

**NEW YORK STATE SALES AND USE TAX:
A DISCUSSION OF JURISDICTIONAL AND REPORTING ISSUES RELATED
TO BUSINESS TAXPAYERS**

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I. Overview of New York Sales and Use Taxes

A. Sales Tax

The New York State Tax Law (“Tax Law”) at § 1105(a) imposes a tax based upon the sales price of tangible personal property at retail, said tax being referred as sales tax. The term tangible personal property is defined as personal property that has a material existence and is perceptible to human sense. Tax Law § 1101(b)(6). Tangible personal property includes, but is not limited to, raw material, manufactured items, artistic renderings, animals, trees, shrubs, plants, water, coins, stamps and precious metal. 20 NYCRR § 526.8. Tangible personal property does not include real estate or intangible property (i.e. stocks, bonds and other investments). 20 NYCRR § 526.3(c)(1) & (2). Additionally, the Tax Law at sections 1105(b) and (c) imposes sale tax upon the charge for certain enumerated utilities and services.

The sales tax is generally imposed on six categories of transactions involving the sale of goods or services. These include:

1. Retail sales of tangible personal property to a consumer, including leases and rentals.
2. Sale of gas, utilities and telephone and telegraph services
 - Including gas, electricity, refrigeration and steam; gas, electric, refrigeration and steam service; telephony and telegraphy or telephone and telegraph service, other than interstate and international service; telephone answering service; and, prepaid telephone calling service
3. Sale of taxable services in nine (9) categories

- Information Services that include providing information by printed or mimeographed matter or any other method of duplication and the collection, compilation or analysis of information and the furnishing of reports. This category does not include information which is of a personal or individual nature and not substantially incorporated in reports furnished to others; is furnished by advertising or other agents; or representatives; or is used by newspapers and radio and television broadcasters in the collection and dissemination of news.
 - Processing and printing services.
 - Installation, repair, and maintenance services performed upon tangible personal property.
 - Storage and safe deposit box rental.
 - Real estate maintenance, service or repair, but not on capital improvements or casual provider of service.
 - Motor vehicle parking and garaging services but not in private homes or homeowner's association.
 - Interior decorating and designing services but not on services of licensed engineer or architect that are in the practice of architecture or engineering.
 - Protective and detective services.
 - Telephonic and telegraphic entertainment and information services.
4. Food and drink sold by restaurants and caterers.

5. Room occupancy.
6. Admissions charges, social or athletic club dues and roof garden or cabaret charges.

Because the sales tax is a transaction tax that is imposed on the transfer of title, possession or both to tangible personal property for consideration or on the rendering of certain services for payment, a gift is not subject to sales tax due to the absence of consideration. Matte of Greenblatt TSB-H-85- (229S) (Oct. 3. 1985).

Moreover, a taxpayer may be subject to sales tax in New York because of the purchases of property or services, or a taxpayer may have collection and remittance obligations with respect to property or services sold to customers.

B. Use Tax

The use tax is intended to prevent the circumvention of the sales tax by imposing a tax on the purchase of tangible personal property and/or certain services that are used in New York without the payment of sales tax. The use tax applies when property is acquired out of state and brought into New York or is purchased from an out-of-state vendor who has no obligation to collect New York sales tax. Due to differing local jurisdiction sales tax rates, use tax is also due when property is purchased in one locality and subsequently brought into another locality. Use tax also applies where a manufacturer purchases property on a tax free basis (i.e. as a sale for resale) and subsequently uses the property rather than reselling it to its customer or a business manufactures property and uses the property in its operations.

The use tax applies to New York resident individuals, estates and trusts and businesses in New York whether conducted by entities such as corporations, partnerships or limited liability companies or sole proprietorships.

An individual is considered a resident for use tax purposes if he/she maintains a permanent place of abode in New York. This rule is broader than the income tax rule, which also requires an individual to be present in New York in the aggregate more than 183 days during a taxable year. This distinction may result in a person being considered a resident for use tax purposes on the basis of having a residence in New York that is not his/her domicile, when for income tax purposes this person is considered a nonresident of New York.

