

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

TSB-A-96 (23)S
Sales Tax
April 22, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S951201A

On December 1, 1995, a Petition for Advisory Opinion was received from Norman Levy Associates, Inc., 21415 Civic Center Drive, Suite 306, Southfield, Michigan 48076-3920.

The issues raised by Petitioner, Norman Levy Associates, Inc., are:

(1) Whether the sales described in the statement of facts below are out-of-state sales that are not subject to tax in New York State.

(2) If the sales described are deemed to be out-of-state sales, what is the nature of the business records Petitioner must maintain to satisfy its burden on audit of proving that such sales are out-of-state sales.

Petitioner is a Michigan based industrial auctioneer and appraiser. As part of its business activities, Petitioner conducts public auction and private liquidation sales nationally and internationally. Petitioner does not take title to the equipment to be sold, but accepts payment from the buyer as seller's agent. Petitioner subsequently remits the proceeds net of commission and expenses to the seller.

The particular transactions at issue take place at public auction sales or private liquidation sales conducted on the premises of sellers located in New York State. In these transactions, Petitioner, acting as seller's agent, sells industrial equipment at the sale site to a buyer for use at a site outside New York State. The terms of these sales are "as is" and "where is"

Paragraph 5 of the Terms and Conditions of the Auction Sale states that "[e]very lot will be sold 'AS IS' and 'WHERE IS' without covenant or warranty as to use or fitness whatsoever."

However, paragraph 3 provides in part:

The buyer shall pay the total bid price for all of the lots as purchased before taking delivery of the property (assets). DELIVERY WILL BE MADE OF PURCHASED PROPERTY ONLY AFTER COMPLETION OF THE ENTIRE AUCTION, If for any reason whatsoever a property as bid cannot be delivered within that period of time of delivery provided for at the sale for any reason whatsoever, the buyer expressly waives liability on the part of the Auctioneer and further agrees that any obligation with respect thereto shall be limited to the bid and paid for price for said property (assets). The buyer shall be responsible at his risk and expense for the timely removal of the purchased property (asset) (emphasis added).

In all instances, the buyer arranges and pays for transport to the out-of-state site by common carrier, and the equipment is released by Petitioner to the buyer's common carrier for transport to the out-of-state site. The buyer never takes physical possession of the purchased equipment until delivered by the common carrier to the out-of-state site. In some instances, the sales invoice reflects the release of the goods to a common carrier for shipment to an out-of-state site. In other instances, the invoice is silent in this regard, though other records document these facts

Section 1101(b) of the Tax Law states in part:

(4) Retail sale. (i) 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, ...

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume...

* * *

(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; ...

Section 525.2(a) of the Sales Tax Regulations provides in part:

(2) The sales tax is a "transactions tax," liability for the tax occurring at the time of the transaction. Generally speaking, the taxed transaction is an act resulting in the receipt of consideration for the transfer of title, or possession or both to property or rendition of services from one person to another. The time or method of payment is immaterial, since the tax becomes due at the time of transfer of property or rendition of service.

(3) The sales tax is a "destination tax," that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate.

(4) The sales tax is a "consumer tax," that is, the tax is imposed on the retail sale of tangible personal property and certain services and is collected from the person who purchases at retail--the consumer. The consumer cannot shift the liability for payment of the tax to another person nor otherwise relieve himself of such liability, although the vendor is personally liable for the tax he was responsible for collecting.

Section 526.7(e) of the Sales Tax Regulations provides in part:

Transfer of possession. (1) Except as otherwise provided in paragraph (3) of this subdivision, a sale is taxable at the place where the tangible personal property or service is delivered, or the point at which possession is transferred by the vendor to the purchaser or his designee.

* * *

Example 2: A person, not a resident of New York State, purchases tangible personal property in New York State and has it delivered to his home out of state. The receipt from the sale is not taxable in New York State as delivery was made outside of New York State.

Section 526.10 of the Sales Tax Regulations provides in part:

526.10 Vendor. (Tax Law, Sec. 1101(b)(8)), (a) Persons included. (1)(i) A person making sales of tangible personal property the receipts from which are subject to tax is a vendor.

Example 1: Auctioneers, door to door salesmen, independent brokers, and operators of service stations, retail stores, restaurants, etc., are vendors.

