

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S120323B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether fees paid to a broker for his services of purchasing building materials on behalf of Petitioner are considered a taxable service. Additionally, Petitioner asks whether reimbursements made by Petitioner to the broker for the purchase of the building materials would be taxable.

We conclude that purchases made on behalf of Petitioner by a broker acting as an agent are subject to sales tax as a sale directly from the vendor to the Petitioner. Compensable fees paid to the broker for acting as Petitioner's agent are not subject to sales tax because this is a nontaxable service. Purchases made on behalf of Petitioner by a broker not acting as an agent are subject to sales tax, but the broker may avoid paying sales tax on its purchases by providing a resale certificate to the vendor. However, if the broker is not acting as an agent, sales tax is due on the entire receipt charged to Petitioner, including any broker fees.

Facts

Petitioner is a construction company in New York City. Petitioner is considering hiring a broker to purchase taxable building materials on its behalf from various sources; in return, Petitioner would pay the broker a commission. In some cases, Petitioner would receive invoices directly from the seller to purchase the building materials with the broker facilitating the transaction. However, in other cases, the broker would not disclose to the seller the relationship between the broker and Petitioner, and the broker would purchase the building materials directly. In turn, the broker would send Petitioner an invoice for the cost of the building materials in addition to the broker fee. In both cases, the building materials would be delivered directly to the Petitioner without the broker taking possession of the goods.

Analysis

The application of sales tax to the purchases of construction material through a broker depends on the relationship that exists between the broker and Petitioner. If an agency relationship is present, i.e., the broker is the Petitioner's agent, the sale of taxable tangible goods is deemed to be a retail sale from the vendor directly to Petitioner. *See* 20 NYCRR § 541.5(c)(2). Therefore, sales tax will be due upon the initial purchase of construction materials from the vendor, but not on any reimbursements paid by Petitioner to the agent. Furthermore, a broker fee in conjunction with this reimbursement will not be subject to tax, because it is a fee for a nontaxable service.

To establish an agency relationship between Petitioner and the broker, there must be a “manifestation” that the broker consents to act on behalf of Petitioner, subject to Petitioner’s control. *See Matter of Hooper Holmes v. Wetzler*, 152 AD2d 871 (3d Dep’t 1989); *Matter of Swet*, TSB-D-91(10)S. This requires that purchases made by the broker must be billed directly by the vendor to Petitioner or, if billed to the broker, the bill must specify that the broker is acting as Petitioner’s agent. Secondly, payment must be made directly by Petitioner to the vendor or, if payment is made by the broker, it must come from a special fund created specifically for this purpose. Finally, the purchased items must be delivered directly to Petitioner. *See generally* 20 NYCRR § 541.5(c).

However, if an agency relationship is not present, the broker is deemed to be purchasing the goods directly and reselling those goods to Petitioner. Tax Law § 1105(a) imposes tax on the receipt of any tangible personal property, except for purchases intended exclusively for resale. Because the broker is purchasing the goods for resale, the broker is a person required to collect tax and must register for sales tax purposes. *See* Tax Law § 1134(a)(1)(ii). The broker will be charged sales tax on the purchase of the construction materials unless the broker timely furnishes the vendor with a properly completed Form ST-120–*Resale Certificate*. The broker must collect sales tax from Petitioner on the resale of the goods to Petitioner unless an exemption applies; the broker then is required to pay over the collected tax to the State. *See* Tax Law § 1134. The entire price paid by Petitioner for the materials will be subject to sales tax as part of the receipt under Tax Law § 1101(b)(3), including any mark-ups or “broker fees” charged by the broker. *See* 20 NYCRR § 526.5. The fact that the goods are delivered directly from the vendor to Petitioner does not, by itself, prevent two transactions from taking place in the absence of an agency relationship.

DATED: November 13, 2015

/S/
DEBORAH R. LIEBMAN
Deputy 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 of the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.