

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-15(15)S
Sales Tax
March 24, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S121127A

The Department of Taxation and Finance received a Petition for Advisory Opinion from “Petitioner” [REDACTED]. Petitioner, an internet retailer, asks whether the annual fee it charges for membership in its marketing discount program (“Membership Program”) is subject to sales and use tax.

We conclude that the annual membership fee is subject to sales and use tax.

Facts

Petitioner is an affiliate in a family of companies associated, among other things, with an internet retailing business. Petitioner operates the corporate group’s website (“Website”). The sellers of the goods and services sold on the Website are either Petitioner’s affiliate (“Web Retailer Affiliate”) or unrelated sellers. Web Retailer Affiliate sells tangible personal property on the website. In purchasing tangible personal property on the Website, a customer must specify a speed of delivery (“same-day,” “next-day, or “two-day” shipping). The amount that Web Retailer Affiliate charges for shipping depends on the speed of delivery chosen by the customer.

Another affiliate (“Fulfillment Affiliate”) performs shipping services, for a fee, in relation to products sold on the Website. The shipping services entail (1) preparing the package for delivery (referred to as fulfillment services), and (2) delivering the items from a fulfillment center to the customer. The Web Retailer Affiliate pays Fulfillment Affiliate for the shipping services it provides in connection with the goods sold by the Web Retailer Affiliate. Unrelated sellers making sales through the Website can also choose to use Fulfillment Affiliate’s shipping service for a fee. The corporate group of which Petitioner is a member also includes an affiliate that sells streaming videos and electronic books or “e-books” (“Digital Products Affiliate”).

The terms and conditions of the Membership Program states in pertinent part:

These Terms are between you and [Petitioner] and/or its affiliates (“Retailer.com” or “Us”) and govern our respective rights and obligations. The Terms, together with applicable terms and conditions related to any promotional offers provided to you for use with [the Membership Program] constitute the entire agreement between you and Retailer.com related to the [Membership Program]. Please note that your use of the [Retailer.com website] and [the Membership Program] are also governed by our Conditions of Use and Privacy Notice, as well as all other applicable terms, conditions, limitations, and requirements on the Retailer.com website, all of which (as changed over time) are incorporated into these Terms. If you sign up for [the Membership Program], you accept these terms, conditions, limitations and requirements.

Members of the general public may sign up for a free trial or paid membership in the program and these members (“Members”) receive certain membership benefits associated with shopping on the Website during the membership period. The free trial period is one month and the paid membership period is one year. The membership benefits provided to Members are described below.

1. Shipping - Members are entitled to receive free two-day shipping and other discounted shipping benefits on select shipping options on eligible purchases made on the Website. Products eligible for these shipping benefits are designated as such on the Website's product pages. Also, certain products sold by the third-party sellers receiving shipping services from Fulfillment Affiliate are eligible for the Membership Program's shipping benefits.
2. Streaming Videos - Members may view designated movies and television shows ("Membership Program Videos") an unlimited number of times at no additional cost during the course of their membership. The Membership Program Videos are viewed on the Member's television, computer, tablet, gaming system, or other compatible device. Membership Program Videos are only available for streaming and cannot be downloaded.
3. Membership Program's Lending Library (“Members’ Lending Library”) - The Members’ Lending Library allows eligible U.S. Members who own a specified type of electronic book reader device to choose from thousands of e-books to borrow for free, as frequently as one book a month, with no due dates. Members must own an electronic book reader device that is registered to the same account as the eligible membership in order to access this benefit.

Recently, Petitioner has offered two new benefits to members of its Membership Program:

4. Special Member Pricing - Special Member Pricing provides discounts to members on sales of certain tangible personal property by Petitioner's Web Retailer Affiliate. Currently, Special Member Pricing is available only on a very limited number of products. However, in the future, it likely will be expanded to a broader range of products. This benefit started in 2013.
5. Bulky Item Benefit - This benefit allows Members to purchase up to 45 pounds of heavy/bulky items and have the items delivered for a flat shipping fee of \$5.99. The heavy/bulky items to which this benefit applies are only available for purchase by Members.

Petitioner is not the entity actually providing the benefits associated with the membership discount program. With respect to the shipping and Bulky Item benefits, the Website Retailer Affiliate and third party sellers are the sellers of record for the tangible goods purchased on the Website and the associated shipping services. Fulfillment Affiliate provides the actual shipping services associated with these items. Similarly, Digital Products Affiliate is the seller of record of the streaming video and the entity responsible for providing the free streaming digital videos and the e-books associated with the free and the Members’ Lending Library benefits, respectively.

