

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-M-08(3)S
Sales Tax
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New Presumption Applicable to Definition of Sales Tax Vendor

Recently enacted legislation (Chapter 57 of the Laws of 2008) amended the Tax Law to provide a presumption that certain sellers of taxable tangible personal property or services are sales tax vendors that are required to register for sales tax purposes and collect state and local sales taxes. The new law provides that a seller is presumed to be a vendor if the seller enters into agreements with residents of this state to refer customers to the seller, as described below under *New rules regarding who is presumed to be a vendor.*

Background

The term *vendor* includes persons who solicit business within the state through employees, independent contractors, agents or other representatives and, by reason thereof, make sales to persons within the state of tangible personal property or services that are subject to sales tax. **Accordingly, if a business located outside New York State solicits sales of taxable tangible personal property or services through employees, salespersons, independent contractors, agents, or other representatives located in New York State, the business must register as a vendor and obtain a *Certificate of Authority* for New York State sales tax purposes.** (See Tax Law Section 1101(b)(8) and Sales and Use Tax Regulations Section 526.10(a)(3).)

For example, an out-of-state business that uses independent manufacturers' representatives in New York State to sell its product in New York State is considered to be soliciting business within this state through the use of independent contractors or representatives. (See Sales and Use Tax Regulations Section 526.10(a)(3).) Therefore, the business must register as a vendor for New York State and local sales tax purposes. Also, an e-commerce retailer that uses persons to act as its representatives in the state to solicit sales or to make and maintain a market in return for commissions, referral fees or other types of compensation is considered to be soliciting business within this state through the use of independent contractors or representatives. Therefore, the e-commerce retailer must register as a vendor for New York State and local sales tax purposes. However, a business is not considered a vendor under section 1101(b)(8) of the Tax Law merely because the business stores advertising on a server or other computer equipment located in New York State, or has advertising disseminated or displayed on the Internet. (See Tax Law Section 12 and TSB-M-97(1.1)S.)

New rules regarding who is presumed to be a vendor

The new legislation provides that a seller that makes taxable sales of tangible personal property or services in New York State is presumed to be a vendor required to be registered for sales tax purposes and required to collect sales tax on all of its taxable sales in New York State, if **both** of the following conditions are met:

- The seller enters into an agreement or agreements with a New York State resident¹ or residents under which, for a commission or other consideration, the resident representative directly or indirectly refers potential customers to the seller, whether by link on an Internet Web site or otherwise. A resident representative would be indirectly referring potential customers to the seller where, for example, the resident representative refers potential customers to its own Web site, or to another party's Web site which then directs the potential customer to the seller's Web site.
- The cumulative gross receipts from sales by the seller to customers in New York State as a result of referrals to the seller by all of the seller's resident representatives under the type of contract or agreement described above total more than \$10,000 during the preceding four quarterly sales tax periods. (Sales tax quarterly periods end on the last day of February, May, August and November.)

For purposes of the presumption described above, a seller is also considered to have met the condition of having an agreement with a New York State resident where the seller enters into an agreement with a third party under which the third party, in turn, enters into an agreement with the New York resident to act as the seller's representative.

In addition, an agreement to place an advertisement does not give rise to the presumption described above. For this purpose, placing an advertisement does not include the placement of a link on a Web site that, directly or indirectly, links to the Web site of a seller, where the consideration for placing the link on the Web site is based on the volume of completed sales generated by the link.

Example 1:

CAB Company (CAB) manufactures and sells specialty fitness equipment. CAB is located in Arizona, where it has its manufacturing plant, administrative offices and catalog call center. CAB has no retail outlets in New York State. Other than making sales of its products, as described below, which are delivered in New York State by common carrier trucking companies, CAB has no other connection with New York State.

CAB maintains a market for its products in New York State mainly by entering into agreements with health and fitness clubs (clubs) located throughout the state whereby the clubs refer club members to CAB's fitness equipment products. When a club member purchases a product from CAB, the member's club is identified and paid a commission equal to 5% of the selling price of the product. From March 1, 2007, to February 29, 2008 (i.e., the preceding four

¹ A New York State resident for sales tax purposes includes, but is not limited to:

- any individual who maintains a permanent place of abode in New York State; and
- any corporation incorporated under the laws of New York, and any corporation, association, partnership or other entity doing business or maintaining a place of business, or operating a hotel, place of amusement or social or athletic club in New York State. (See Sales and Use Tax Regulations Section 526.15.)

quarterly sales tax periods), CAB's gross receipts from sales made through its agreements with the clubs located in New York State totaled \$38,628.

