

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division**

TSB-A-08(42)S
Sales Tax
September 15, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070724A

On July 24, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Walsworth Publishing Company, Inc., 306 North Kansas Avenue, Marceline, Missouri 64658. Petitioner, Walsworth Publishing Company, Inc., provided additional information pertaining to the Petition on October 10, 2007.

The issue raised by Petitioner is whether Petitioner or its customers are required to collect sales tax on sales of school yearbooks.

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

Petitioner, a Missouri corporation, is a publisher of school yearbooks and is registered for the collection of sales tax in New York State. Petitioner contracts with customers in the State for publication of their school yearbooks. Petitioner's customer may be a public school, a private school, or a club, extraclassroom activity fund or organization of such public or private school. Such private school, club, extraclassroom activity fund, or organization may or may not be a qualifying (religious, scientific, charitable, educational, etc.) exempt organization pursuant to section 1116(a)(4) of the Tax Law. Under its sales agreement with the customer, the customer is responsible for the content, sale and delivery of the yearbook to the student or other purchaser. The customer, with Petitioner's assistance if requested, determines how many yearbooks are to be printed at the time the initial sales agreement is signed. Should the customer not sell all of the books it agreed to purchase in the contract with Petitioner, the customer will own those books and will not receive a credit for unsold books. In addition to the agreed upon number of yearbooks, Petitioner will generally provide an incidental number (15 - 25) extra copies of the yearbook in case the customer sells more books than it has anticipated. The customer is invoiced for these additional copies along with the agreed upon number of books. However, if the extra copies are not sold, they may be returned to Petitioner for a credit.

For an additional fee, a customer may also contract with Petitioner for the provision of three optional programs for selling the yearbooks. These three optional sales programs also provide purchasers with alternative payment methods. The optional programs are (1) a school order day, (2) a home order mailing, and (3) a Web site and call center for taking orders.

When Petitioner's customer chooses to purchase one of these three sales options, Petitioner contracts on behalf of the customer with an independent agency (Agency) to develop and service the optional sales programs. Billing services and payment processing service are provided for yearbooks ordered by individual purchasers (e.g., students, parents, etc.) through the sales programs; and, arrangements for a school order day, home order mailing, or Web site and

call center services may also be provided for the yearbook sales pursuant to the offered sales option plans, thus relieving the customer of these responsibilities. The customer determines the price to be charged to the individual purchasers (e.g., students, parents, etc.) for the yearbook and provides that information to Agency. The price charged to the individual purchasers as determined by the customer takes into account any additional funds provided by the customer for the yearbook purchase such as monies obtained from sales of advertising, subsidies or endowments and other fundraising activities.

Individual yearbook purchasers ordering yearbooks may pay Petitioner's customer directly, or, if the customer is participating in one of the optional sales programs, yearbook purchasers may be billed for the yearbooks at a later date, make payment to the sales program by check or credit card, or make payments in installments. The yearbooks are delivered to Petitioner's customer at the school for distribution regardless of the manner in which the individual purchasers placed their orders. The contract or enrollment form signed by Petitioner's customer with respect to each of the three optional sales programs contains the statement: "I (the customer) understand that (Petitioner) or other third parties will act on behalf of the (customer) to bill students for yearbooks and collect funds from them in accordance with the pricing specified (by the customer)"

The order forms and invoices used in the optional sales programs list the name of Petitioner's customer as the seller. The return address for payments lists the name of the customer in care of Agency's order center. In order to access yearbook sales information for a particular customer through the Internet, individual purchasers placing orders through the Web site must enter a number identifying the customer. The individual purchasers (students, parents, etc.) are directed to make checks payable to Agency's order center.

Amounts collected by Agency from individual purchasers (students, parents, etc.) on behalf of the customer are turned over to Petitioner. Petitioner treats these collections as amounts paid on account by the customer to whom Petitioner provides its final invoice. Such collections are deducted as prepayments from the amount shown on Petitioner's final invoice to its customer. When the customer is invoiced for the yearbooks by Petitioner, the per-unit charge paid to Agency by Petitioner for Agency's services is passed through to the customer by Petitioner. If the total of the payments collected by Agency directly from purchasers (i.e., the retail sales price as determined by Petitioner's customer) happens to exceed the total amount of Petitioner's contract with the school (i.e., the wholesale cost of all the books plus the cost of Agency's sales program) the overage is returned to the customer. Otherwise, the customer is responsible for paying to Petitioner the difference between what was collected by Agency and turned over to Petitioner as a prepayment for the customer's purchase and the total of what was owed by the customer for the books and Agency's services.