A corporation is considered a resident for use tax purposes if it is incorporated in New York, maintains an office in New York, or does business in the State. If the business entity is not a corporation, or if the business is a foreign corporation (i.e., incorporated in a state other than New York), then the purchase and ownership of property in New York may not rise to the level of conducting business when there is no commercial activity that occurs in New York. Entering into contracts in New York, arranging for payment of the property and insurance in New York, and payment of bills from a location in New York may, however, create residence.

For tax years beginning in 2003, taxpayers have New York Use Tax personal income tax reporting and payment obligations. The due date for reporting and paying the use tax is the date that the federal income tax return must be filed. If the individual requests an extension of time to file the income tax return, the individual must report and

pay any use tax due at the time he/she requests an extension. By adding this provision, the New York State Department of Taxation and Finance (the “Tax Department”) now have a stronger mechanism for criminal action with respect to failing to report and remit use taxes.

The Tax Department created a chart (found in the instructions to the income tax returns and Individual Purchaser’s Report of Sales and Use Tax) that allows individuals to calculate sales and use tax due on purchases of individual items and services costing less than \$1,000. The chart is based upon the individual’s federal adjusted gross income. Taxpayers may not utilize the chart for any business related purchases, regardless of cost.

Individuals who are residents for use tax purposes, but are not residents for personal income tax purposes and have no New York source income must file new Form ST-140, the Individual Purchaser’s Report of Sales and Use Tax. Non-registered businesses are required to report and pay sales and use tax on current Form ST-130, Business Purchaser’s Report of Sales and Use Tax, within 20 days of purchase or use.

II. Jurisdiction to Tax and Related Issues

The State’s ability to impose taxes on a transaction is limited by both the Commerce and Due Process clauses of the United States Constitution to circumstances in which there is a sufficient nexus between the state and the transaction to permit the imposition of the tax. Once a nexus is established, all New York Sales are taxable.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution pertains to the taxing power of a state. Wisconsin v. J.C. Penney Company 311 U.S. 435 (1940). Under the Due Process Clause, the Supreme Court requires that,

for a state to validly tax an interstate commercial activity, there must be “some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax”. Miller Bros. Co. v. Maryland, 347 US 340; Moorman Mfg. Co. v. Bair, 437 U.S. 267.

The Commerce Clause of the U.S. Constitution grants to Congress the power to regulate commerce among the several States and has been interpreted as implicitly prohibiting, even in the absence of Congressional regulation, unduly burdensome or discriminatory state taxation of transactions or entities engaged in interstate commerce. Oklahoma Tax Commission v. Jefferson Lines, 514 U.S. 115 (Apr. 3, 1995) In interpreting the Commerce Clause, the Supreme Court has held that state taxing schemes must meet four requirements to satisfy those provisions of the United States Constitution. These are that (1) the transaction being taxed must have substantial nexus with the taxing state, (2) the tax must be fairly apportioned, (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided by the state. Complete Auto Transit v. Brady 430 U.S. 274 (1977); Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

These various legal cases have been interpreted by the New York Court of Appeals that held that a physical presence of an out-of-state vendor in New York is not required to impose sales/use tax. Instead, the Court has held that a taxpayer must have a more than slightest presence with New York to establish a sufficient connection to New York in order to impose tax. Orvis Co. Inc. v. New York Tax Appeals Tribunal, 86 N.Y.2d 165 (1995).

III. Non-Taxable Sales

A. Exclusions

As discussed earlier in this course outline, Tax Law § 1105(a) imposes a tax based upon the sales price of tangible personal property at retail. Tangible personal property does not include real estate or intangible property (i.e. stocks, bonds and other investments). 20 NYCRR § 526.3(c)(1) & (2). Moreover, Tax Law § 1105(b) and (c) impose sale tax upon the charge for certain enumerated utility and other services unless purchased for resale. As discussed later in this outline, a limited number of retail sales of tangible personal property are specifically exempted from sales tax under the Tax Law and therefore, not subject to the tax.