Based on the foregoing, CAB is presumed to be making sales in New York State through independent contractors or other representatives and required to be registered as a sales tax vendor, collect New York State and local sales taxes, and file the required sales tax returns.

Example 2:

XYZ Company (XYZ) is an Internet-based retailer of sporting goods specializing in downhill skiing equipment. XYZ is located in Vermont, where it has its administrative offices and its warehouse, which holds its inventory for sale. XYZ makes sales of its merchandise throughout the United States and has customers in New York State. The merchandise sold by XYZ is delivered by the U.S. Postal Service or by common carrier.

As part of its marketing plan, XYZ has entered into agreements with several ski clubs located in New York State whereby the ski clubs will maintain links to XYZ's retail Web site on the clubs' own Web sites. XYZ will pay a commission to the ski clubs based on the sales that XYZ makes that originate from these links.

From March 1, 2007, to February 29, 2008 (i.e., the preceding four quarterly sales tax periods), XYZ has gross receipts from sales of its merchandise based on these agreements with the New York State ski clubs totaling \$78,390.

Based on the foregoing, XYZ is presumed to be making taxable sales in New York State by soliciting business in New York State through the use of independent contractors or other representatives and required to be registered as a sales tax vendor, collect New York State and local sales taxes, and file the required sales tax returns.

Example 3:

T sells a variety of small tools nationwide, over the Internet. T's home office is in Arkansas, where its warehouse and administrative offices are located. Other than making sales of its products as described below, which are delivered to its customers in New York State by common carrier, T has no other connection with New York State.

T enters into a contract with S, a service provider. Under the contract, S enters into agreements with New York State residents on behalf of T, whereby the New York State residents agree to refer potential customers to T's Web site in order to purchase T's products by placing T's product links on their Web sites. Under the contract, S tracks sales of T's products as a result of the referrals from the New York State residents' Web sites. S distributes commissions to the New York State resident representatives based on these sales from an account maintained by S on behalf of T for this purpose.

From March 1, 2007, to February 29, 2008 (i.e., the preceding four quarterly sales tax periods), T's gross receipts from sales made under its agreements with S and the New York State

residents as described above totaled \$68,000. Therefore, T is presumed to be soliciting sales in New York State through the use of independent contractors or other representatives and required to be registered as a sales tax vendor, collect New York State and local sales taxes, and file the required sales tax returns.

Example 4:

G Inc. (G) is an Internet-based retailer of gardening tools and supplies. G's home office is in North Carolina, where its warehouse and administrative offices are located. G makes sales of its products nationwide, including New York State, and its products are delivered to its customers by common carrier. Other than having customers in New York State and the agreements described below, G has no other connection with New York State.

As part of its business plan to market its products in New York State, G enters into agreements with several garden clubs and other local organizations to place online advertisements on their Web sites, which, when clicked, lead the Web site user to G's retail Web site. In exchange for placing G's advertisements on its Web site, G will pay the organizations a set fee based only on the number of clicks on the link to G's Web site, whether or not sales are made.

G's agreement with the organizations is merely to place advertising on the organizations' Web sites. Therefore, G is not presumed to be a vendor making taxable sales in New York State by soliciting business in New York State through the use of independent contractors or other representatives. Therefore, G is not required to register for sales tax purposes.

Presumption that solicitation takes place may be rebutted

A seller may rebut the presumption that it is soliciting sales in New York State through resident representatives. For purposes of administering the new presumption, the Tax Department will deem the presumption rebutted where the seller is able to establish that the only activity of its resident representatives in New York State on behalf of the seller is a link provided on the representatives' Web sites to the seller's Web site and none of the resident representatives engage in any solicitation activity in the state targeted at potential New York State customers on behalf of the seller.

Example 5:

This example assumes the same facts as in Example 2 on page 3 of this memorandum. In addition, at least one of the ski clubs refers potential customers to XYZ by distributing flyers in New York State that promote the links to XYZ on the ski club's Web site. Therefore, XYZ is unable to rebut the presumption that it is making taxable sales in New York State through New York State resident representatives. XYZ is required to register for sales tax purposes and collect sales tax on all of its taxable sales in New York State.

Example 6:

This example also assumes the same facts as in Example 2 on page 3 of this memorandum. However, none of the ski clubs refer potential customers to XYZ through the use of flyers, newsletters, telephone calls or e-mails to club members or any other means of solicitation in the state targeted at potential New York State customers on behalf of XYZ. Therefore, XYZ may successfully rebut the presumption that it is making taxable sales in New York State through New York State resident representatives and XYZ is not required to register for sales tax purposes.