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

* * *

18. Fulfillment services. Any of the following services performed by an entity on its premises on behalf of a purchaser:

- (i) the acceptance of orders electronically or by mail, telephone, telefax or internet;
- (ii) responses to consumer correspondence and inquiries electronically or by mail, telephone, telefax or internet;
- (iii) billing and collection activities; or
- (iv) the shipment of orders from an inventory of products offered for sale by the purchaser.

Section 1105(a) of the Tax Law imposes sales tax upon the receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1116(a) of the Tax Law provides, in part:

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, 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;

Section 1116(b) of the Tax Law, as amended by Chapter 57 of the Laws of 2008, effective September 1, 2008, provides, in part:

Nothing in this section shall exempt:

(1) (i) retail sales of tangible personal property by any shop or store operated by an organization described in paragraph (4), (5) or (6) of subdivision (a) of this section; (ii) sales, other than for resale, of services described in subdivision (b) or paragraph five of subdivision (c) of section eleven hundred five of this article by that organization, whether or not at a shop or store; (iii) retail sales of tangible personal property and sales, other than for resale, of those services by that organization, made with a degree of regularity, frequency, and continuity by remote means, such as by telephone, the internet, mail order or otherwise; or (iv) retail sales of tangible personal property by lease or rental by that organization as lessor, whether or not at a shop or store;

Section 525.2(a) of the Sales and Use Tax Regulations provides, in part:

Sales tax.

* * *

(2) Except as specifically provided otherwise, the sales tax is a “transactions tax,” with the liability for the tax occurring at the time of the transaction. Generally, a taxed transaction is an act resulting in the receipt of consideration for the transfer of title to or possession of (or both) tangible personal property or for the rendition of an enumerated service. The time or method of payment is generally immaterial, since the tax becomes due at the time of transfer of title to or possession of (or both) the property or the rendition of such service

(3) Except as specifically provided otherwise, the sales tax is a “destination tax.” The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser’s designee, controls both the tax incidence and the tax rate.

(4) The sales tax is generally a “consumer tax.” That is, the person required to collect tax must collect the tax from the customer (*i.e.*, the consumer) when collecting the taxable receipt . . . to which the tax applies. The customer cannot shift the liability for payment of the tax to another person nor otherwise be relieved of such liability. The vendor, or other person required to collect the tax, collects the tax as trustee for and on account of the State and is also personally liable for the tax required to be collected.

Section 529.2 of the Sales and Use Tax Regulations provides, in part:

New York State, agencies, instrumentalities, public corporations, and political subdivisions thereof. (a) Governmental entities.

* * *

(3) A *political subdivision* as used in this section means a county, town, city, village, school district, fire district, special district corporation and board of cooperative educational services of this State.

(b) As purchaser. (1) New York State, or any of its agencies, instrumentalities, public corporations or political subdivisions (hereinafter referred to as New York State governmental entities) are not subject to sales or use tax when they are the purchaser, user, or consumer of tangible personal property or services or when they are the occupant of a hotel room or a patron at a place of amusement, club, roof garden, cabaret or other similar places.

(2) New York State governmental entities as purchasers, users, consumers, occupants or patrons must exercise their right to exemption through the issuance of governmental purchase orders or the appropriate exemption document.

(c) As vendor. (1) Sales by New York State governmental entities of tangible personal property or services of a kind not ordinarily sold by private persons are exempt from sales and use tax.

Example 1: A county clerk sells tax maps, copies of ordinances and certified copies of documents. The sale of these items is not taxable.

Example 2: A governmental entity sells evergreen seedlings in bundles of 1,000 to qualified landowners with the stipulation that once the evergreens are planted they may not be removed with roots attached nor may they be planted for ornamental purposes. The sale of the seedlings is not taxable, because the sales are of a kind not ordinarily sold by private persons.

(2) Sales by New York State governmental entities of tangible personal property or services of a kind which are ordinarily sold by private persons . . . are subject to the sales and use tax. . . .

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

Religious, charitable, scientific, testing for public safety, literary or educational organizations, organizations which foster national or international amateur sports competition, and organizations for the prevention of cruelty to children or animals.

(a) General. (1) Any corporation, association, trust, or community chest, fund or foundation, 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 501 of the United States Internal Revenue Code of 1986), 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, which meet the qualifications of this section are exempt from the sales and use tax on any purchases of tangible personal property, services, food and drink, hotel occupancy, or admissions and dues. In addition, such organizations may, except under the circumstances described in subdivision (i) of this section, make sales without collecting the sales or use tax.

* * *

(h) Sales to exempt organizations. (1) Any sale or amusement charge to or any use or occupancy by an exempt organization to which an exempt organization certificate has been issued is exempt from sales and use tax.

