

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

TSB-A-85(24)S
Sales Tax
June 24, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S840827C

On August 27, 1984 a Petition for Advisory Opinion was received from C.G. Jung Foundation for Analytical Psychology, Inc., 28 East 39th Street, New York, New York 10016.

The issues raised are: (1) whether Petitioner may refund to its customers sales tax it has collected on its sales of books and pamphlets and (2) whether Petitioner is required to collect sales tax on its future sales of books and pamphlets.

Petitioner is an exempt organization as described in section 1116(a)(4) of the Tax Law.

Petitioner maintains a room (the M. Esther Harding Room) in its New York City offices which is used for meetings, lectures and reading. Books and pamphlets concerned with analytical psychology and closely related fields are made available to Foundation members for reading in this room. Petitioner maintains a list of publications that are available for sale to members and persons attending Foundation lectures. As a consequence of making hard-to-find titles available, Petitioner's sales have increased and a cash register has been installed in the Harding Room. Petitioner's list of publications is also sent through the mail to Foundation members and other interested persons who request the list. A separate charge is made for postage and handling on mail order sales.

Pursuant to directions received from the Sales Tax Instructions and Interpretations Unit of the Technical Services Bureau, Petitioner has been collecting sales tax on its mail order and Harding Room sales. However, Petitioner avers that it should not be required to collect such tax because: (1) it is an exempt organization (2) the publications sold are not easily commercially available and (3) the publications are made primarily available to members. Petitioner believes, based on items (2) and (3), it is not operating a shop or store requiring the collection of sales tax.

Petitioner states that it has collected the sales tax and accounted for such funds separately, pending resolution of the question of whether collection of sales tax was required. If not required, Petitioner intends to refund to purchasers any moneys actually collected.

Issue I

The Sales and Use Tax Regulations provide that "Where a person required to collect tax, collects tax on receipts...not subject to tax,... the tax collected must be paid over to the State Tax Commission..." 20 NYCRR 534.8(b)(1). Accordingly, Petitioner's failure to remit the tax collected was improper, notwithstanding the fact that there was doubt on Petitioner's part as to the taxability

of its sales. Petitioner must therefore remit to the State Tax Commission any moneys purportedly collected in accordance with Articles 28 and 29 of the Tax Law and not refund such moneys to its customers. Any customer who has made an erroneous, illegal or unconstitutional payment of tax to Petitioner may apply to the Tax Commission for a credit or refund in accordance with 20 NYCRR 534.2.

Issue II

The Tax Law imposes a tax on the receipts from every retail sale of tangible personal property with certain exceptions. Tax Law 1105(a).

Sales made by organization's described in section 1116(a)(4) of the Tax Law are generally not subject to tax. Tax Law 1116(a). However, if such organizations make sales of tangible personal property through a shop or store the exemption does not apply. Tax Law 1116(b)(1)

The Sales and Use Tax Regulations describe a shop or store to include "...any place or establishment where goods are sold from display with a degree of regularity, frequency and continuity..." 20 NYCRR 529.7(i)(2).

Petitioner is operating a shop or store within the meaning and intent of Tax Law 1116(b)(1) and 20 NYCRR 529.7(i)(2). Petitioner is therefore required to collect and remit tax on its mail order and Harding Room sales. The fact that some of the publications are sold via mail order is not material. It would be contrary to the intent of Tax Law 1116(b)(1) to allow a taxpayer to circumvent the collection of tax by the simple expedient of conducting otherwise taxable transactions through the mail.

DATED: June 4, 1985

FRANK J. PUCCIA
Director
Technical Services Bureau

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