

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

TSB-A-06(29)S
Sales Tax
November 30, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S060302A

On March 2, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from Foley & Lardner LLP, 321 N. Clark St., Suite 2800, Chicago, Illinois 60610. Petitioner, Foley & Lardner LLP, furnished additional information with respect to the Petition on March 16, 2006.

The issue raised by Petitioner is whether there is sufficient nexus between Petitioner's client (Company) and New York State to require Company to register as a vendor and collect sales and use tax on sales to New York customers.

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

Company is a foreign corporation with no physical presence in or connection to New York other than its sale of service contracts to New York customers. A service contract is an agreement for a separate consideration between a service contract provider ("provider") and a customer wherein the provider agrees to repair (or in some cases replace) a product that has had a mechanical or electrical failure after the manufacturer's warranty has expired. Company describes the following three scenarios for the sale of service contracts in New York.

Scenario One

Company's service contracts are sold to customers through third-party retailers ("Retailer") at retail locations in New York at the time Retailer sells a specific product to a customer. When the New York Retailer sells the product to a customer in New York, the Retailer may offer to sell the customer Company's service contract covering the product purchased.

Scenario Two

Company's service contracts are sold directly to New York customers via its Web site as a result of referrals from unrelated parties (i.e., an Internet broker or retailer).

Scenario Three

Company's service contracts are sold by an affiliate of Company ("Marketer") or unrelated third party via direct mail solicitations to New York customers. Marketer or the unrelated third party receives commissions from Company for any sales made.

As provided for in Company's service contracts and in accordance with agreements with certain Retailers, a Retailer may be responsible for making repairs or replacements under the service contracts. Also, pursuant to certain service contracts, a customer is required to contact

Company either by phone or Internet to report a claim. After the claim is verified by Company as allowable under the customer's contract, the customer may have the item repaired by the Retailer pursuant to the service contract. As a designated repair center, the Retailer will receive direct payment from Company. If the customer's contract provides for product replacement, the Retailer may issue the customer a gift card for use in one of Retailer's stores which may not be in the state where the customer purchased the product. Under other service contracts, the customer has no obligation to use a specific vendor for repair service. Under these contracts, Company might not provide direct payment to the vendors. Rather, the customer may be required to pay the vendor and submit the receipt to Company for reimbursement.

In all scenarios, Company's sale of service contracts, through its Marketer, Retailers, third parties, or the Internet, represents Company's only contact with New York. Specifically, Company does not:

- Maintain a place of business within New York.
- Receive or process requests in New York to enter into a service contract with Company.
- Sell, own, lease, maintain, use, or have the right to use any tangible personal property in New York.
- Rent, lease, or offer for sale tangible personal property to New York customers in any way.
- Allow its trade name to be used within New York by a franchisee, licensee or any other entity.

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:

* * *

(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, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

* * *

(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;

* * *

(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;

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business . . . whether or not any tangible personal property is transferred in conjunction therewith, . . .

* * *

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides:

Except as specifically provided otherwise, the sales tax is a "destination tax." The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.

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

Vendor. (a) Persons included.

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

* * *

(ii) A person making sales of services, the receipts from which are subject to tax, is a vendor. This may include a person entering this State from outside the state to perform services on property located in this State.

* * *

(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 [sic], is a vendor.

* * *

(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.

* * *

(4)(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 a retail stores [sic] 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.

Section 527.5(c) of the Sales and Use Tax Regulations provides, in part:

Maintenance and service contracts. (1) The purchase of a maintenance or service contract is a taxable transaction.

(2) The vendor making sales of such contracts may purchase for resale any tangible personal property which is transferred to his customer in connection with the services rendered.

(3) Any charge made for services rendered in addition to the purchase price of the maintenance or service contract is taxable.

Opinion

Company is a foreign corporation with no physical presence in or connection to New York State other than its sale of service contracts to New York customers. Petitioner describes three scenarios for Company's sale of service contracts in New York. While Petitioner describes Company's business activity as the "sale of a contract," in essence Company is selling repair services to tangible personal property. These services are to be performed at a future time when the customer's product no longer operates properly. Under the contract, Company offers to repair or replace the product. Ultimately, all such services are delivered by Company to its customers through other contractors who either repair or replace the property. The sale of a maintenance or service contract for tangible personal property is a taxable transaction under section 1105(c)(3) of the Tax Law. See section 527.5(c) of the Sales and Use Tax Regulations.

A state can require an out-of-state seller to collect the state's sales or use tax only when the seller has "sufficient nexus" with the taxing state, i.e., some physical presence as required by the Commerce Clause of the United States Constitution. See *National Geographic Society v*

California Board of Equalization, 430 US 561 (1977); *Quill Corp. v North Dakota*, 504 US 298 (1992). Petitioner asserts that Company has no physical locations or other presence in New York State, other than its sale of service contracts to New York customers. However 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." Nexus with New York State may be based on the presence of sales representatives in the State or on the presence of employees, independent contractors, agents, or service representatives in the State. See section 526.10(a)(4)(ii) of the Sales and Use Tax Regulations.

In Scenario 1, Company's service contracts are sold to New York customers through third-party Retailers at locations in New York State. When a New York Retailer sells a product to a customer in New York, the Retailer may also sell Company's service contract covering the repair or replacement of the product purchased. In addition, the Retailer may be the entity which does the repair or makes the replacement. The Retailer is considered a representative of Company. See *Scripto, Inc. v Carson*, 362 U.S. 207 (1960).

Accordingly, Company, through the actions of the Retailers on Company's behalf, is considered to have sufficient nexus with New York State to require it to register for sales tax purposes and to collect the sales or use tax on any sales of taxable service contracts it may make in New York. See section 526.10(a)(4)(ii) of the Sales and Use Tax Regulations. Company comes within the statutory definition of *vendor* under section 1101(b)(8)(i)(A) of the Tax Law since it is making sales of services, the receipts from which are subject to sales tax. Therefore, Company is required to collect and remit New York State and local sales tax at the time the service contract is purchased.

In Scenarios 2 and 3, Company's service contracts are sold directly to New York customers via Company's Web site as a result of referrals from unrelated parties (i.e., an Internet broker or retailer) and from customer contacts as a result of direct mail solicitations by Marketer or an unrelated third party. The Internet broker or retailer, if present in New York State, might be considered as providing sufficient nexus to hold Company liable for the collection of tax. Similarly, if Marketer or the unrelated third party has a presence in New York, then Company might be considered to have sufficient nexus with New York. However, regardless of whether the Internet broker or Marketer has a presence in New York, it appears that in all of these scenarios Company will have Retailers acting as designated repair centers located in New York to provide Company's customers with repair services or replacement merchandise. These service providers, whether acting as independent contractors, agents, or in another representative capacity, are considered to be acting on behalf of Company in New York as provided in section 526.10(a)(4)(ii) of the Sales and Use Tax Regulations. They perform services promised by Company to its customers on Company's behalf. Accordingly, Company has sufficient nexus

with New York to require it to register as a vendor for sales tax purposes and to collect sales tax on any sales of taxable service contracts it makes in New York. See section 1101(b)(8)(i) of the Tax Law.

DATED: November 30, 2006

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