An exclusion from sale tax is, however, a sale that does not meet one of the definitions of a taxable sale of tangible personal property or services and therefore, is not subject to sales tax. Some of the transactions most commonly excluded from sale tax are:

- The sale of real estate consisting of land and buildings [20 NYCRR § 526.8(c)(1)];
- The sale of investment products; however, if a stock certificate or a bond is redeemed and the actual paper is sold as decoration, that sale is subject to sales tax [20 NYCRR § 526.8(c)(2)];
- The sale of coins as a medium of exchange is not subject to sales tax (i.e. the exchange of US dollars for Canadian currency); however, the

sale of collectible coins is subject to sales tax [20 NYCRR §5 26.8(a)(6)];

- The sale of postage stamps for purposes other than mailing is subject to sales tax; however, the sale as postage is not [20 NYCRR § 526.8(a)(7)];
- The sale of professional services is generally not subject to sales tax (i.e. Physician, Lawyer, Accountant) because it is not a specifically enumerated taxable service; and
- A sale made to a customer who intends to resell the item purchased; said exclusion is applicable whether the item purchased is tangible personal property or services [20 NYCRR § 526.3].

B. Exemptions

1. Exempt Organizations

Sales to certain individuals or organizations are exempt or not subject to sales tax. These purchasers include the Federal, New York State and local New York State government agencies, the United Nations, diplomatic missions and diplomatic personnel, organizations exempt under Internal Revenue Code § 501(c)(3) (i.e. charities), certain organizations consisting of past or present members of the United States armed services, certain Indian nations or tribes and certain health maintenance organizations. See 20 NYCRR § 529 for a discussion of each exempt type of organization.

Except for charities, HMO's and groups consisting of armed service members, the above organizations do not need to make any application to the Tax Department to be treated as exempt. The other organizations must, however, apply for and be granted an exemption from state sales tax. This application is generally made after the organization has obtained an exemption from federal income tax from the Internal Revenue Service. If the organization intends to seek tax-exempt status under Internal Revenue Code § 501(c)(3), it should save any receipts from purchases made prior to the Internal Revenue Service determination in order to prove how much sales tax was paid. The organization will be able to apply for a refund later after it obtains the sales tax exemption. As discussed in Part C of this outline, if an exempt organization is a customer in a sales transaction, it must supply an exemption certificate to the vendor of these otherwise taxable goods or services. Tax Law § 1116.

2. Exempt Sales

Certain sales of tangible personal property are exempt from sales tax regardless of the nature of the purchaser and do not require an exemption certificate. This category of exempt sales includes, but is not limited to:

- Food, food products, beverages, dietary foods, and health supplements that are sold by food markets for human consumption; however, sales of candy, confections, soft drinks, alcoholic beverages, fruit drinks consisting of less than 70% natural fruit juices, sandwiches and heated foods are not exempt (Tax Law § 1115(a)(1); 20 NYCRR §

528.2);

- Drugs and medicines intended for use, internally or externally, in the diagnosis, cure, mitigation, treatment, or prevention of illness or disease in humans, except that the sale of cosmetics and toiletries is taxable (Tax Law § 1115(a)(3); 20 NYCRR § 528.4);
- Medical equipment and supplies along with the services related to these items; however, medical equipment and supplies purchased for use in providing medical or similar services for compensation, such as services by physicians, hospitals, clinical laboratories and ambulance companies are not exempt from sales tax (Tax Law § 1115(a)(3) and (g); 20 NYCRR § 528.4);
- Newspapers, magazines and other periodicals (Tax Law § 1115(a)(5); 20 NYCRR § 528.6);
- Prosthetic aids and devices, hearing aides and eyeglasses and the services related to these items (Tax Law § 1115(a)(4) and (g); 20 NYCRR § 528.5);
- The sale of the official flag of the United States of America or the once official flag of the United States along with the official flag of New York State is exempt while the sale of the flag of another state or a decal of the flag is taxable (Tax Law § 1115(a)(11); 20 NYCRR § 528.12);

- All tangible personal property used in farming or a commercial horse breeding operation and services related thereto are exempt from sales tax (20 NYCRR § 528.7);
- The sales proceeds not to exceed \$600 from a garage sale held at a person's residence are exempt provided that the person holds the garage sale for no more than 3 days in a calendar year and it is not part of a trade or business. This exemption does not apply to the sale of boats, snowmobiles or motor vehicles at a garage sale. It also does not apply to a sheriff or estate sale or a community garage sale. (Tax Law § 1115(a)(11); 20 NYCRR § 528.12);
- The sale of a motor vehicle by an individual to his spouse, child or parent (20 NYCRR § 528.15);
- Services of laundering and dry cleaning;
- Shoe repair services;
- Capital improvements to real estate (See Section D.); however, Tax Law § 1101(b)(4)(i) and 20 NYCRR § 541.1 provide that tangible personal property sold to a contractor, subcontractor or repairmen for use or consumption in erecting, repairing, maintaining, servicing, adding, altering, or improving structures, buildings, property on land or real property constitutes a taxable retail sale even when the tangible personal

property is used in a capital improvement;