Relief for sellers covered by the presumption

For sales tax quarterly periods beginning before June 1, 2008, the Tax Department may not assess sales tax required to be collected, or related penalty and interest, against a business that is covered by the presumption discussed in this memorandum, if the business meets all of the following conditions:

- On April 23, 2008, the business is covered by the presumption such that the business is a vendor by virtue of having a representative soliciting sales on its behalf in the state.
- The business is not required to be registered for sales tax purposes and collect tax for any reason other than having resident representatives soliciting sales in the state as described in this memorandum.
- The business was not registered for sales tax purposes on April 23, 2008, and was not registered for sales tax purposes at any time between July 23, 2007 and April 23, 2008.
- The business was not registered for sales tax purposes at the time it made the sales for which it failed to collect sales tax.
- The business registers for sales tax purposes and begins to collect sales tax from its New York State customers by **June 1, 2008**.

(See Tax Law Section 1101(b)(8)(vi).)

Note: A TSB-M is an informational statement of changes to law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.

**Additional Information on How Sellers May Rebut the New Presumption
Applicable to the Definition of Sales Tax Vendor as Described in
TSB-M-08(3)S**

This memorandum provides additional guidance relating to rebutting the presumption that a seller is a vendor required to be registered for sales tax purposes and collect state and local sales taxes pursuant to Chapter 57 of the Laws of 2008.

TSB-M-08(3)S, *New Presumption Applicable to Definition of Sales Tax Vendor*, states that the Tax Department will deem the presumption rebutted where the seller is able to establish that the only activity of its resident representatives in New York State on behalf of the seller is placing a link on the resident representatives' Web sites to the seller's Web site. In addition, none of the resident representatives may engage in any solicitation activity in the state targeted at potential New York State customers on behalf of the seller.

The inclusion of language in a contract or agreement between a seller and a resident representative that prohibits solicitation by the resident representative is not sufficient, by itself, to rebut the presumption that the seller is a vendor. In order to rebut the presumption, the seller must be able to demonstrate both that the prohibition has been established and that the resident representative has complied with it. Thus, for example, a seller may rebut the presumption by meeting both of the following conditions:

Contract condition - The contract or agreement between the seller and the resident representative provides that the resident representative is prohibited from engaging in any solicitation activities in New York State that refer potential customers to the seller including, but not limited to: distributing flyers, coupons, newsletters and other printed promotional materials, or electronic equivalents; verbal solicitation (e.g., in-person referrals); initiating telephone calls; and sending e-mails. In addition, if the resident representative is an organization such as a club or a non-profit group, the contract or agreement must provide that the organization will maintain on its Web site information alerting its members to the prohibition against each of the solicitation activities described above; and

Proof of compliance condition - Each resident representative must submit to the seller, on an annual basis, a signed certification stating that the resident representative has not engaged in any prohibited solicitation activities in New York State, as described above, at any time during the previous year. In addition, if the resident representative is an organization, the annual certification must also include a statement from the resident organization certifying that its Web site includes information directed at its members alerting them to the prohibition against the solicitation activities described above. Furthermore, the certification must contain a statement alerting the representative that the certification and any information submitted with it is subject to verification and audit by the Tax Department.

With regard to the proof of compliance condition:

- The resident representatives may submit the annual certification to the seller in paper form or electronically. The certification must be signed (either manually or electronically) by the resident representative. If the resident representative is an organization, the certification must be signed by a person who has the authority to execute binding contracts on behalf of the organization. The certification must also show the name and address of the resident representative, and, if the resident representative is an organization, the name and address of the person signing the certification.
- A seller will be considered to have satisfied this condition if it receives the completed certifications from its resident representatives and the seller accepts the certifications in good faith (that is, the seller does not know or have reason to know that any of the certifications are false or fraudulent).
- The seller must retain copies of the certifications that are signed by and received from resident representatives, in either hard-copy or electronic format, as part of the seller's record keeping requirements. In addition, the seller must make the copies available to the department upon request.
- In weighing the significance of a seller's reliance on certifications from fewer than all its New York resident representatives, the Tax Department will apply the standards for constitutional nexus set forth in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and *Orvis Co. v. Tax Appeals Tribunal*, 86 N.Y. 2d 165, 178 (1995).
- There is no specific form required for this certification process. The seller may choose the form of the certification as long as it contains the information prescribed above. The Tax Department plans to issue a form in the near future that sellers may use to obtain the certification.

If the seller meets the two conditions described above, it rebuts the presumption. Accordingly, the seller need not register and collect tax unless the Department subsequently determines that any of the resident representatives are actually engaging in solicitation activities in New York State or that the seller is a vendor for some other reason (e.g., the seller has employees in the State).

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