(2) 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. *Direct purchaser, occupant or patron* as used in this paragraph includes any agent or employee authorized by the organization to act on its behalf in making such purchases, provided the organization and its agent or employee are both identified on any bill or invoice. An organization is the direct payer of record where direct payment is made by the organization or from its funds directly to the vendor.

(3) An exempt organization certification is deemed to be properly completed when it contains the:

- (i) name and address of the vendor;
- (ii) name and address of the exempt organization;
- (iii) number assigned to the exempt organization certificate;
- (iv) signature of a responsible officer of the exempt organization; and
- (v) date the certification was executed.

(4) Sales to any member, officer or employee of an exempt organization are subject to the sales and use tax when the sales are for the personal use of the purchaser rather than the organization.

(i) 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.

Section 532.1 of the Sales and Use Tax Regulations provides, in part:

Collection of tax from customer. (a) Time of collection. (1) Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies.

(2) Where a vendor makes a sale for which payment is not received at the time of delivery, such sale must be reported on the return covering the period in which the sale is made. Thus, if the sale is a taxable sale, the full amount of tax must be remitted with the return whether or not any money was collected at the time of sale.

(3) Any person willfully failing to collect the tax from a customer may be subject to the criminal penalties prescribed by section 1817 of the Tax Law and the Penal Law. . .

(b) Statement of and reference to tax. (1) Whenever the customer is given any sales slip, invoice, receipt, or other statement or memorandum of the price, amusement charge, or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him.

(2) Whenever the sales and use tax is separately stated on such document, it may be referred to as *tax*.

(3) The words *tax included* or words of similar import, on a sales slip or other document, do not constitute a separate statement of the tax, and the entire amount charged is deemed the sales price of the property sold or services rendered.

Opinion

Petitioner is a publisher of school yearbooks and is registered for the collection of sales tax in New York State. Petitioner contracts with customers in the State for publication of their school yearbooks. Petitioner's customer may be a public school, a private school, or a club, extraclassroom activity fund, or organization of such public or private school. Such private school, club, extraclassroom activity fund, or organization may or may not be a qualifying (religious, scientific, charitable, educational, etc.) exempt organization pursuant to section 1116(a)(4) of the Tax Law.

Under Petitioner's sales agreement with its customer, the customer is responsible for the content of the publication and for the sale and delivery of the yearbook to the individual purchasers (students, parents, etc.). Petitioner invoices the customer for the number of books the

customer agreed by contract to purchase. The customer will own those books and will not receive a credit for any unsold books included in that amount. Petitioner also bills the customer for an additional 15-25 yearbooks printed and delivered to the customer, but the customer may return any of such yearbooks not sold and the customer will be given a credit for these returns.

According to the facts presented, Petitioner is making a sale of tangible personal property that may be subject to sales tax imposed under section 1105(a) of the Tax Law. If Petitioner's customer is a public school as described in section 1116(a)(1) of the Tax Law and section 529.2(a)(3) of the Sales and Use Tax Regulations, Petitioner will have a contract signed by the person authorized to contract for a disbursement of the school district's funds. In such instance, Petitioner's invoice would name the school district as purchaser. In that case, Petitioner would not be required to collect sales tax on sales of yearbooks to the customer (i.e., public school) as the sale would be exempt from sales tax pursuant to the provisions of section 1116(a)(1) of the Tax Law. See section 529.2(b)(1) of the Sales and Use Tax Regulations. Petitioner would be required to substantiate that the sale was exempt by maintaining in its sales records documents (e.g., school district purchase orders) as described in section 529.2(b)(2) of the Sales and Use Tax Regulations.

The provisions of section 1116(a)(1) of the Tax Law provide that school districts, as political subdivisions of New York State, are not required to collect sales tax on receipts from sales of tangible personal property of a kind not ordinarily sold by private persons. Section 529.2(c)(2) of the Sales and Use Tax Regulations further provides that sales by political subdivisions of New York State, including school districts, of tangible personal property of a kind ordinarily sold by private persons are subject to the sales and use tax. Since books are property of a kind ordinarily sold by private persons, public school districts are generally required to collect sales tax on their sales of such books.

However, the acquisition of yearbooks by public schools is typically handled by a student organization such as a yearbook committee or "key club" under the aegis of the extraclassroom activity fund of the school district. Such student organizations and extraclassroom activity funds of public schools are not included in the exemption granted to school districts under section 1116(a)(1) of the Tax Law. Purchases by these organizations and funds are normally subject to sales tax. Purchases of tangible personal property for resale, however, are not subject to sales tax. See section 1101(b)(4) of the Tax Law.