- Tangible personal property sold by a mortician, undertaker or funeral director in the performance of professional services is not subject to sales tax; however, the purchase of these items by the mortician, undertaker or funeral director is not for resale and therefore, subject to the payment of sales tax upon purchase by the mortician, undertaker or funeral director. The rental of limousines or hearses is subject to sales tax (Tax Law § 1115(a)(7); 20 NYCRR § 528.8); and
- Licensed veterinarian services except boarding, grooming and clipping (Tax Law § 1115(f); 20 NYCRR § 528.24).

C. Exemption Certificate

Although the customer is liable for the payment of sales tax under Tax Law § 1133, the Tax Law at § 1132 also places the liability for the collection and payment of the sales tax on the vendor. The vendor's responsibility is to collect the tax due from the consumer and remit it to the Tax Department. Therefore, the liability for the sales tax falls upon both the vendor and the customer.

Moreover, 20 NYCRR § 532.4 establishes a presumption that all receipts from the sale of tangible personal property or charged for certain enumerated services are subject to sales tax until the contrary is established, thus giving rise to the customer's obligation to pay sales tax and the vendor's obligation to collect it. In the event of a transaction for which an exemption from sales tax is claimed, the burden of proving that a receipt is non-

taxable is on the vendor and also on the customer. A vendor will be relieved from liability to collect and remit sales tax and will meet the burden of proof to establish that a transaction is exempt from sales tax upon timely receipt of a properly completed exemption certificate from the customer accepted by the vendor in good faith. 20 NYCRR § 532.4(b)(2)

When an exemption certificate is required, the vendor must obtain a properly completed one from the customer within ninety days of the delivery of the product or service subject to sales tax otherwise the vendor is required to collect sales tax. 20 NYCRR § 532.4(b)(2). The exemption certificate must contain the name and address of the customer and the vendor, the date prepared, taxpayer identification number of the customer and the signature of the customer. The Tax Department prescribes form exemption certificates and can require that additional information be supplied on the form. 20 NYCRR § 532.4(b)(2)(ii).

A customer may provide a single transaction certificate covering a single purchase or may provide a blanket exemption certificate covering all purchases made with the vendor of the same general type of item. If a vendor fails to collect tax and to obtain an exemption certificate, both the vendor and customer will be liable for the sales tax unless it can be otherwise proven that the sale was exempt. 20 NYCRR § 532.4(b)(6).

The most common exemption certificates apply to purchases made for resale, those made as a capital improvement, or those made to an exempt organization.

D. Real Property Issues

As indicated previously, the sale of real property is not subject to sales tax. Moreover, Tax Law § 1115(a)(17) provides that a sale that is otherwise a taxable sale of tangible personal property is exempt from taxation if the property becomes a capital improvement or an integral component of real property. A capital improvement is defined as an addition or alteration to real property that:

- Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property;
- Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
- Is intended to become a permanent installation. Tax Law § 1101(b)(9).

However, Tax Law § 1101(b)(4)(i) and 20 NYCRR § 541.1 provide that tangible personal property sold to a contractor, subcontractor or repairmen for use or consumption in erecting, repairing, maintaining, servicing, adding, altering, or improving structures, buildings, property on land or real property constitutes a taxable retail sale even when the tangible personal property is used in a capital improvement. Therefore, when a contractor purchases material and supplies for use in a capital improvement, the contractor is obligated to pay sales tax. The contractor is not required to collect sales tax from the customer who owns the real estate provided the customer supplies a capital improvement certificate. The reader should review Tax Department Publication # 862

for an excellent summary of the sales and use tax classifications for capital improvements and repairs to real property.

