

PUBLICATION

Spotlight on New York: Definition of Sales Tax "Vendor" Expanded to Include Remote Sellers with Affiliates in New York State

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Effective June 1, 2009, recently enacted New York tax legislation broadly expands the definition of a sales tax vendor that is required to collect and remit New York sales or use taxes on sales of taxable tangible personal property or services to New York customers. The legislation targets remote sellers that are affiliated by as little as a five percent direct or indirect ownership interest with a business in New York. On May 6, the New York Department of Taxation and Finance (Department) issued Technical Services Bulletin (TSB)-M-09(3)S to explain its interpretation of the 2009 law change.

Remote Sellers with New York Affiliates

Under prior New York law, an out-of-state (remote) seller was required to register as a sales tax vendor if any in-state business, whether or not affiliated with the remote seller, engaged in solicitation activities on behalf of the remote seller. Amended New York Tax Law Section 1101(b)(8)(l) significantly expands the type of activities that require registration, and they go well beyond solicitation. Beginning June 1, a remote seller is defined as a vendor that must register for sales tax purposes and begin collecting and remitting sales tax when it is affiliated with a business in New York once either of the following conditions are satisfied: **Condition I** - The remote seller and New York affiliate use the same trademark, service mark, or trade name in New York; or **Condition II** - The New York affiliate engages in activities in New York that benefit the remote seller in its development or maintenance of a market in New York to the extent the activities satisfy nexus requirements under the U.S. Constitution.

Nexus requirements are one of the constitutional protections for taxpayers from over-reaching state tax laws. However, the New York legislation's definition of affiliation, together with the Department's view of market development and maintenance activities, pushes the envelope of nexus-creating activities.

Definition of Affiliation

Under this recently enacted law, a New York business and a remote seller are affiliated with each other if one owns, directly or indirectly, more than five percent of the other, or if more than five percent of each person is owned, directly or indirectly, by the same person or an affiliated group of persons. Under New York Tax Law Section 1101(a), a "person" includes corporations, partnerships, limited liability companies, and individuals.

Activities of Affiliate Resulting in Vendor Status for Remote Seller

Under Condition II, the Department will consider a range of activities by a New York affiliate as satisfying market development or maintenance on behalf of the remote seller. However, the Department will first determine if the percentage of direct or indirect ownership exceeds 50 percent. If the remote seller and New York person are affiliated by a greater than 50 percent direct or indirect ownership interest, the Department will consider the remote seller a vendor if the New York person performs certain activities for the remote seller, including: accepting merchandise returns; distributing catalogs or coupons on behalf of the remote seller; distributing or displaying advertising of the remote seller; performing repair services on behalf of the remote seller; and directing the business activities of the remote seller, including decisions about strategic planning,

marketing, inventory, staffing and distribution. These and other activities focused on by the Department in TSB-M-09(3)S may be constitutionally suspect based on decisions from other state courts.

If the affiliation is a direct or indirect ownership interest of more than five percent but is equal to or less than 50 percent, the Department will evaluate whether the remote seller is a New York vendor by considering (1) the nature and extent of the activities performed by the New York person on behalf of the remote seller, and (2) the extent of the actual direct or indirect control exercised by one of the affiliates over the other or by any affiliate in the group over the New York person.

New York's Trend of Expanding Sales Tax Jurisdiction

New York is taking a leading role in expanding sales tax nexus so as to acquire taxing jurisdiction over remote sellers. In addition to this recently enacted 2009 "affiliation" legislation discussed above, 2008 legislation targeted remote sellers entering into agreements with residents of New York to refer customers to the remote seller (for example, a New York resident's website hosted in that State which allows a customer to click on a link to a remote seller's website). New York Tax Law Section 1101(b)(8)(i). The 2008 legislation, so-called the "Amazon.com law," is currently being challenged but it was sustained by a New York trial court. *Amazon.com LLC v. New York Dept. of Taxation and Finance*, No. 601247/08 (N.Y. Supr. Ct., County of New York, Jan. 12, 2009); *Overstock.com, Inc. v. New York Dept. of Taxation and Finance*, No. 107581/08 (N.Y. Supr. Ct., County of New York, Jan. 12, 2009). Amazon.com has appealed the dismissal of its case to the Appellate Division.

At least seven other states have proposed similar "Amazon.com" legislation modeled after New York's, including California, Maryland, North Carolina and Tennessee. Other states also should be expected to consider laws similar to New York's 2009 affiliation legislation.

Should you wish to discuss these New York developments in more detail, please contact any of the attorneys within the Firm's Tax Department.