

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-84(22)S
Sales Tax
October 4, 1984

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S840109A

On January 9, 1984, a Petition for Advisory Opinion was received from William Esty Company, Inc., 100 East 42nd Street, New York, New York 10017.

The issue raised is whether Petitioner's purchase orders satisfy the disclosure requirement, necessary for a principal-agent relationship to be recognized for sales tax purposes, set forth in Technical Services Bureau Memorandum TSB-M-83(16)S. Where a principal-agent relationship is established, the agent (in the present case an advertising agency) may make purchases without the payment of tax where its principal is an organization exempt from tax under the provisions of the Tax Law. If its principal is not an exempt organization, not only would sales tax be due on the sale to the advertising agency, but, in addition, tax would be due on payments by the principal to the advertising agency for services performed on the purchased materials (e.g., editing, cropping, retouching, etc.). Such services would constitute the services of "producing, fabricating, processing, printing or imprinting" such tangible personal property and, as such, the receipts from the sale of such services would be subject to tax under section 1105(c)(2) of the Tax Law. On the other hand, if a principal-agent relationship did not exist, the same tax would be payable on the purchase of the materials, but no tax would be due on the payment for the services described above, as the same would constitute exempt advertising services, pursuant to Tax Law, §1105(c)(1).

Petitioner, an advertising agency, states that it makes purchases on behalf of its clients, acting as agent for its client in making such purchases. The front of the general purchase order used by Petitioner provides a line for listing the name of Petitioner's client, there identified as its client. The front of the purchase order also states, in bold type - "IMPORTANT! SEE TERMS AND CONDITIONS ON REVERSE SIDE."

On the reverse of the form appears the following:

"The following terms and conditions shall be applicable to this order:

1. Work submitted by the **VENDOR** pursuant to this order must, in our opinion, be satisfactory for the purposes for which it is ordered, and is subject to approval by the client herein specified. All material delivered hereunder, when approved by client, becomes without reservation the property of the client from the moment of creation.

. . .

3. William Esty Company, Incorporated is an accredited advertising agency and as such, is acting as an agent for the client designated on the face of this order."

Technical Services Bureau Memorandum TSB-M-83(16)S, Advertising Agencies, provides, in part, as follows:

"A. Principal-Agent Relationship

In order for a principal-agent relationship to exist for sales tax purposes the conditions set forth in TSB-M-78(3)S must be met. Those conditions are:

1. The advertising agency must clearly disclose to the supplier the name of the client for whom the agency is acting as agent,

Condition 1 above will be met only where the complete name of the client is disclosed on any purchase order given to a supplier and the advertising agency is identified as agent acting for and on behalf of the disclosed client (e.g., X advertising agency as agent for Y, name of client)."

As the example given indicates, the disclosure of agency status must be clear, direct and unequivocal. Such is not the case with the purchase order here under consideration. Thus, it is stated therein that the Petitioner is "an accredited advertising agency" and that it is "as such" that it is acting as an agent for its client. That is, it is acting as an agent insofar as an advertising agency by its nature and normal operation is an agent for its clients. However, it cannot be said that advertising agencies are necessarily agents of their clients for purposes of purchasing property to be used in creating an advertisement. Rather, the proposition must be proven in each case, by reference to the agreement entered into by the advertising agency and its client. Thus, the statement on the purchase order does not give clear and unequivocal notice of agency status, but rather grounds such notice on a dubious legal theory. Accordingly, it cannot be said to satisfy the applicable requirement set forth in the Technical Services Bureau Memorandum cited above.

DATED: September 17, 1984

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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