

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

TSB-A-04(20)S  
Sales Tax  
September 2, 2004

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030912D

On September 12, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Metsky & Associates, P.C., 2399 Route 10 East, Morris Plains, New Jersey, 07950.

The issue raised by Petitioner, Metsky & Associates, P.C., is whether, under the facts presented, the sale of mailing lists would qualify for exemption from sales and compensating use tax under section 1115(n)(2) or 1116(a)(4) of the Tax Law.

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

Seller, a provider of mailing lists, is a registered New York State vendor licensed to conduct business and charge sales tax within the state of New York. The user of the mailing lists is Buyer. Buyer conducts business and maintains an office within the state of New York. Buyer proposes to rent or license the mailing lists from Seller for the purpose of delivering promotional materials to its customers or prospective customers within the state of New York. Buyer will be obtaining from Seller only the right to use the mailing lists. The promotional materials, printed promotional materials or promotional materials upon which producing, fabricating, processing or imprinting services will have been directly performed will be produced by Buyer or obtained from parties other than Seller.

Petitioner indicates that Buyer may be a printer/mailer or a business printing and mailing its own promotional materials. In other instances, Buyer may be a college or university which may provide Seller with an *Exempt Organization Certificate*, Form ST-119.

**Applicable law and regulations**

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

\* \* \*

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) *for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax* under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five

where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . . (Emphasis added)

\* \* \*

(7) Use. The exercise of any right or power over tangible personal property or over any of the services which are subject to tax under section eleven hundred ten of this article or pursuant to the authority of article twenty-nine of this chapter, by the purchaser thereof . . . . Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials, or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine.

\* \* \*

(12) Promotional material. Any advertising literature, other related tangible personal property (whether or not personalized by the recipient's name or other information uniquely related to such person) and envelopes used exclusively to deliver the same. Such other related tangible personal property includes, but is not limited to, free gifts, complimentary maps or other items given to travel club members, applications, order forms and return envelopes with respect to such advertising literature, annual reports, prospectuses, promotional displays and Cheshire labels but does not include invoices, statements and the like. Promotional materials shall also include paper or ink furnished to a printer for use in providing the services of producing, printing or imprinting promotional materials or in producing, printing or imprinting promotional materials, where such paper and ink become a physical component part of the promotional materials and such printer sells such services or such promotional materials to the person who furnished the paper and ink to such printer.

Section 1105 of the Tax Law imposes sales tax, in part, on:

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

\* \* \*

(c) The receipts from every sale, except for resale, of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or

individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons. . . .

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed.

Section 1115(n) of the Tax Law provides, in part:

(1) Except as otherwise provided in this subdivision, promotional materials mailed, shipped or otherwise distributed from a point within the state, by or on behalf of vendors or other persons to their customers or prospective customers located outside this state for use outside this state shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article.

(2) Services otherwise taxable under paragraph one or two of subdivision (c) of section eleven hundred five of this article relating to mailing lists or activities directly in conjunction with mailing lists shall be exempt from tax under this article if such services are performed on or directly in conjunction with promotional materials exempt under paragraph one or four of this subdivision.

\* \* \*

(4) Notwithstanding any contrary provisions of paragraph one of this subdivision, promotional materials which are printed materials and promotional materials upon which services described in paragraph two of subdivision (c) of section eleven hundred five have been directly performed shall be exempt from tax under this article where the purchaser of such promotional materials mails or ships such promotional materials, or causes such promotional materials to be mailed or shipped, to its customers or prospective customers, without charge to such customers or prospective customers, by means of a common carrier, United States postal service or like delivery service.

(5) Services otherwise taxable under paragraph two of subdivision (c) of section eleven hundred five performed on promotional materials exempt under paragraph four of this subdivision shall be exempt from tax under this article.

\* \* \*

(8) Nothing in this subdivision shall be construed to exempt tangible personal property (i) purchased by a person (other than exempt promotional materials described in paragraph four of this subdivision) or (ii) manufactured, processed or assembled by the manufacturer, processor or assembler, who furnishes such property to the vendor of

promotional materials exempt under paragraph one or four of this subdivision to be included as free gifts with such exempt promotional materials to be mailed or shipped to such purchaser's or such manufacturer's, processor's or assembler's customers or prospective customers or who otherwise uses such property in this state, for example, by giving or donating the property as free gifts to another person, unless such tangible personal property is mailed, shipped or otherwise distributed from a point within this state to such customers or prospective customers located outside this state for use outside this state.