The extraclassroom activity fund of a school district (only one such fund is required for each school district) may register as a sales tax vendor with the Department. As a registered vendor, the extraclassroom activity fund may issue a properly completed *Resale Certificate* (Form ST- 120) to Petitioner when purchasing yearbooks for student organizations or the fund if such yearbooks are purchased by the fund for resale. The student organization or the extraclassroom activity fund must collect and remit sales tax on their receipts from sales of yearbooks.

If Petitioner's contract is signed with a private or parochial school that is exempt from sales tax under the provisions of section 1116(a)(4) of the Tax Law, and such school is the purchaser and payer of record, Petitioner may accept a properly completed *Exempt Organization Exempt Purchase Certificate* (Form ST-119.1) in lieu of collecting the sales tax on the receipts from its sales of yearbooks. See section 529.7(h) of the Sales and Use Tax Regulations. Sales of tangible personal property by an organization exempt from tax under section 1116(a)(4) of the Tax Law are not subject to sales tax unless such sales are made by a shop or store operated by such organization. See section 1116(b)(1) of the Tax Law. Therefore, when the yearbooks are sold from a shop or store as described in section 529.7(i)(2) of the Sales and Use Tax Regulations, these organizations' sales of yearbooks are subject to sales tax. It should be noted that for these organizations' yearbook sales made on or after September 1, 2008, such sales will be taxable when made with a degree of regularity, frequency, and continuity by remote means, such as by telephone, the Internet, or mail order. See section 1116(b)(1) of the Tax Law as amended by Chapter 57 of the Laws of 2008; section 1116(a)(4) of the Tax Law and section 529.7(i) of the Sales and Use Tax Regulations.

Agency's role pursuant to the optional sales programs in these transactions is that of a fulfillment service provider. That is, Agency provides services on behalf of Petitioner's customers which services include accepting orders electronically or by mail, telephone, fax or Internet; and, billing and collection activities. See section 1101(b)(18) of the Tax Law. As a fulfillment service provider for Petitioner's customers, sales through Agency are subject to sales tax to the extent that such sales would be subject to sales tax if made directly by the customer. Thus, sales of school yearbooks to students, parents, and other purchasers by a public school; by an extraclassroom activity fund, club, or organization of a private or public school; by a private school that is not exempt from sales tax under section 1116(a)(4) of the Tax Law; or by a school which, though qualifying for exemption pursuant to section 1116(a)(4) of the Tax Law, makes sales of yearbooks through a shop or store; are subject to sales tax whether such sales are made directly by those entities or through Agency acting for such entities. Similarly, on and after September 1, 2008, Agency's sales as agent for a private school made via the Internet, telephone or mail order may also be subject to tax regardless of whether the school regularly sells property at a shop or store. See section 1116(b)(1) of the Tax Law as amended by Chapter 57 of the Laws of 2008, effective September 1, 2008.

As the fulfillment service provider for Petitioner's customer, Agency must separately state the sales tax due on any bill or invoice rendered on behalf of the customer to the consumer. See section 532.1(b) of the Sales and Use Tax Regulations. The sales tax on each individual sale is computed on the amount (including any amount charged for Agency's services) actually charged to the individual consumer by the public school, student organization, extraclassroom activity fund, or non-exempt private school at the tax rate in effect where the book is delivered to the consumer or its designee. See section 525.2 of the Sales and Use Tax Regulations.

The services provided by Agency (billing, payment processing, maintaining a Web site for sales, etc.) are not services enumerated as taxable under section 1105(c) of the Tax Law. Petitioner pays Agency for the services contracted by Petitioner with Agency on the customer's behalf and passes Agency's charges for these services through to its customer on its bill to the customer for the yearbooks. However, Petitioner's customers may purchase yearbooks from Petitioner without purchasing the services performed by Agency. The sale to the customer of Agency's services is a sale separate and distinct from Petitioner's sale of the yearbooks to the customer. The purchase of Agency's services is not an expense of Petitioner in its sale of yearbooks to the customer. The services provided by Agency are not services which are subject to sales tax, and such services being separately contracted and sold constitute a separate sale the charges for which are distinct from the charges for the sale of the yearbook. Thus, the amounts charged and billed for Agency's services are not subject to tax, provided that the charges for the services are separately stated and reasonable. The amounts paid for Agency's services by the customer are a part of the customer's expense of selling the yearbooks to the consumer (students, parents, etc). If such costs are included in the price charged for the purchase of the yearbook by consumers, such costs are part of the customer's receipts from its sale of the yearbooks.

DATED: September 15, 2008

/s/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.