

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(18)S
Sales Tax
April 4, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020809A

On August 9, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from The Friends of Mt. Hope Cemetery, 791 Mt. Hope Avenue, Rochester, New York, 14620-2752.

The issue raised by Petitioner, The Friends of Mt. Hope Cemetery, is whether its sales of tangible personal property constitute sales by a shop or store operated by Petitioner.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is an exempt organization as described under Section 501(c)(3) of the Internal Revenue Code and is duly registered as an exempt organization under Section 1116(a)(4) of the Tax Law. Petitioner was formed to support and promote an historic cemetery which is owned and operated by the City of Rochester. To this end, Petitioner intends to sell books and merchandise to further the understanding and appreciation of the cemetery. For example, Petitioner will sell a cemetery guide book that retails for \$19.95, a book of photography of the cemetery that retails for \$35, and children's magazines about historic figures interred in the cemetery that retail for \$5.00. Petitioner will also sell merchandise that refers to and promotes the cemetery such as mugs and T-shirts. Petitioner will conduct these sales at a building known as the North Gate House, which is situated within the boundary lines of the cemetery. The gate house is a 1,725 square foot building, constructed in 1878 for use as an office by the cemetery. It is no longer used for cemetery operations and now serves as Petitioner's headquarters.

The gate house consists primarily of an entrance foyer and four main rooms. All rooms in the gate house are used by Petitioner for various purposes. One room is used as a board meeting and reception room in which the sales in question will occur. Another room is used exclusively for exhibits. The two remaining rooms are used by Petitioner as offices.

The 530 square foot board meeting and reception room is used throughout the year as a reception area for public events; as a room for Petitioner's monthly board meetings, annual meeting and committee meetings; as a work space to fold, label and assemble Petitioner's newsletter for mailing; and, from May through October, as a staging area for tours of the cemetery. The room contains permanent exhibits and finished wall boards for changing exhibits, a large conference table used for meetings and to serve free refreshments after tours, a long counter used to register visitors for tours and distribute free Petitioner literature such as tour schedules, pocket guides and membership brochures plus literature from sister organizations, and benches for public seating. The

books and merchandise offered for sale will be displayed at one end of the counter occupying a small area of the available counter space. Books and merchandise will be sold by Petitioner's staff from this area throughout the tour season from the first of May until the end of October. Tours occur every Sunday at 2:00 and 3:00 P.M., plus an additional 12 special Saturday theme tours from May through October. Petitioner's total revenues for a full fiscal year have never exceeded \$19,000, including proceeds from memberships, donations, interest income, tour fees and merchandise sales.

Applicable Law and Regulations

Section 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1115(a)(30) of the Tax Law provides an exemption from the sales and compensating use tax for:

Clothing and footwear for which the receipt or consideration given or contracted to be given is less than one hundred ten dollars per article of clothing, per pair of shoes or other articles of footwear or per item used or consumed to make or repair such clothing and which becomes a physical component part of such clothing.

Section 1116 of the Tax Law provides, in part:

(a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

* * *

(4) Any corporation, association, trust, or community chest, fund, foundation, or limited liability company, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h) of section five hundred one of the United States internal revenue code of nineteen hundred

fifty-four, as amended), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office

* * *

b) Nothing in this section shall exempt:

(1) retail sales of tangible personal property by any shop or store operated by an organization described in paragraph (4) . . . of subdivision (a) of this section

Section 529.7(i) of the Sales and Use Tax Regulations provides, in part:

Sales by exempt organizations. (1) Except as provided in paragraphs (2) through (4) of this subdivision, sales of tangible personal property and services by exempt organizations are exempt from the sales and use tax.

(2) Retail sales of tangible personal property made by any shop or store operated by an exempt organization described in section 1116(a)(4), (5) or (6) are subject to the sales and use tax. A shop or store as used in this section includes any place or establishment where goods are sold from display with a degree of regularity, frequency and continuity as well as any place where sales are made through a temporary shop or store located on the same premises as persons required to collect tax. Vending machines alone do not constitute a shop or store. However, where vending machines are located in a defined area devoted to selling tangible personal property, then sales from such vending machines constitute sales from a shop or store.

* * *

Example 2: An exempt organization operates a gift shop and book store. Sales made by such shop or store are taxable.

Example 3: A counter is placed in an enclosed area at the back of a church for the purpose of displaying religious articles for sale. The counter is open for business each week for two hours on a specific day at which times a clerk is present. The counter is in a separate area used solely to display tangible personal property for sale and, thus, is a shop or store.

* * *

(6) An exempt organization making taxable sales is required to register as a vendor, collect the appropriate tax, and file timely sales tax returns.

Opinion

Petitioner asks if its sales of books, T-shirts and mugs constitute sales made by an exempt organization through a shop or store operated by the organization, and, therefore, require Petitioner to register for sales tax purposes and collect sales tax on its sales.

Pursuant to Section 1116(b) of the Tax Law, sales by organizations described in Section 1116(a)(4) of the Tax Law, such as Petitioner, are exempt from sales tax unless such sales are retail sales of tangible personal property made by any shop or store operated by such an organization.

Section 529.7(i)(2) of the Sales and Use Tax Regulations describes a “shop” or “store” as any place or establishment where goods are sold from display with a degree of regularity, frequency and continuity as well as any place where sales are made through a temporary shop or store located on the same premises as persons required to collect tax. Section 529.7(i)(2) provides that vending machines alone do not constitute a shop or store. However, where vending machines are located in a defined area devoted to selling tangible personal property, then sales from such vending machines constitute sales from a shop or store.

Petitioner states that sales are conducted throughout the tour season from the first of May till the end of October. During this period, tours occur every Sunday at 2:00 and 3:00 P.M., plus an additional 12 special Saturday theme tours. After the individual tour is completed, tour patrons are invited to partake of free refreshments in the board meeting and reception room, where free literature promoting the cemetery and merchandise for sale are displayed. Patrons of the tour have a reasonable expectation that, either before or after the tour, free literature and merchandise for sale will be made available to them from the counter top display.

Petitioner’s merchandise is sold from a counter display. These sales as described by Petitioner are clearly not sales from vending machines. Petitioner’s merchandise is sold with the degree of regularity (every Sunday), continuity (from May through October) and frequency (at least once a week) required by Section 529.7(i)(2) of the Sales and Use Tax Regulations in order for such sales to be considered sales by a shop or store. Therefore, Petitioner is required to obtain a Certificate of Authority and collect sales tax on such sales.

Petitioner’s sales of clothing items (i.e., T-shirts) for less than \$110.00 per item are exempt from the statewide sales tax (4%) but subject to the Monroe County sales tax (4%) as of this date.

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For additional rate information, see New York State Sales and Use Tax Rates by Jurisdiction, publication 718, and Local Sales and Use Tax Rates on Clothing and Footwear, Publication 718C.

DATED: April 4, 2003

/s/
Jonathan Pessen
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.