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A New York Sales & Use Tax Guide for Online Retail and eCommerce

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Introduction

Survey data from the Government Accountability Office shows that state revenue from sales tax on remote sales reached $23 billion in 2021.[1] This is a significant increase from the $3 billion collected in 2018, the same year the Supreme Court released its decision in *South Dakota v. Wayfair*. The case expanded the authority of states to enforce sales and use tax obligations on businesses with not just physical presence but that also have economic nexus with them. Needless to say, state sales and use tax has become more complex and impactful as the internet expands market opportunities for online vendors and as ecommerce practices mature.

Your clients who operate an ecommerce business could have New York sales and use tax liability from their economic presence when delivered to a customer in New York. Inversely, the business could have sales tax obligations in the other places where they deliver goods or services, including to neighboring states like New Jersey, Connecticut, and Pennsylvania. Our guide provides a framework for understanding the key sales and use tax issues CPAs need to consider for their clients who operate via ecommerce in and out of New York, including discussion of the following topics:

- Registering for a NYDTF Seller's Permit.
- Finding the right New York sales tax rate.
- Working with marketplace providers.
- Applying New York sales and use tax to delivery charges.
- Managing the sales and use tax impact for New York businesses with out-of-state transactions.

[1] See GAO-22-106016, "Remote Sales Tax: Initial Observations on Effects of States' Expanded Authority", pg. 1 (June 14, 2022).

When Do Remote Sellers Need to Register for a NYDTF Certificate of Authority?

When certain thresholds are met, remote sellers are responsible for collecting and remitting the New York sales tax on their transactions. This means online vendors and other internet marketplace providers may need to register with the New York Department of Taxation and Finance (NYDTF) by applying for a Certificate of Authority.[2] The NYDTF requires a Certificate of Authority for remote sellers that cumulatively meet the following criteria in the four preceding sales tax quarters:

- Have **$500,000** or more of total gross receipts for sales of tangible personal property delivered to New York; ***and***
- Have **100** or more sales of tangible personal property.[3]

The NYDTF broadly defines a business's gross receipts and sales transactions for determining registration and remittance obligations.[4] The figures include gross receipts, including receipts from exempt sales and before taking any deductions for expenses. Sales transactions generally refers to any invoice, sales slip, contract, or other memorandum of sale issued during the lookback period. Remote sellers should also include their sales from online marketplaces into their calculations.

What New York Sales Tax Rate Applies to Remote Sellers?

Another challenge for remote sellers in New York is knowing the taxable rate that applies to each transaction. Remote sellers must focus on two aspects that affect their sales tax rate on a particular transaction— (1) the delivery location and (2) the nature of the good being sold.

[2] See TB-ST-360, Issued September 2, 2011 (Updated February 1, 2022).
[3] See TSB-M-19(4)S.
[4] See https://www.tax.ny.gov/pubs_and_bulls/publications/sales/nexus.htm "Registration requirement for businesses with no physical presence in New York State", FAQs, last updated July 26, 2022 (accessed June 27, 2023).

Like other states, New York has a combined tax rate that varies based on the county or city where your client transfers possession of the product or provides its service. While New York's state tax rate is 4 percent, the combined rate could vary from 7 to nearly 9 percent.[5] Publication 718 provides businesses with the combined tax rate for all New York localities along with the reporting code for filing their sales and use tax returns.

Depending on the nature of your sales, other New York taxes can also add to the total taxes remote sellers are responsible for collecting from customers and paying to the NYDTF. For example, New York places an additional 5 percent tax on the sale of entertainment or information services via telecommunication.[6] Businesses must stay current on the total tax rates that apply to their internet sales. Doing so allows them to properly calculate the amount of tax due at the time of sale, avoiding any under or overpayment to the NYDTF.

How Does New York Sales Tax Work for Marketplace Providers and Marketplace Sellers?

Most remote sellers rely on a variety of methods to make sales, including the use of a business website or through a centralized marketplace. When a business relies on another company's platform to facilitate transactions, they are known as a marketplace seller and the company providing the facilitation services is a marketplace provider. The NYDTF extends its sales tax reporting and collection obligations to marketplace providers that make sales to New York customers. Marketplace providers have the same threshold requirements for obtaining a Certificate of Authority as other remote sellers.[7]

Note: Marketplace providers are only responsible for the tax that is related to the sale of tangible personal property, which means marketplace sellers must collect and pay the sales tax for things that New York does not classify as tangible personal property, including the following:

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[5] See Publication 718 (Effective March 1, 2022).
[6] See TB-ST-825 (referencing N-93-20 and updated July 9, 2021).
[7] See TSB-M-19(2.1)S (October 17, 2019).

- Passenger car rentals
- Restaurant food
- Services
- Hotel occupancy
- Admission to a place of amusement[8]

Protecting the Business from New York Sales Tax Liability as a Marketplace Seller

Despite marketplace providers having sales tax collection and reporting obligations, the NYDTF can still impose liability on marketplace sellers under limited circumstances. For example, when the marketplace provider claims its failure to collect sales tax was due to the receipt of insufficient or incorrect information from the marketplace seller.[9] The main exception to this rule is when the case involves affiliated parties. The NYDTF considers affiliated parties in this context to be any marketplace provider and seller when an ownership interest of more than 5% exists by one over the other, either directly or indirectly.[10]

Marketplace sellers can protect themselves from unnecessary sales tax liability by supplying their marketplace providers with accurate information about their sales and by retaining a Marketplace Provider Certificate of Collection. The Certificate of Collection (Form ST-150) is an acknowledgment from the marketplace provider that they are responsible for collecting the tax when selling the businesses tangible personal property. Sometimes, marketplace providers will provide a publicly available statement in lieu of Form ST-150, but marketplace sellers should still retain evidence of this public statement in case of a dispute over liability for a sales tax assessment.