It should be noted that a mobile home is not considered real property for purposes of the rules concerning capital improvements. As to modular homes, 20 NYCRR § 544.2(e) provides that a modular home (referred to in the regulations as a factory manufactured home) is a structure which is not a mobile home and which is designated primarily for residential occupancy and constructed by a method or system of construction whereby the structure or its components are:

- Wholly or in substantial part manufactured in manufacturing facilities; and
- Intended or designed for permanent installation, or assembly on a building site.

The primary distinction between a mobile home and a modular home is that a mobile home is built on a permanent chassis consisting of frame and wheels while a factory manufactured home is not. 20 NYCRR § 544.2(a). The initial retail sale of a mobile home is subject to sales tax computed upon 70% of the sales price of the mobile home. This 70% rule is inapplicable to modular homes pursuant to the tax regulations set forth at 20 NYCRR § 544.3(b)(1).

In contrast to the rules on mobile homes, 20 NYCRR § 544.3(b)(1) provides that a modular which has not been installed on real property as a capital improvement is subject to sales tax as the sale of tangible personal property. 20 NYCRR § 544.3(b)(2) goes on

to state that the sale of a factory manufactured home (a/k/a modular home) to a contractor, subcontractor, or repairmen to be installed as a capital improvement by such contractor, subcontractor, or repairmen is subject to sales tax as the retail sale of tangible personal property.¹ Although these regulations do not specifically state that the sale and permanent installation of a modular home on real property constitutes a non-taxable capital improvement, this rule is implied by the regulations, and also constitutes the holding of the Supreme Court, Appellate Division in Lake City Manufactured Housing, Inc. v. State of New York Tax Appeals Tribunal (1992 3rd Dept), 590 NYS2d 325.

In that case, Lake City Manufactured Housing, Inc. was engaged in the business of manufacturing modular homes and sold said homes through dealers. The case held that Lake City Manufactured Housing, Inc. was entitled to a sale tax exemption as a capital improvement for the sale of the modular homes that it installed, but that it was subject to sales tax for the sales of the modular homes that it did not install.

A modular home is typically a residential dwelling that is constructed in a factory, transported to a construction site and installed on a previously poured foundation. The responsibility for the actual installation may fall upon the manufacturer of the modular units, dealer who contracts with the manufacturer to sell the units or a general contractor who contracts with the homeowners to construct the residence. Often times, the components are constructed out of state and installed on real property in New York.

¹ This is consistent with Tax Law § 1101(b)(4)(i) and 20 NYCRR § 541.1 wherein it is provided that tangible personal property sold to a contractor, subcontractor or repairmen for use or consumption in erecting, repairing, maintaining, servicing, adding, altering, or improving structures, buildings, property on land or real property constitutes a taxable retail sale even when the tangible personal property is used in a capital improvement.

Under the pronouncements in STB-05-2.1, the Tax Department set forth rules governing the sales tax applicable to modular homes for transactions entered into after September 1, 2005 by providing examples of various scenarios and detailing the method of collecting tax in each. In summary, the pronouncement held that the sale of a modular home on an installed basis would not be subject to sales tax but that the sale would be subject to tax if sold otherwise. The Tax Department has also recently issued a series of Advisory Opinions setting forth the rules governing the sale of modular homes and clarifying the rules set forth in STB-05-2.1. I direct the reader attention to TSB-A-06(12)S and TSB-A-06(16)S.

E. Corporate and Partnership Distributions

The Tax Law exempts all the following transactions from sales tax:

- A contribution of property to a corporation upon its organization in exchange for its stock;
- A contribution of property to a partnership in return for a partnership interest;
- A distribution of property from a corporation to its shareholders in a complete or partial liquidation;
- A distribution of property from a partnership to the partners in a complete or partial liquidation; and
- The transfer of property to a corporation for stock in a merger or consolidation transaction.

