

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-92 (3)S
Sales Tax
January 30, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S911024A

On October 24, 1991 a Petition for Advisory Opinion was received from Crescent Metal Products, Inc., 12711 Taft Avenue, Cleveland, Ohio 44108-1683.

The issues raised by Petitioner, Crescent Metal Products, Inc., are whether:

(1) Petitioner is required to collect New York sales and use taxes from a customer located outside of New York when Petitioner ships the goods to a third party located in New York pursuant to the request of such customer.

(2) If Petitioner is required to collect New York sales and use taxes, what tax rate and purchase price should be used to compute the tax.

Petitioner is a manufacturer of mobile food service and instamatic cooking equipment. It is an Ohio corporation with its headquarters in Cleveland, Ohio. It is a registered vendor with the New York Department of Taxation and Finance and is authorized to do business in the State of New York. All sales of equipment must be approved by Petitioner's home office in Cleveland, Ohio. Petitioner collects New York sales and use taxes whenever it makes a sale to a New York customer.

Petitioner also sells products to customers located in other states. These non-New York customers often resell Petitioner's products to third parties. Sometimes these third parties are located in the State of New York. From time to time, non-New York customers request that Petitioner drop-ship the products to third parties located in New York. Regardless of where the product is drop-shipped, Petitioner ships all items F.O.B. Cleveland, Ohio and Petitioner always bills the non-New York customer for the products. The non-New York customer, and not the third party located in New York, is responsible for paying Petitioner's invoice for the products. Petitioner has no knowledge of the purchase price paid by the third party located in New York to the non-New York customer.

Section 1105(a) of the Tax Law generally provides for the imposition of sales tax upon "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1101(b)(4)(i) of the Tax Law defines retail sales as "[a] sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property. . .".

Section 1132(c) of the Tax law provides in pertinent part, as follows:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property

or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five,, . . are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) of this section, unless (1) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a certificate in such form as the tax commission may prescribe, signed by the purchaser and setting forth his name and address and, except as otherwise provided by regulation of the tax commission, the number of his registration certificate, together with such other information as said commission may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, and, where the certificate requires the inclusion of the purchaser's registration certificate number or other identification number required by regulations of the tax commission, that the purchaser's certificate of authority has not been suspended or revoked and has not expired as provided in section eleven hundred thirty-four, or (2) the purchaser, not later than ninety days after delivery of the property or the rendition of the service, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the tax commission may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. Where a certificate or document referred to in the previous sentence is received within the time limit set forth therein, but is deficient in some material manner, and where such deficiency is thereafter removed, the receipt of such certificate or document shall be deemed to have satisfied all of the requirements of the preceding sentence. Where such a certificate or statement has been furnished to the vendor, the burden of proving that the receipt, amusement charge or rent is not taxable hereunder shall be solely upon the customer. The vendor shall not be required to collect tax from purchasers who furnish a certificate of resale, an exempt organization statement or other exemption certificate in proper form, unless, in the case of a certificate described in clause one of the second sentence of this subdivision whereon the purchaser's registration certificate number, or other identification number required by regulation of the tax commission, is required to be included, such purchaser's certificate of authority is invalid because it has been suspended or revoked as provided in section eleven hundred thirty-four, and the tax commission has furnished registered vendors with information identifying those persons whose certificates of authority have been suspended or revoked, or unless such purchaser's certificate of authority is invalid because it has expired, and the tax commission has provided registered vendors with a means of determining whether such expiration has occurred. Where the vendor accepts such a certificate from a person identified by the tax commission as one whose certificate of authority has been suspended or revoked or from a person whose certificate of authority has been identified as having expired, the receipt, amusement charge or rent from such transaction shall be deemed to be

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a taxable sale at retail. Provided, however, the tax commission may authorize a purchaser, who acquires tangible personal property or services under circumstances which make it impossible at the time of acquisition to determine the manner in which the tangible personal property or services will be used, to pay the tax directly to the tax commission and waive the collection of the tax by the vendor. . . .

Therefore in accordance with the provisions of Section 1105(a), 1101(b)(4)(i) and 1132(c) of the Tax Law. Petitioner should collect sales tax from a customer located outside of New York State when Petitioner ships the goods to a third party located in New York State pursuant to the request of such customer unless the Petitioner has received a New York resale certificate or other appropriate exemption document from the customer. The purchase price paid by the customer to the Petitioner and the combined state and local tax rate in effect in the locality in which the goods are delivered should be used to compute the tax.

In the event that the Petitioner does not obtain such documentation, then upon audit the burden of proof shall be upon the Petitioner to prove that its customer purchased the merchandise at issue for resale or that the sale was otherwise exempt from the imposition of sales tax. Steelcase, Inc., Adv Op St Tx Comm, July 3, 1988, TSB-H-87(219)S.

DATED: January 30, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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