

SALES AND USE TAX BULLETIN 2011-01

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Remote Seller Nexus

Pursuant to the provisions of the Tax Reform Code of 1971 ("TRC") the Secretary of the Department of Revenue ("the Department") issues the following reminder to retailers having a nexus with the Commonwealth ("remote sellers") to collect Pennsylvania Sales Tax on internet, catalog and telephone sales. The TRC will be enforced by the Department consistent with the analysis set forth below and in accordance with applicable state and federal law.

Factual and Legal Background

Pennsylvania has long imposed a sales tax on each sale at retail of tangible personal property or taxable services within the Commonwealth. A vendor is required to collect the tax from the purchaser and remit the collected tax to the Commonwealth. 72 P.S. §7202(a). If the vendor does not collect tax on a taxable sale at retail, and the purchaser uses the purchased item or service within the Commonwealth, the purchaser is required to pay use tax directly to the Commonwealth. 72 P.S. §7202(b). Thus, when anyone in Pennsylvania purchases items from remote sellers, where the items would be taxable if purchased at a store in Pennsylvania and the remote sellers do not collect tax, the purchaser is legally required to accrue and remit tax directly to the Department.

The Department recognizes that it is problematic for individual purchasers to accrue and remit tax on their taxable purchases from remote sellers. It is much more efficient and much less burdensome for the tax to be collected by vendors at the time of the purchase, and for the vendors to remit the tax directly to the Department. The TRC requires vendors that are maintaining a place of business within the Commonwealth to collect sales tax on each sale at retail within the Commonwealth. 72 P.S. §§ 7201(p) and 7202(a).

The TRC defines "maintaining a place of business in this Commonwealth" as:

"(1) Having, maintaining or using within this Commonwealth, **either directly or through a subsidiary, representative or an agent**, an office, distribution house, sales house, warehouse, service enterprise or other place of business; or any agent of general or restricted authority, or representative, irrespective of whether the place of business,

representative or agent is located here, permanently or temporarily, or whether the person or subsidiary maintaining the place of business, representative or agent is authorized to do business within this Commonwealth.

(2) **Engaging in any activity** as a business within this Commonwealth by any person, either directly or **through a subsidiary, representative or an agent, in connection with the lease, sale or delivery of tangible personal property** or the performance of services thereon for use, storage or consumption or in connection with the sale or delivery for use of the services described in subclauses (11) through (18) of clause (k) of this section, including, but not limited to, having, maintaining or using any office, distribution house, sales house, warehouse or other place of business, any stock of goods or any solicitor, canvasser, salesman, representative or agent under its authority, at its direction or with its permission, regardless of whether the person or subsidiary is authorized to do business in this Commonwealth.

(3) Regularly or substantially soliciting orders within this Commonwealth in connection with the lease, sale or delivery of tangible personal property to or the performance thereon of services or in connection with the sale or delivery of the services described in subclauses (11) through (18) of clause (k) of this section for residents of this Commonwealth by means of catalogues or other advertising, whether the orders are accepted within or without this Commonwealth.

(3.1) Entering this Commonwealth by any person to provide assembly, service or repair of tangible personal property, either directly or through a subsidiary, representative or an agent.

(3.2) Delivering tangible personal property to locations within this Commonwealth if the delivery includes the unpacking, positioning, placing or assembling of the tangible personal property.

(3.3) Having any contact within this Commonwealth which would allow the Commonwealth to require a person to collect and remit tax under the Constitution of the United States."

72 P.S. § 7201(b) (emphasis supplied).

Pursuant to the TRC, the Department is authorized to require remote sellers to collect and remit tax on their sales to Pennsylvania customers to the full extent authorized by the United States Constitution.

Many years have passed since the United States Supreme Court has reviewed this issue

and provided guidance concerning the Constitutional limits of requiring a vendor to collect and remit the tax. Pursuant to the United States Supreme Court, when determining whether a business has tax nexus with a state, which in part is dependent upon the physical presence within the state of representatives of that business, it does not matter whether the representatives are regular employees of the company, or are independent contractors hired by the company. Scripto, Inc. v. Carson, 362 U.S. 207 (1960). In Scripto, the vendor was required to collect and remit Florida sales tax based on the activity of sales representatives within Florida on behalf of Scripto, even though those representatives were not Scripto's employees. Thus, a remote seller can have nexus with Pennsylvania because of its relationship with third parties who act as agents or representatives of the remote seller who have a physical presence within the Commonwealth.

More recently, in Quill Corporation v. North Dakota, 504 U.S. 298 (1992), the United States Supreme Court rejected North Dakota's efforts to require Quill Corporation to collect sales tax based on Quill Corporation using common carriers such as the United States Postal Authority to send catalogs and product into the state. In Quill, the Supreme Court discussed its previous decision in Scripto, reiterating that Scripto's independent contractors within Florida established sufficient physical presence to permit the State of Florida to require Scripto to collect and remit tax on its sales to Florida customers. Quill Corporation, however, had no such physical presence through either employees or representatives.

Remote Seller Activity Constituting Nexus with the Commonwealth

Upon carefully reviewing the United States Supreme Court's decisions, and also reviewing the manner in which many remote sellers currently operate, particularly given the relationships that some out-of-state remote sellers have with Pennsylvania representatives and agents, the Department is providing this guidance concerning which activities satisfy the TRC and United States Constitution insofar as maintaining a place of business in the Commonwealth.

Examples of maintaining a place of business in the Commonwealth include, but are not limited to:

- (1) A remote seller storing its property or the property of a representative at a distribution or fulfillment center located within the Commonwealth, regardless if the center also stores property of third parties that is distributed from the same location.
- (2) A remote seller who has a contractual relationship with an entity or individual physically located in Pennsylvania whose website has a link that encourages purchasers to place orders with the remote sellers. The in-state entity or individual receives consideration for the contractual relationship with the remote seller.

- (3) A remote seller utilizing affiliates, agents and/or independent contractors located in Pennsylvania who will provide repair, delivery or other service relating to tangible personal property sold by the remote seller to Pennsylvania customers.
- (4) A remote seller's affiliates, agents and/or independent contractors provide service(s) within the Commonwealth (including, but not limited to storage, delivery, marketing or soliciting sales) that benefit, support and/or complement the remote seller's business activity.
- (5) A remote seller's employee(s) regularly travel(s) to Pennsylvania for any purpose related to the remote seller's business activity.
- (6) A remote seller who accepts orders that are directly shipped to Pennsylvania customers from a Pennsylvania facility which is operated by a remote seller's affiliate, agent or independent contractor.
- (7) A remote seller who regularly solicits orders from Pennsylvania customers via the website of an entity or individual physically located in Pennsylvania, such as via click-through technology.

When a remote seller is maintaining a place of business in this Commonwealth as defined above in the TRC, as illustrated by the foregoing examples, such remote seller has nexus with the Commonwealth. The TRC, read in conjunction with the United States Constitution and relevant United States Supreme Court decisions requires these remote sellers to collect sales tax on sales within Pennsylvania. The Department will enforce these provisions accordingly.

Remote sellers and any other vendors who have nexus with Pennsylvania, who sell products shipped to Pennsylvania locations and who are not currently registered to collect and remit Pennsylvania sales tax should contact the Department about collection obligations and registration.