

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

TSB-A-88 (50)S
Sales Tax
TSB-A-88 (23)C
Corporation Tax
October 13, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z880209A

On February 9, 1988, a Petition for Advisory Opinion was received from Giftmaster Inc., 3825 W. Green Tree Road, Milwaukee, Wisconsin 53209.

The issues raised are whether Petitioner is subject to franchise tax and whether Petitioner must collect sales tax when Petitioner sells merchandise to New York residents via orders received from airline passengers who order from catalogs on board commercial aircraft and if Petitioner is not required to collect sales tax, may it surrender its registration.

Facts

Petitioner produces a catalog for a client, in this case a commercial airline. The catalog is given to the airline and shipped via interstate commerce to a location outside New York State; generally, to the airline's distribution point for their on-board program. At the point of shipment, Petitioner loses ownership and control of the catalogs. The compensation to the airline for the catalog on-board program is a commission based on total sales nationwide.

The catalogs are put on board a commercial aircraft and made available to its passengers. It is presumed for purposes of this advisory opinion that some portion of the catalogs are made available in this manner to passengers boarding aircraft in New York State. When a New York resident orders merchandise and it is shipped into New York, Petitioner has been collecting and paying tax on such shipments.

Petitioner states that it does not employ capital, own or lease property or maintain an office in New York State. The only physical contact with New York is when the aircraft lands in New York State.

Petitioner now believes it is not required to pay franchise taxes nor is it required to collect sales taxes on the New York State shipments because it feels it does not meet the criteria for taxation.

Franchise Tax

The business corporation franchise tax imposed by section 209.1 of Article 9- A of the Tax Law is imposed on every foreign corporation, unless specifically exempt, for the privilege of doing business, or of employing capital, or of owning or leasing property in New York State in a corporate or organized capacity, or of maintaining an office in New York State.

Section 1-3.4(b)(9) of the Business Corporation Franchise Tax Regulations describes the exemption from tax applicable under Public Law 86-272 (15 U.S.C.A. §§381-384) as follows:

(i) A foreign corporation whose income is derived from interstate commerce is not subject to tax under article 9-A if the activities of the corporation in New York State are limited to either, or both of the following:

(A) the solicitation of orders by employees or representatives in New York State for sales of tangible personal property and the orders are sent outside New York State for approval or rejection; and, if approved, are filled by shipment or delivery from a point outside New York State, and

(B) the solicitation of orders by employees or representatives in New York State in the name of or for the benefit of a prospective customer of such corporation if the customer's orders to the corporation are sent outside the state for approval or rejection; and, if approved, are filled by shipment or delivery from a point outside New York State.

(ii) For purposes of this exemption, a corporation will not be considered to have engaged in taxable activities in New York State during the taxable year merely by reason of sales in New York State or the solicitation of orders for sales in New York State, of tangible personal property on behalf of the corporation by one or more independent contractors

On the basis of the facts presented herein, it is determined that pursuant to Public Law 86-272 and section 1-3.4(b)(9) of the Business Corporation Franchise Tax Regulations, Petitioner is exempt from the franchise tax imposed under Article 9-A of the Tax Law.

Sales Tax

NEXUS

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 (Art. I, § 8, cl. 3) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. National Geographic Society v. California Board of Equalization, 430 US 551.

The test to determine whether a particular state exaction violates the Commerce Clause by invading the exclusive authority of Congress to regulate trade between the states, and the test to determine whether a state has complied with the requirements of due process in this area, are similar. National Bellas Hess, Inc. v. Department of Revenue, 386 US 753. "[T]he relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate some definite link, some minimum connection, between

[the State and] the person it seeks to tax." National Geographic Society v. California Board of Equalization, 430 US at 561.

Activities in a state that have been found to be constitutionally sufficient to establish nexus to require an out-of-state corporation to collect state taxes include the operation of retail stores of the corporation in the state, Nelson v. Sears, Roebuck and Co., 312 US 359; Nelson v. Montgomery Ward, 312 US 373; the presence of traveling salesmen in the state, General Trading Co. v. Tax Commission, 322 US 335; and the presence of independent contractors or agents of the corporation in that state, Scripto, Inc. v. Carson, 362 US 207.

In this regard, it is noted that the airline with which Petitioner has contracted for the distribution of catalogs is not distributing catalogs in New York State in its capacity as a common carrier. Rather, the airline and Petitioner have entered into a joint endeavor whereby the airline will share in the revenues of the endeavor on a commission basis.

Accordingly, it is concluded that Petitioner has sufficient connection with New York State by virtue of the presence in the state of an independent contractor distributing Petitioner's catalogs.

STATUTORY PROVISIONS

Section 1131(1) of the Tax Law states, "[p]ersons required to collect tax' ... shall include: every vendor of tangible personal property ..."

Sales and Use Tax Regulations section 526.10(e) provides, in part:

(e) Interstate vendors. (1) A person outside of this State making sales to persons within the State, who solicits the sales in New York, as defined in subdivision (d) of this section, or who maintains a place of business as defined in subdivision (c) of this section, is required to collect the sales tax on the tangible personal property delivered in New York or the services performed in New York.

(2) A person making sales to his customers within the State, who has solicited such sales by the interstate distribution of catalogs or other advertising material by mail and who delivers the merchandise through the mail or by common carrier, and who neither maintains a place of business as defined in subsection (c) of this section, nor solicits business as defined in subdivision (d) of this section, is not required to register as a vendor. However, if such person registers voluntarily, he is under the same obligations as any other vendor. 20 NYCRR 526.10(e).

Subdivisions (c) and (d) of section 526.10 of the Sales and Use Tax Regulations defines the terms "maintaining a place of business" and "soliciting business" as follows:

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(c) Maintaining a place of business. A vendor shall be considered to maintain a place of business in this State if he, 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. 20 NYCRR 526.10(c).

(d) Soliciting business. (1) A person is deemed to be soliciting business if he has employees, salesmen, independent contractors, promotion men, missionary men, service representatives or agents soliciting potential customers in the State.

(2) A person is deemed to be soliciting business in New York if he distributes catalogs or other advertising material, in any manner in the State.

(3) A person is deemed to be soliciting business if he places advertisements in New York newspapers or over New York radio or television stations, and either requests that orders, payments or inquiries be sent to a New York address or delivers orders to New York in vehicles that he controls. 20 NYCRR 526.10(d).

Petitioner employs no capital, does not own or lease any property and does not maintain any offices in New York. Hence, Petitioner does not maintain a place of business in New York within the meaning of sales tax regulation section 526.10(c).

However, Petitioner is soliciting business in the state inasmuch as it has independent contractors in the state soliciting business for Petitioner through the distribution within this state of Petitioner's catalogs.

Accordingly, Petitioner qualifies as a vendor under regulation section 526.10 and is required to collect sales tax on all sales delivered to addresses within New York State.

DATED: October 13, 1988

s/FRANK J. PUCCIA
Director
Technical Services

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