The affiliates of Petitioner that perform the services related to the Membership Program's benefits are compensated by Petitioner pursuant to intercompany agreements. For example, Petitioner pays the Fulfillment Affiliate and the Digital Products Retailing Affiliate for, respectively, the shipping services and video-streaming benefits provided as part of Petitioner's Membership Program. The amount of the payments is determined using GAAP principles for intercompany accounting.

Analysis

The Tax Law imposes sales tax on the receipts from retail sales of tangible personal property and the receipts from the sale, except for resale, of specified services. *See* Tax Law § 1105(a),(c). The term "receipts" includes "any charges by the vendor to the purchaser for shipping or delivery." Tax Law § 1101(b)(3).

A payment made for the right to make purchases of taxable goods at a discounted price at a later time is subject to sales tax. *See Matter of Credit Bureau of Central New York v. State Tax Commission*, 105 AD2d 1042 (3d Dept 1984). In that case, the court determined that membership fees paid to a credit reporting agency were merely part of the members' cost of the credit reports since the credit reports were the only things provided to members by the credit bureau in return for the fee. The court concluded that such fees are subject to tax since they are, in reality, prepayments that only entitled members to reduced charges for the credit reports. In TSB-A-92(66)S, the Department concluded that the annual membership fee paid by members for access to a retailer's warehouse sales facilities was subject to sales tax pursuant to Tax Law § 1105(a) since, in substance, the membership fee was a prepayment for the merchandise sold by the retailer. The Department applied the same rule to the membership fee for shopping at a discount store in TSB-A-94(10)S.

A 1996 Advisory Opinion, TSB-A-96(15)S, presents a different situation. There, the issue was a charge for a membership fee that entitled members to receive a listing of participating vendors where members were entitled to receive discounts. The businesses, which were all waterfront businesses, did not pay the petitioner to be included in the discount deal. The Department opined that "the sale of membership in Petitioner whereby members receive the right to discounts from designated vendors is considered the sale of an intangible" and was thus nontaxable. The difference in the outcome in this 1996 Advisory Opinion from the taxable outcome in TSB-A-92(66)S can be explained by the fact that, in TSB-A-92(66)S, the vendor selling the underlying good received the membership payment, so the membership fee functioned as a type of prepayment. In contrast, in the 1996 Advisory Opinion, there is no indication that the vendors providing the discounted goods and services received any part of the membership payment. Thus, the rule that emerges from these Advisory Opinions is that payments made by a customer to a vendor or the vendor's agent that entitle the customer to make subsequent purchases for taxable goods at a discount are subject to sales tax.

Some of the membership benefits here are taxable. While e-books are not taxable (*see* TSB-M-11[20]S), and the Department has not opined on whether streaming video services are taxable under Tax Law § 1105(c)(9), the discounted shipping benefits are taxable. Shipping charges are not taxable in their own right, because transportation is not one of the enumerated services that are subject to sales and use tax. *See* Tax Law § 1105. However, shipping charges

are taxable if they are included in a vendor's taxable "receipts." "Receipts" are defined to include "any charges by the vendor to the purchaser for shipping or delivery" of taxable items. *See* Tax Law § 1101(b)(3) (emphasis added). Thus, the question of whether the shipping benefits portion of Petitioner's Membership Program is taxable devolves to whether any portion of Petitioner's charge for its Membership Program could be said to be a charge by a vendor to its customer for shipping of a taxable item. Web Retailer Affiliate is one of Petitioner's affiliates that is offering the program according to the program's terms and conditions. Web Retailer Affiliate sells items of tangible personal property on its website. Sales of tangible personal property are presumed to be taxable under Tax Law § 1132(c). Web Retailer Affiliate's charge to the customer for shipping taxable tangible personal property is reduced or eliminated altogether if the sale is covered by the Membership Program. Thus, the shipping benefit is a taxable benefit because it entitles a member to receive a discount on the delivery charge for a purchased item that is presumed to be subject to New York's sales or use taxes. *See* Tax Law §§ 1101(b)(3); 1105(a); Tax Law § 1132(c).

Additionally, the Special Members Pricing benefit, which became available in 2013, is a taxable benefit, as it provides a discount on purchases of certain items of tangible personal property, which are presumed to be taxable under Tax Law § 1132(c). The Bulky Items benefit, which became available in 2014, is taxable if it provides discounted shipping charges, pursuant to the analysis set forth above.

Given that a member's payment of the fee for the Membership Program entitles the member to receive a discount on the purchase price of, or the delivery charge for, items from Web Retailer Affiliate that are presumed to be subject to sales or use taxes, the fee for the Membership Program is a prepayment for a taxable item and is thus subject to tax. The fact that the fee for the Membership Program also entitles the member to receive benefits that are not subject to tax does not change this result. *See* 20 NYCRR § 527.1(b); *Lake Grove Entertainment, LLC v. Megna*, 81 AD 3d 1191 (3d Dept 2011).

DATED: March 24, 2015

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.