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:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;

\* \* \*

(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. . . ;

Section 1119(a) of the Tax Law provides, in part:

Subject to the conditions and limitations provided for herein, a refund or credit shall be allowed for a tax paid pursuant to subdivision (a) of section eleven hundred five or section eleven hundred ten . . . (2) on the sale or use of tangible personal property purchased in bulk, or any portion thereof, which is stored and not used by the purchaser or user within this state if that property is subsequently reshipped by such purchaser or user to a point outside this state for use outside this state. . . .

Section 1132(c)(1) of the Tax Law provides, in part:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services . . . are subject to tax until the contrary is established, and the burden of proving that any receipt,

amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer. . . .

Section 529.7(h)(2) of the Sales and Use Tax Regulations provides, in part:

*In order to exercise its right to exemption the organization must be the direct purchaser, occupant or patron of record. It must also be the direct payer of record and must furnish its vendors with a properly completed exempt organization certification. . . . An organization is the direct payer of record where direct payment is made by the organization or from its funds directly to the vendor. (Emphasis added)*

Technical Services Memorandum, entitled *Expanded Sales and Compensating Use Tax Exemption for Promotional Materials*, August 20, 1997, TSB-M-97(6)S, provides, in part:

Prior to March 1, 1997, promotional materials mailed, shipped, or otherwise distributed from a point within this state, by or on behalf of vendors or other persons, to their customers or prospective customers located outside this state, for use outside this state, were exempt from sales and compensating use taxes.[See TSB-M-92(4)S.] On and after March 1, 1997, the exemption also applies to certain printed promotional materials, as well as certain other promotional materials, mailed or shipped by a common carrier, the U.S. Postal Service or a like delivery service within the state.

Please note that purchasers of promotional materials should use new Form ST-121.2, *Certificate of Exemption for Purchases of Promotional Materials*, with respect to purchases of promotional materials exempt under either the old rules or the new rules. . . .

\* \* \*

(For purposes of examples 1, 2, 3, 4, 7, and 8 of this TSB-M, it is assumed that the purchaser of the exempt promotional materials or exempt services will furnish the seller of the exempt promotional materials or exempt services a properly completed Form ST-121.2, Certificate of Exemption for Purchases of Promotional Materials. It is also assumed that the promotional materials will be delivered to the purchaser's customers or prospective customers [ultimate recipients] without charge to those customers or prospective customers.)

\* \* \*

Example 4. A retailer contracts with a printer to purchase advertising brochures printed by the printer. *The retailer also contracts with a mailer for the mailing of the brochures and for the rental of several mailing lists.* Under the terms of the contract with the mailer, the mailer will perform merge/purge services on the mailing lists, print address labels, and affix the labels to the brochures. The mailer will store the brochures for a period of time before mailing them to the retailer's customers

throughout the U.S., including New York State, via the U.S. Postal Service. The brochures are printed promotional materials. (Emphasis added)

The printer's charges to the retailer for the brochures are exempt from sales and compensating use taxes. *The mailer's charges to the retailer for the rental of the mailing lists, and for the printing and affixing of address labels, are exempt from sales and compensating use tax under section 1115(n)(2) of the Tax Law.* The mailer's charges to the retailer for storing the brochures before mailing them are also exempt from tax, since the mailer performed exempt services with respect to the printed promotional materials being stored. (Emphasis added)

\* \* \*

### **Tangible Personal Property Purchased for Use in In-House Printing of Promotional Materials**

Purchases of tangible personal property used by the purchaser to print its own promotional materials in-house, such as paper, ink, and mechanicals, do not qualify for the exemptions available for promotional materials delivered in the state.