IV. Reporting Requirements

A. Certificate of Authority

As previously discussed, if a business intends to make sales in New York that are subject to sales tax, it must collect the sales tax from the customer and remit it to the Tax Department. Tax Law § 1132. Prior to making any taxable sale, a vendor must register with the Tax Department and obtain a Certificate of Authority. Tax Law § 1134(a)(1). A business must also register in order to issue or accept most sales tax exemption certificates. The making of taxable sales or the issuance or acceptance of most exemption certificates is not allowed until the issuance of a Certificate of Authority by the Tax Department to the vendor participating in these activities. A Form DTF-17, Application for Registration as a Sales Tax Vendor, must be submitted to the Tax Department at least twenty days prior to commencing business or opening a new place of business. The Tax Department will review the application and if approved, is required to issue the Certificate of Authority within five business days of receipt of the application. Tax Law § 1134(a)(2). Once issued, the vendor at its place of business must prominently display the Certificate of Authority. The Tax Department is authorized to reject the application for registration if it determines that the applicant or a responsible officer, director, partner, employee or majority shareholder thereof has been convicted of a crime or owes taxes to the Tax Department. Tax Law § 1134(B). The denial of the application is reviewed in the same manner as proposed assessment of additional tax. (See Course Material on the appeals process.)

The Tax Department issues two types of certificates of authority: 1) regular; and 2) temporary. The regular certificate authority is issued unless it is determined that the other is applicable. There is no requirement to renew a regular Certificate of Authority, but it may be revoked by the Tax Department in the event that the holder thereof fails to comply with all sales tax filing and paying obligations. The temporary Certificate of Authority is issued when it is expected that the applicant will make taxable sales in no more than two consecutive quarterly sales tax periods within twelve months. Once expired, the temporary certificate is not valid and the vendor must reapply within twenty days of any taxable sale.

The Tax Department previously issued a Certificate of Authority for show and entertainment when the applicant's only business activities involved taxable sales made at fleas markets, fairs, craft, antique, coin, stamp or comic book shows, or an entertainment event with a capacity of less than 1,000 persons. Effective January 1, 2009, the Tax Department ceased issuing this type of Certificate of Authority and vendors are now issued a regular Certificate of Authority instead.

If a business is required to register and obtain a Certificate of Authority and fails to do so, the Tax Department may assess a penalty under Tax Law § 1145(a)(3). The maximum penalty for engaging in business without the proper Certificate of Authority is \$10,000 imposed at the rate of up to \$500 for the first day business is conducted without having obtained a valid Certificate of Authority plus \$200 a day for each day thereafter.

An out-of-state vendor, with insufficient nexus to New York State to require the collection of sales tax, may voluntarily register as a vendor to collect and remit the use

tax due from the customers. Upon voluntary registration, a vendor will have the obligation to collect and remit tax and file the required returns.

20 NYCRR § 533.1 sets forth the registration requirements relating to sales tax vendors.

B. Record Keeping

Any vendor issued a Certificate of Authority must maintain records on all sales by jurisdiction along with maintaining a method of associating an exempt sale to a particular customer along with the exemption certificate. A customer that utilizes an exemption certificate must maintain records for these purchases in order to substantiate the exempt use. These records must be maintained for a minimum of three years from the later of the due date of the sales tax return or the actual filing date. Tax Law § 1135.

20 NYCRR § 533.1 sets forth the record keeping requirements relating to sales tax vendors.

C. Filing Returns/Payment of Tax

A registered vendor must timely file the required sales tax return and remit the tax due. Upon issuance of a Certificate of Authority, the vendor may be classified by the Tax Department as either an annual or quarterly filer. A vendor will be classified as an annual filer if the Application for Registration as a Sales Tax Vendor indicates that the vendor is not expected to pay or collect any sales tax and is in a manufacturer or wholesaler. The Tax Department may later determine a vendor to be an annual filer if the sales tax due for the preceding four quarters did not exceed \$3,000. An annual filer is required to submit a sales tax return for the period March 1 through February 28 (or 29 in

a leap year) by March 20. Unless initially designated as an annual filer, a vendor will be classified as a quarterly filer and required to submit sales tax returns on a quarterly basis. The quarterly returns cover the periods March 1 through May 31, June 1 through August 31, September 1 through November 30 and December 1 through February 28 (or 29 in a leap year). The quarterly sales tax returns are due within twenty days of the end of the quarter.

If a vendor's total taxable sales in any preceding quarter are \$300,000 or more, then the vendor must file monthly sales tax returns. The change to monthly filing status is automatically effective on the first day following the quarter in which this threshold is met. A vendor will continue being classified as a monthly filer until taxable sales in each of the last four quarters is less than \$300,000.

