Title: Third Party Drop-Shipments

Nov 17, 1994

Re: TAA 94A-060

Applicability of Florida sales tax on third party drop-shipments wherein sales are made by a registered Florida dealer to an unregistered out-of-state customer who requires shipment of the goods to a Florida end-purchaser.
Section 212.07(1)(b), F.S.
Rule 12A-1.038(2), and (4), F.A.C.
Rule 12A-1.091(10), F.A.C.

Dear :

This is a response, styled a Technical Assistance Advisement, to your letter dated August 15, 1994, in which you questioned the validity of subjecting to Florida sales tax, certain third party drop-shipment transactions of the business entity you represent, XXX (herein Taxpayer), notwithstanding an administrative rule, and an "internal position" of the Department which describe such transactions as taxable. You contend that a statute, s. 212.06(6), F.S., levies Florida sales tax solely on "...the sale at retail..." and that the drop shipments described in your letter are not such sales "at retail." You also cite a recent decision in the New Jersey Tax Court, categorized by the court as a case "of first impression," wherein certain drop-shipments of the kind you assert are described in your letter, were found to be sales for resale, not subject to tax.

Specifically, your letter asks the Department to determine whether 6 different drop-shipment transactions are subject to Florida sales tax.

Before the Department formulates its response to those transactions, the facts, as described in your letter will, in part, be replicated below, as will your arguments that these drop-shipments are not "sales at retail."

You provide the following facts:

"[Taxpayer] has a Florida manufacturing facility which is registered as a dealer for Florida sales tax purposes. [Taxpayer's] sales are generated from catalogs which are used by distributors located throughout the country. [Taxpayer] receives purchase orders (P.O.'s) from the distributors to imprint specialized logos on ink pens or lighters. These orders are placed by the distributors by mail, overnight, fax, or telephone, based on [Taxpayer's] catalog prices and discount codes. In order to conduct efficient operations, the distributors often request [Taxpayer] to drop ship the imprinted pens or lighters to the end user's location. Some of these drop shipments are to the distributors' customer location in Florida.
...

"The distributors' business operations consists of selling the pens/lighters ordered from [Taxpayer] to end users all over the country. As with similar manufacturers in this industry, [Taxpayer] has no direct contact with the distributor's customers and has no control over the distributor's retail pricing to end users.
...

"[Taxpayer] bills the distributors based on the wholesale price provided for the items specified in the P.O. If the distributor is a registered Florida dealer, it provides [Taxpayer] a Florida sale-for-resale certificate for sales tax on the transaction. In many instances, the distributor is not located in Florida and has not registered to do business in Florida. As the distributor in this case can not provide a valid sale-for-resale certificate, [Taxpayer] typically will receive a certificate from the distributor's home state to support that the transaction is a sale-for-resale or that the shipment will be delivered outside Florida.

"The customers who purchase pens/lighters from the distributors may be the end user, a tax exempt organization or governmental entity, a reseller or an organization such as a cruise ship or airline which may present valid direct pay permits to the distributor. Also, the customers may have the pens/lighters

delivered to one main location for distribution to other company locations throughout the country.

"The distributor bills the end user the agreed-upon retail price for the ink pens/lighters. In most, if not all, instances [Taxpayer] does not have knowledge of the retail price being charged between the distributor and the ultimate purchaser and does not ship C.O.D. When the distributor is not located or registered in Florida as a dealer, it does not charge sales tax to the Florida end user. If the distributor is a Florida dealer, it charges and collects Florida sales tax on sales to Florida end users or receives an appropriate exemption certificate.

"[Taxpayer] has no contractual relationship with the end users. The distributor's customer does not receive a bill from [Taxpayer] and the two parties have no direct contact other than the delivery of the goods via a common carrier. [Taxpayer] delivers the goods F.O.B from its manufacturing facility to the common carrier."

In the segment of your letter under the legend TAXATION, you cite s. 212.06(6), F.S., as support of your argument that these drop-shipments are sales for resale. This statute provides that it is the intention of the statutory chapter to levy a tax on the sale at retail. You also cite Rule 12A-1.091(10), F.A.C., which requires that sales tax be collected from an out-of-state unregistered dealer who buys goods from a Florida manufacturer who then delivers the goods to the Florida customer.

You also discuss an "internal position" of the Department as it was expressed in a trade group questionnaire. This "internal position" presents eight diagrams depicting different fact patterns of drop-shipments. You state that the seventh and eighth diagrams are analogous to the facts of [Taxpayer].

In the segment of your letter under the legend TAXPAYER'S POSITION you reiterate the position that the sale between Taxpayer and distributor is not a sale at retail because it is not a sale to the end user. You state that Taxpayer currently receives a Florida resale certificate in a sale to a Florida

based distributor, but if the sale is to a distributor located in another state the Taxpayer receives that state's resale documentation.

You protest the Department's requirement that in this latter event Taxpayer must collect the tax from the out-of-state distributor as required under Rule 12A-1.091(10), F.A.C., or that, in another instance, Taxpayer must collect the tax from the end-user, as expressed in the "internal position," if the drop-shipment is made from Taxpayer's location in Florida to the end user's location in Florida.