Example 11. A company uses in-house printing equipment and supplies (paper, ink, etc.) to produce its own promotional materials. The promotional materials consist of advertising brochures and catalogs. The company will ship the promotional materials to customers and prospective customers via the U.S. Postal Service, without charge to the customers. Since the company is purchasing raw materials, and is not purchasing promotional materials, these purchases are taxable. However, if the company delivers any of the brochures or catalogs outside the state for use outside the state, the company will be entitled to a refund of any sales tax or use tax paid on the raw materials incorporated into those brochures or catalogs, as provided under section 1119(a)(4) of the Tax Law, with respect only to property upon which fabricating, processing, printing, or imprinting was performed.

### **Opinion**

Seller intends to rent or license mailing lists to various Buyers. The Buyers intend to use the mailing lists purchased from Seller for the purpose of delivering promotional materials to their customers or prospective customers, or the customers or prospective customers of the Buyers' customers within the state of New York. Buyer will be obtaining from Seller only the right to use the mailing lists. Buyer may be a printer/mailer, a business printing and mailing its own promotional materials, or a college or university. Buyer may provide Seller with documentation establishing its exempt status.

Purchases of the use of a mailing list are sales of tangible personal property or information services subject to sales and use tax under section 1105(a) or (c)(1) of the Tax Law. See *Alan Drey Company, Inc.*, 67AD2d 1055; *Harold E. Mertz v. State Tax Comm.*, 89 AD2d 396. Accordingly, Seller is required to collect sales tax on all mailing lists sold to Buyer in New York State, unless Buyer furnishes a properly completed exemption document within 90 days of the sale. Seller's timely acceptance, in good faith, of a properly completed exemption document relieves Seller from the duty to collect sales tax on the sale of its mailing list. The Tax Law presumes receipts for property or services described in section 1105 of the Tax Law are subject to tax until the contrary is established. The burden of proving that any receipt is not taxable is upon the vendor or the customer. Where a properly completed exemption document is furnished to the vendor, and accepted in good faith by the vendor, the burden of proving that the sale is not taxable rests solely upon the customer. See section 1132(c)(1) of the Tax Law.

The Tax Law provides exemptions for tangible personal property or services purchased for resale or purchased by exempt organizations. See sections 1101(b)(4)(i), 1105(c) and 1116 of the Tax Law.

Thus, to the extent that Buyer is purchasing mailing lists from Seller exclusively for resale as such, such purchases may be made without payment of tax. In such instances, Buyer may issue a *Resale Certificate*, Form ST-120, to relieve Seller of responsibility for collecting the sales tax. See sections 1101(b)(4)(i) and 1132(c) of the Tax Law.

Sales of mailing lists to colleges or universities may also be exempt from tax. Where Buyer has established its exempt status as a religious, charitable, educational, etc., institution or organization under section 1116(a)(4) of the Tax Law, and Buyer is the purchaser of the mailing list and payer of record, the receipts from such sale are not subject to tax. The organization should furnish, and Seller should maintain for its records, a properly completed *Exempt Organization Certificate*, Form ST-119. See section 1116(a)(4) of the Tax Law. Colleges or universities which are governmental entities, (e.g., SUNY at Albany) and are the purchaser, user and consumer of the mailing lists, are likewise exempt from tax under section 1116(a)(1) of the Tax Law. In such instance, the governmental purchase order for the mailing list is the appropriate exemption document for Seller to maintain to confirm the exemption. Section 529.7(h) of the Sales and Use Tax Regulations.

It should be noted that the exemptions provided in section 1116 of the Tax Law are only applicable to purchases by an exempt organization for its own use and consumption. A purchase of mailing lists by Buyer, which is not itself a qualifying exempt organization, for Buyer's use in performing services for an exempt organization is not exempt pursuant to section 1116.

In addition, section 1115(n) of the Tax Law in certain circumstances provides specific exemptions for mailing lists and services performed on mailing lists consumed in conjunction with the delivery of promotional materials.

The exemption from sales tax provided by section 1115(n)(1) of the Tax Law provides that promotional materials mailed, shipped or distributed from within New York State by or on behalf of vendors to their customers or prospective customers located outside New York State qualify for exemption from sales and compensating use tax. See TSB-M-97(6)S, *supra*, Example 4; TSB-M-92(4.1)S, *supra*. Section 1115(n)(4) of the Tax Law provides that **printed** promotional materials, furnished free of charge to customers or prospective customers of the person purchasing the materials, and delivered to such customers or prospective customers by common carrier, the United States postal service or like delivery service are exempt from the sales and compensating use tax. See TSB-M-97(6)S, *supra*.