A sales tax return must be filed even if there is no activity for the period covered by the return. If a vendor ceases business, it must file its last sales return within twenty days indicating it as final so that the Tax Department is notified that the vendor will no longer collect and remit tax. If this is not done, the Tax Department will estimate the sales tax that it believes due and attempt to assess that tax through its administrative assessment process. Therefore, it is critical for a vendor to file a final return if it ceases operations. See 20 NYCRR § 533.3(e)

Sales tax returns are prepared based on the accrual method of accounting and the vendor must remit the tax due by the due date of the return as listed above. 20 NYCRR § 532.1(a)(2)

Although Tax Law § 1133(a) makes the vendor primarily liable for the tax, the customer is also liable for sales tax pursuant to Tax Law § 1133(b). This section makes the customer liable for sales tax when said customer fails to pay the tax to the person who is required to collect it. In that event, such tax shall be payable by the customer directly to the Tax Department and it shall be the duty of the customer to file a return with the Tax Department and to pay the tax to it within twenty days of the date the tax was required to be paid. 20 NYCRR § 532.1(e)

20 NYCRR § 533.3 and 533.4 sets forth the filing and payment requirements relating to sales tax vendors.

D. Tax Rates

In general, the amount of the sales tax is based upon the combined state and local rate in effect in the locality where the taxable product or service is delivered. See Publication 718 for a complete list of sales tax rates by county.

E. Bulk Sales

Whenever a person who is required to collect sales tax sells or otherwise disposes of business assets in bulk, other than in the ordinary course of business, the person acquiring title to said assets shall be held liable for the seller's unpaid sales tax up to the greater of the selling price or fair market value of the assets sold or transferred unless the parties comply with the notification provisions of Tax Law § 1141(c). This rule regarding bulk sales transactions applies whether the assets acquired are tangible personal property, intangible property or real estate. The party acquiring these assets will be

relieved of any liability for sales tax if said party notifies the Tax Department at least ten days before taking possession of or paying for said assets. The notification must be submitted on Form AU-196.10, Notification of Sale, Transfer or Assignment in Bulk, via registered mail. The Tax Department has ninety days from receipt of the notification to respond as to whether the assets can be sold or transferred or whether the purchaser is required to satisfy the seller's sales tax liability prior to taking possession or paying for said assets.

If a component of the category of assets being sold as part of the sale of a business include tangible personal property (i.e. machinery and equipment), sales tax is typically due upon the transfer of those assets at closing. The purchaser normally pays this expense. This issue must also be considered when preparing the documentation for the sale of a business in which hard assets are included.

Because a Certificate of Authority is not assignable or transferable, it cannot be sold as part of a bulk sales transaction. Therefore, the customer must apply for a Certificate of Authority. If the seller ceases to do business as a result of the bulk sales transaction, the Certificate of Authority must be surrendered.

20 NYCRR § 537 sets forth the bulk sales rules for sales tax vendors.

**THE PRECEDING IS NOT INTENDING TO PROVIDE LEGAL ADVICE TO
READER AND SHOULD NOT BE RELIED ON WITHOUT CONSULTATION
FROM READER'S TAX AND LEGAL ADVISOR.**

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James B. Biagi is currently an Assistant Professor of Business and Managerial Science at Marywood University in Scranton, Pennsylvania and he teaches in the fields of Accounting, Federal Taxation and Law. For almost twenty-five years prior to his current appointment, Mr. Biagi was a practicing Tax Attorney and CPA in New York State. He is a former Trial Attorney with the Office of Chief Counsel for the Internal Revenue Service (“IRS”) in New York City and auditor in a large multinational accounting firm. Over the course of his career, he has been an advisor to many individuals, businesses and charities with regard to tax matters, devoting much of his time to representing clients with federal tax problems of all types ranging from audits and collection cases to criminal matters and IRS disbarment proceedings. During his career, he also has taught at various colleges and lectured on continuing professional education topics in the field of taxation.

By way of credentials, he holds a Juris Doctorate with a concentration in tax law from the University at Buffalo School of Law, Buffalo, New York and has an undergraduate degree in accounting from Pace University in Pleasantville, New York.