New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-08(65)S
Sales Tax
December 30, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S081021A

On October 21, 2008, the Department received a petition for an advisory opinion from [redacted] Petitioner asks if the acceptance of payments directly from the customers of retailers to whom it has sold window treatments constitute retail sales subject to sales tax. No new sale occurs upon a customer's assumption of the debt between Petitioner, as manufacturer, and the retailer from whom the customer bargained for the product, nor does such assumption alter the locus of the taxable event, which occurs between the retailer and the customer. Therefore, the acceptance of such payment by Petitioner is not a receipt from a taxable sale by Petitioner, and Petitioner is not required to collect tax on such payment under section 1132(a) of the Tax Law.

Facts

Petitioner manufactures window treatments that it sells to retail firms ("retailers") engaged in providing interior decorating and designing services to third party customers. Petitioner has resale certificates on file for all retailers to whom it sells window treatments. Petitioner's bill for the window treatments names the retailer as the purchaser. Petitioner may deliver the window treatments to the retailer or the retailer's customer. Petitioner is unrelated to the retailers, and Petitioner and the retailers separately account for their sales. Some retailers have on occasion required their customers to make payments directly to Petitioner of the deposit or balance owed by the retailer to Petitioner for the window treatments. Such payments may be for a portion or the entire amount of the price charged by Petitioner to the retailer for the window treatments.

Issue

Petitioner asks if the acceptance of direct payments from third party customers constitute retail sales subject to sales tax.

Analysis

Pursuant to Section 1105 (a) of the Tax Law, "(t)he receipts from every retail sale of tangible personal property, except as otherwise provided" are subject to sales tax. However, Section 1101 (b)(4)(i)(A) of the Tax Law excludes from the definition of "retail sale" those sales made to any person exclusively "for resale as such or as a physical part of tangible personal property."

20 NYCRR 526.6(c)(1) further explains this "resale exclusion." This regulation provides that

> Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component

> part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

The exclusion will not be recognized, however, unless, "the vendor receives a properly completed resale certificate," 20 NYCRR 526.6(c)(2). To reduce the possibility of fraud or tax evasion, the presumption is that a sale is a taxable retail sale unless rebutted by a resale certificate in the form established by Section 1132(c) of the Tax Law. See Savemart, Inc. v. State Tax Commission, 105 A.D. 2d 1001, 1003, 482 N.Y.S.2d 150, 152 (3rd Dept. 1984), app. dism. 64 N.Y.2d 1039, 478 N.E.2d 212, 489 N.Y.S.2d 1029 (1985); lv. den. 65N.Y.2d 604, 482 N.E.2d 926, 493 N.Y.S.2d 105 (1985).

It appears, from the facts recited in this Opinion that Petitioner is selling window treatments to the retailers, rather than to the retailers' customers. Assuming that Petitioner is contracting with the retailers for the sale of window treatments, and that the retailers are entering into separate sales contracts with their customers for the transfer of the window treatments for consideration, then the retailers may purchase the window treatments exempt from sales tax for resale. When properly documented by the filing of a resale certificate, the transaction between Petitioner and the retailer is not taxed. The taxable event is the retail sale of the window treatments by the retailer to the customer. In circumstances in which the customer pays Petitioner directly, the customer is assuming the retailer's duty to Petitioner by providing a portion of the consideration owed to Petitioner for the excluded sale. The customer is not entering into a separate sales transaction with Petitioner.

This analysis is supported by 20 NYCRR 526.7(a)(1), which provides that "(t)he words sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration." See also Tax Law section 1101(b)(5).

For a sale to exist there must be independent consideration. In the instant case, Petitioner appears to sell its window treatments to retailers for consideration. Because resale certificates are issued to Petitioner, if those certificates are properly completed and accepted by Petitioner in good faith, Petitioner is not required to collect sales tax on such sales. The retailer then resells the window treatments to customers for consideration, which may consist, in part, of payments by the customers directly to Petitioner of any deposit or balance owed to Petitioner by the retailer. These payments to Petitioner do not constitute a new sale by Petitioner; they are instead part of the consideration for the initial transaction between Petitioner and the retailer, which was untaxed due to the resale exclusion. Even though payment comes directly from the customer, it does not represent consideration for a new sale by Petitioner to the customer. Therefore, such payment is not a receipt from a taxable sale by Petitioner, and Petitioner is not required to collect tax on such payment under section 1132(a) of the Tax Law. The customer's payment to Petitioner, however, must be included in the retailer's taxable receipts from the sale of window treatments to the customer. It should be noted that if Petitioner receives money constituting State sales tax from a customer petitioner would be obligated to remit such money to the Tax Department. Petitioner, in that case, would become jointly and

severally liable with the retailer for remittance of the tax collected. See *City of New York v Advance Trading Corp.*, 202 Misc 208 (1952); *E. Parker Brown, II,* Adv Op Comm T&F; February 29, 2000, TSB-A-00(13)S.

If it appeared in a particular instance that Petitioner was contracting directly with an end user for the sale of window treatments, and the retailer was merely acting as the selling agent or representative of Petitioner, then Petitioner would be making a retail sale of the window treatments and would be liable for the sales tax due on that sale. See Tax Law section 1133(a).

DATED: December 30, 2008

/S/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.