Section 1115(n)(2) of the Tax Law provides that services relating to mailing lists or activities directly in conjunction with mailing lists are not taxable when performed on or directly in conjunction with exempt promotional materials. Section 1101(b)(12) provides that the Cheshire labels consumed in the delivery of promotional materials are themselves promotional materials that may qualify for exemption from tax.

When Buyer is claiming the exemption for mailing lists used in conjunction with printed promotional materials meeting the criteria established under section 1115(n)(4) of the Tax Law, a *Certificate of Exemption for Purchases of Promotional Materials*, Form ST-121.2, should be properly completed by Buyer indicating 100% exempt in Part II, section E, for mailing list services directly in conjunction with printed promotional materials.

To the extent that the promotional materials do not meet the criteria of section 1115(n)(4) of the Tax Law, but are promotional materials mailed or otherwise distributed from a point within New York State by or on behalf of vendors to their customers or prospective customers located outside this state, the exemption provided by section 1115(n)(1) of the Tax Law would apply. The mailing lists used in conjunction with such promotional materials would also be exempt based on the percentage of customers located outside New York State. Buyer should indicate that percentage in section E of Form ST-121.2. To the extent that the promotional materials do not meet the criteria of section 1115(n)(4) of the Tax Law (e.g., they are not printed) and are mailed or otherwise delivered to customers or prospective customers located in New York State, the mailing lists used in conjunction with such promotional materials would be taxable to the extent of the addressees located within New York State.

Seller's timely acceptance, in good faith, of a properly completed exemption document relieves Seller from the duty to collect sales tax on its sale of mailing lists to Buyer. See section 1132(c)(1) of the Tax Law. To the extent that Buyer issues a fraudulent exemption document or indicates an exempt percentage higher or lower than is warranted on Form ST-121.2, Buyer would owe sales and use tax or be entitled to a credit or refund of the tax, as the case may be. See *Automobile Club of New York, Inc.*, Adv Op Comm T & F, April 14, 1998, TSB-A-98(28)S.

Since promotional materials are defined in section 1101(b)(12) of the Tax Law as advertising material, and the exemption provided by section 1115(n) applies to promotional materials sent to



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customers or prospective customers free of charge, the interpretations of what is advertising material and who are considered to be customers become particularly relevant. Thus, it has been determined that mailings of political advertising materials to the electorate, or mailings of promotional materials to persons who are not the ultimate consumers of the product being advertised are not exempt from sales and compensating use tax under section 1115(n)(1) and (4). See *Town of Islip Republican Committee*, Adv Op Comm T&F, March 3, 1999, TSB-A-99(15)S; *Promex Medical, Inc.*, Adv Op Comm T&F, April 8, 1999, TSB-A99(23)S. Similarly, printed materials which are not soliciting purchases by customers or prospective customers (such as corporate stockholder proxy solicitations, invoices and billing statements) are not advertising materials and thus not promotional material for purposes of the exemptions provided in section 1115(n). See *Bowne of New York City, LLC*, Adv Op Comm T&F, July 11, 2002, TSB-A02(26)S; *KPMG LLP*, Adv Op Comm T&F, June 3, 2002, TSB-A02(10)S. The receipts from the sale or use of mailing lists consumed or used to mail nonexempt materials, and not consumed or used in conjunction with exempt promotional materials, are subject to New York sales and use tax.

Lastly, Buyer's purchase of mailing lists used to distribute the promotional materials or printed promotional material can qualify for the exemption under section 1115(n)(2) of the Tax Law notwithstanding that the promotional materials being mailed were self produced by Buyer (i.e., the property to be mailed was produced, fabricated, printed, etc., in-house) rather than purchased from a third party. The promotional materials would have to be exempt under section 1115(n)(1) or (4) in order for the mailing lists to be exempt.

DATED: September 2, 2004

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