You also cite the case of Steelcase, Inc. v. Director, Division of Taxation, CCH New Jersey Tax Reports 400-234 (New Jersey Tax Court 1993), wherein the court held that New Jersey law and the regulations of the Division of Taxation require the Division of Taxation to consider any proof, including documents of the domiciliary state of the non-New Jersey distributor, in determining whether the sale is for resale. If the transaction is of that character, then no tax may be levied irrespective whether the goods are shipped from a location in New Jersey to the New Jersey site of the distributor's customer. You conclude your letter by positing 6 fact patterns all of which relate to Taxpayer who ships to a Florida end-user pursuant to instructions from Taxpayer's out-of-state unregistered customer.

Department Response

As you correctly state, the Department's administrative rule, Rule 12A-1.091(10), F.A.C., requires a Florida manufacturer to collect Florida sales tax from an out-of-state, unregistered dealer in the instance where the manufacturer delivers the goods to the Florida customer of the dealer. You are also correct when you cite the Department's response to a trade group's questionnaire that the Florida drop-shipper (when such shipper is not a Florida manufacturer) is required to collect tax from the Florida customer of an out-of-state, unregistered seller when the drop-shipper delivers the goods from the drop-shipper's Florida site, or when the drop shipper either delivers the goods by its own or leased trucks, or when the payment terms are COD irrespective, in either of these two instances, of the location

of the drop-shipper.

It is the understanding of the Department that Taxpayer operates from its manufacturing facility in Florida. Thus, as required by subsection (10) of Rule 12A-1.091, F.A.C., Taxpayer shall charge the appropriate Florida sales tax on any sale to an out-of-state unregistered dealer who requires Taxpayer, pursuant to such sale, to deliver its products to the Florida customer of such dealer.

This rule, Rule 12A-1.091(10), F.A.C., requires a Florida manufacturer to collect the Florida sales tax on any taxable sale made to an unregistered out-of-state dealer who directs the Florida manufacturer to delivery the goods, which are the subject matter of the sale, to the Florida customer of the out-of-state dealer. The tax is collected from the out-of-state dealer because the dealer, being unregistered in Florida for sales tax purposes, cannot extend to the Florida manufacturer a valid Florida resale certificate.

It is the position of the Department that the Steelcase decision is not persuasive because the Florida law and administrative rules do replicate the New Jersey law which the New Jersey Tax Court found to be a permissive scheme of extending resale certificates. In Steelcase, the court concluded that the New Jersey statute, s. 54:32B-12(b), NJSA, failed to provide the requirement that the sole, acceptable resale certificate be issued by the New Jersey dealer.

However, the Florida statutes have no such deficiency. Section 212.07(1)(b) requires that a resale be made in "...strict compliance with the rules and regulations, and any dealer who makes a sale for resale which is not in strict compliance shall himself be liable for and pay the tax."

The administrative rules interpreting this statute leave no doubt (except in the instances of specific exceptions which exceptions enforce the Department's position) that the only resale certificate which is acceptable is that issued by Florida. Subsection (4) of Rule 12A-1.038, F.A.C., strictly limits resale certificates to those issued by this state. The

rule language states that "[a] dealer shall refuse to accept a resale certificate [except in the instance of export from this state solely for purposes of resale] and shall collect the tax unless the purchaser has obtained a dealer's certificate of registration from the Department of Revenue...." Subsection (2) of the administrative rule even provides the standard for determining the effective date of the Florida resale certificate. These provisions provided the basis for settling the question of the issuance of a valid certificate of resale in the decision by the Supreme Court of this state in State Department of Revenue v. Anderson, 404 So.2d 397 (Fla. 1981).

Thus, the Department finds that in no instance may Taxpayer avoid the collection of sales tax from its out-of-state unregistered customer in any of the fact patterns provided at the conclusion of your letter. The tax is on the first level of each of the 6 transactions, that is, on the sales by Taxpayer to the unregistered out-of-state customer who must pay Florida sales tax because such customer, being unregistered in Florida for sales tax purposes, may not extend a valid Florida resale certificate.

With respect to the second level of the 6 transactions, that of the sales by Taxpayer's customer to the Florida purchaser, the liability for the payment of Florida use tax by the Florida end user would only occur in fact pattern 1. In fact patterns 2., 3., 4., 5., and 6., no Florida use tax could be imposed because each of the hypothetical Florida purchasers would be free of the tax by reason of the purchase for resale, possession of exemption certificates, or direct pay authority, or by the provision of export documentation.

Having found that the above cited statutes, case law and administrative rule provisions require the status of registration with the State as a prerequisite to the issuance of a valid resale certificate, the provisions of the "internal position" you describe in your letter are not relevant to the fact patterns posited by you, and need not be discussed.

This response constitutes a Technical Assistance Advisement under s. 213.22, F.S., which is binding on the department only

under the facts and circumstances described in the request for this advice as specified in s. 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this advice is based may subject similar future transactions to a different treatment than expressed in this response.

You are further advised that this response and your request are public records under Chapter 119, F.S., which are subject to disclosure to the public under the conditions of s. 213.22, F.S. Your name, address, and any other details which might lead to identification of the taxpayer must be deleted by the Department before disclosure. In an effort to protect the confidentiality of such information, we request you notify the undersigned in writing within 15 days of any deletions you wish made to the request or the response.

Sincerely,

Robert G. Parsons
Tax Law Specialist

Ctrl #17813