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[8] *Id* at pg. 2.
[9] *Id* at pg. 3.
[10] *Id* at pg. 1.

Are Delivery Charges from Remote Sales Subject to New York Sales Tax?

When you sell tangible property online, you likely pass the cost of delivery onto the purchaser either through a separately stated charge on the invoice or by incorporating the cost into the total purchase price. In some states, how a business lists the delivery charge on an invoice can determine the sales tax impact. Sales tax in New York will generally apply to *all* additional delivery charges when they are related to the sale of taxable property.[11] This broadly includes charges labeled for items like postage, transportation, handling, etc. However, New York sales tax won't usually apply to delivery charges for nontaxable or exempt property.

The biggest challenge for remote sellers becomes handling their sales tax collection obligations on delivery charges when the transaction involves a combination of taxable and exempt property. In these cases, how a business applies New York sales tax will depend on how it states the delivery charge on the invoice. If the remote seller only states one delivery charge, then New York will assume the total delivery charge applies to the taxable property (which means sales tax applies to the entire delivery fee). However, remote sellers can fairly allocate the delivery cost between the taxable and nontaxable property and only pay sales tax on the delivery charge for the taxable property.[12]

How to Manage Remote Sales in Other States as a New York Business

Businesses located in New York that engage in ecommerce will need to consider their potential sales tax obligations in other states. They will also need to pay attention to how this side of their business affects their New York sales tax reporting.

Generally, businesses that deliver products or perform services outside of New York will not need to charge New York tax on those sales or purchases.[13] This

[11] See TB-ST-838 (May 14, 2012).
[12] *Id* at pg. 2-3.
[13] See Publication 750 A Guide to Sales Tax in New York State (Updated November 2015), pg. 31-32.

could include sales made at a storefront in New York but delivered to the customer in a neighboring state. However, businesses must carefully document the place of delivery for those purchases on invoices, receipts, or another form to validate that the sale is nontaxable in New York.[14] Another concern for New York businesses making out-of-state sales is the need to register for a permit in other states because they meet the economic thresholds as a remote seller. It is advisable to check sales data on a monthly or quarterly basis to identify states where a business may need to register for sales and use tax reporting.

Reconciling Remote Sales on a New York Sales and Use Tax Return

New York's sales and use tax return forms do not typically request information on a business's out-of-state sales.[15] Rather, the business is responsible for separating taxable New York sales from exempt out-of-state sales. Keeping accurate records of this sales data is key when defending your sales tax reporting in the event of an audit from the NYDTF. Unless a business can prove a sale was exempt, the auditor could assume it was subject to New York sales tax.

Claiming a Reciprocal Credit for Sales and Use Tax Paid to Another State

Businesses with multi-state operations could have use tax liability to the NYDTF for items purchased in another state that are later brought into New York. When the business pays sales or use tax to another jurisdiction, it could qualify for a reciprocal credit to limit the amount owed to the NYDTF.[16] A business must meet the following requirements to qualify for the credit:

- The state where the business paid sales and use tax must allow a corresponding credit for sales and use tax paid to New York.
- The business must be liable for sales and use tax paid to the other state.
- The tax paid must be for a sales or use tax (i.e., not another excise tax).
- The business has no right to a refund or credit for the tax paid to the other state.

[14] *Id*.
[15] See Form ST-100 New York State and Local Quarterly Sales and Use Tax Return.
[16] See TB-ST-765 Reciprocal Credit for Sales or Use Taxes Paid to Other Taxing Jurisdictions (Issued October 9, 2013).

- The business has proof of payment for the sales and use tax paid to the other state.[17]

Conclusion

New York and multi-state sales tax administration can be a real burden for the CPAs of remote sellers and ecommerce businesses with complex transaction methods or that participate in niche industries. A host of issues can trigger lengthy audits from the NYDTF and surprise assessments that threaten the finances of well-run companies. We regularly work with CPAs on behalf of their clients when facing difficult problems in their sales tax compliance, including the following types of issues:

- The classification of property as taxable or exempt.
- Participating in the NYDTF's voluntary disclosure program.
- Reconciling New York sales with exempt out-of-state sales.
- Disputes involving New York sales tax liability between marketplace providers and marketplace sellers.
- Substantiating sales tax reporting with the use of exemption certificates, invoice records, and other data.

We always encourage CPAs to schedule a consultation with our office on a periodic basis to discuss their clients' sales tax practices or to discuss strategy in the event of a recent audit or assessment notice from the NYDTF. ***You can click here to schedule a free consultation today.***

About Sales Tax Helper, LLC

Founded in 2018, Sales Tax Helper, LLC is a nationwide specialty firm comprised of lawyers, CPAs, and former state auditors. Our team of professionals assist CPAs through sales and use tax consulting, nexus studies, VDA applications, audit defense, assessment appeals, and sales tax litigation. Collectively, we've managed thousands of sales and use tax audit defenses and obtained millions of dollars in overturned assessments and recovered refund claims for businesses and individuals.

[17] *Id*.