1101(b)(8)(i)(C)(I) of the Tax Law). Therefore, if Petitioner at its New York retail location, for example, assisted the sales of Catalog L.P. by referring customers to Catalog, L.P., by accepting returns of merchandise from catalog customers, by soliciting names and addresses of customers for the catalog mailing list, by distributing catalogs or catalog discount coupons, by accepting orders for purchases from Catalog L.P. from store customers when a product is unavailable at the retail store, or by fulfilling sales ordered from Catalog L.P., Catalog L.P. would be considered as having a presence in New York through the activities of Petitioner acting as its New York salesperson or independent contractor. See Matter of Hammacher Schlemmer Co., Inc., Dec Tx App Trib., November 22, 2000, TSB-D-00(17)S and Orivs, Company, Inc., *supra* for discussion of activities that may potentially create nexus. Such activities by Petitioner's employees at the in-state retail location would be in-state solicitation on behalf of Catalog L.P. beyond the mere contact by U.S. mail and common carrier permitted under the nexus standards set forth in Quill Corp., *supra*, and National Bellas Hess, Inc., *supra*. Such solicitation activities by Petitioner on behalf of Catalog L.P. would make Catalog L.P. a vendor for purposes of the sales and use taxes imposed by article 28 of the Tax Law and would require it to register and collect tax on sales to persons within New York.

Similarly, if Petitioner and Catalog L.P. were to share a common inventory, common accounting and legal staffs, etc., and their activities, such as advertising or solicitation of sales, were so commingled that they were considered to be operated as alter egos of each other rather than separate legal entities, their combined activities would create nexus for Catalog L.P. (See Franklin Mint Corp. v. Tully, *supra*; Harfred Operating Corporation, *supra*.)

The facts of this Petition represent that Petitioner and Catalog L.P. are operated as separate and distinct entities even though Bass Pro, Inc. has a controlling ownership interest in each. Based upon the facts presented in this Petition and the assumptions that Petitioner does not perform

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activities on behalf of Catalog L.P. and that Petitioner and Catalog L.P. are not operating as the alter ego of each other, or of Bass Pro, Inc., neither Petitioner nor Catalog L.P. will be required to collect New York State sales or use tax on Catalog L.P.'s sales shipped to a New York address. See Spencer Gifts, Inc., supra.

However, as discussed above, changed circumstances which would demonstrate that Petitioner is the alter ego of Catalog L.P., or that Petitioner is performing services whether as agent, independent contractor, or otherwise on behalf of Catalog L.P., could warrant a conclusion that there was sufficient nexus to compel Catalog L.P. to collect New York State and local sales and use taxes on Catalog L. P.'s sales shipped to a New York address. See Spencer Gifts, Inc., supra.

DATED: June 11, 2003

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