Section 533.2 of the Sales Tax Regulations provides in part:

533.2 Records to be kept. (Tax Law, Secs. 1132(c), 1135, 1138(a), 1142(5)) (a) General. (1) For the proper administration of the sales and use tax law and to prevent evasion of the sales tax, it is statutorily presumed that all receipts from sales and purchases of property or services of any type ... are subject to the tax until the contrary is established. The burden of proving that any receipt, ... is not taxable is on the vendor or the customer. To satisfy his burden of proof, a vendor must maintain records sufficient to verify all transactions.

(2) Upon audit by the department, or at such other times as the department requests, the vendor or user must present all the records described in this Part, kept in a manner suitable to determine the correct amount of tax due, together with such documentation, summaries and schedules, including any New York State or federal tax returns or schedules as the department may request. Such vendor or user must provide the auditors of the department with suitable facilities for conducting their audit or examination. In those instances where the vendor or user maintains or processes records on an electronic data processing system, the department reserves the right to have such records presented on machine-sensible form, and the vendor or user must furnish access to such equipment or records as is necessary for the department to carry out its standard audit procedures.

(3) All records required to be kept by this Part shall be preserved for a period of three years from the due date of the return to which they relate, or the date of filing, if later, except as provided in paragraph (4) of this subdivision, and longer than three years if their contents are material to any period open or extended pursuant to statute, or in any action or proceeding pending before the Department of Taxation and Finance or in a judicial proceeding or action.

* * *

(b) Sales records. (1) Every person required to collect tax, including every person purchasing or selling tangible personal property for resale must keep records of every sale, ... and all amounts paid, charged or due thereon, and of the tax payable thereon. The records must contain a true copy of each:

(i) sales slip, invoice, receipt, contract, statement or other memorandum of sale; ...

(2) The sales record either must provide sufficient detail to independently determine the taxable status of each sale and the amount of tax due and collected thereon or may be substantiated by analysis of supporting records

(3) The seller must maintain records which substantiate points of delivery if delivery was made at a place other than his place of business. Such documents should include receipts from parcel delivery services, common carriers, unregulated truckers, the United States Postal Service, foreign freight forwarders, and logs from company vehicles. Such documents must be referenced to specific sales transactions.

(4) Exemption certificates must be dated and retained in order to prove exempt sales. Once a properly completed certificate is obtained, it relieves the seller of liability to collect the tax on transactions to which the certificate applies. Every vendor accepting an exemption certificate must maintain a method of associating a sale made for exempt purposes with the certificate on file. The burden of proving the validity of any properly completed certificate rests with the customer or other person who issues the certificate.

In this case, the purchaser makes arrangements for delivery of the property to a point outside New York State by a common carrier. Petitioner releases the equipment to the common carrier for transport to the out-of-state site. The purchaser never takes physical possession of the equipment until delivered by the common carrier to the out-of-state site. Under these circumstances, possession is deemed to be transferred outside of New York State. (See TSB-M-82(3.1)S). Under Section 526.7(e) of the Sales and Use Tax Regulations the sale would not be subject to New York State and local sales taxes.

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However, Petitioner, as an auctioneer and acting as a seller's agent, would be a vendor required to register and file returns with the Department of Taxation and Finance and collect the appropriate sales and local use taxes if Petitioner makes sales of tangible personal property where actual physical possession of the property is transferred to the purchaser within New York State. Where the purchaser accepts the property in the State, tax is due even if the property is subsequently delivered out of state. Any delivery of the property purchased to an agent, representative, employee, or other designee of the purchaser in New York State is a taxable transaction, as transfer of possession from the seller to the purchaser is actually effected in New York State. Under section 1132(c) of the Tax Law, all sales are deemed to be taxable unless satisfactory evidence to the contrary is maintained. See section 533.2 of the Sales and Use Tax Regulations.

For sales where delivery is made outside New York State, Petitioner is required to maintain records sufficient to verify the point of delivery and should (in addition to the records required to be kept by section 533.2 of the Sales Tax Regulations and section 1135 of the Tax Law) keep a record of the following information associated with the sales invoice:

1. The address, locality and state where delivery is made;
2. If the property is delivered to a common carrier, indicate the name and business address of the carrier and keep a copy of the bill of lading and payment documentation;
3. The complete name and address of the person to whom the property is delivered;
4. Where the property is delivered to a designee or employee of the purchaser by the seller or its agent, indicate the address where the property is delivered, the name of such designee or employee of the purchaser who accepts delivery, and such designee's or employee's relationship to the purchaser;
5. Any other documentation that Petitioner believes will support its basis for not collecting and remitting the sales taxes.

DATED: April 22, 1996

/s/
Doris S. Bauman
Director
Technical Services Bureau

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