

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

TSB-A-90(14)S
Sales Tax
March 21, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890921B

On September 21, 1989 a Petition for Advisory Opinion was received from Cooperman, Levitt and Winikoff, P.C., 800 Third Avenue, New York, New York 10022.

The issue raised by Petitioner, Cooperman, Levitt and Winikoff, P.C., is the applicability of New York State and Local Sales and Use Tax to the co-operative, direct mail advertising program offered by Petitioner's client.

The instant transaction involves a direct mail advertising program offered by Petitioner's client (hereinafter referred to as "Company"), a business entity located within New York. Company obtains clients who desire to have a post card (hereinafter referred to as "card") produced containing an advertisement of the client's product or service and to have such card included in a package containing similar cards of other clients which is mailed to potential customers within a particular locality. The card also serves as a form for requesting information concerning, or for ordering, the client's product or service. The package in which the cards are mailed contains the name of Company.

Under its standard contractual agreements with clients, Company arranges for the printing of a minimum number of cards and the distribution thereof. Company engages one or more out-of-state printer/mailers which, using supplies purchased directly by them, print the cards, package the cards, and deposit the packages in the United States mail at a location outside New York State for mailing to potential customers within a particular geographic locality.

Generally, Company's clients provide the design for the advertisement which is to appear on the clients' cards. In all instances where the client does not provide the artwork or mechanical, Company will purchase such items from a third party.

The artwork or mechanicals are either delivered directly to the out-of-state printer/printer by the producers thereof or are delivered to Company for subsequent delivery to the out-of-state printer/mailers.

Company rents mailing lists from third parties for the purpose of obtaining the names and addresses to be used by the printer/mailers when mailing the packages of cards.

Each contract with a client relates to a particular locality. If the agreement calls for a mailing to New York City, all of the client's cards which are produced and distributed under that contract would be mailed to New York City addresses.

Company's charge to a client is generally a flat amount based upon the number of cards to be distributed for such client. A separate charge is added if Company aids in the design of the artwork or if the advertising is to be in color.

Section 525.2 of the New York State Sales and Use Tax Regulations states, in relevant part:

(a)...

(2) The sales tax is a "transactions tax," liability for the tax occurring at the time of the transaction. Generally speaking, the taxed transaction is an act resulting in the receipt of consideration for the transfer of title, or possession or both to property or rendition of services from one person to another. The time or method of payment is immaterial, since the tax becomes due at the time of transfer of property or rendition of service.

(3) The sales tax is a "destination tax," that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate...

(4) The sales tax is a "consumer tax," that is, the tax is imposed on the retail sale of tangible personal property and certain services and is collected from the person who purchases at retail-the consumer. The consumer cannot shift the liability for payment of the tax to another person nor otherwise relieve himself of such liability, although the vendor is personally liable for the tax he was responsible for collecting.

(b) The compensating use tax is imposed on the use within the State of tangible personal property and services which would have been subject to sales tax if purchased in this State. It is designed to equalize the tax burden and to make the purchaser of property or services liable for a tax, measured by the purchase price, where, for various reasons, the sales tax was not paid at the time of purchase. It protects vendors located in the State from the competition of out-of-state vendors who are not required to collect tax and makes it unattractive for New York purchasers to purchase out of the State solely for tax avoidance purposes.

Section 1105 of the Tax Law states in relevant part:

... there is hereby imposed and there shall be paid a tax ... upon:

- (a) The receipts from every retail sale of tangible personal property ...
- (c) The receipts from every sale, except for resale, of the following services:

(1)...but... excluding the services of Advertising or other agents...

Section 527(3) of the Sales and Use Tax Regulations states in relevant part:

(b) Exclusions

(5) Fees for the services of advertising agencies or other persons acting in a representative capacity are excluded from the tax. Advertising services consist of consultation and development of advertising campaigns, and placement of advertisements with the media without the transfer of tangible personal property. ... Sales of tangible personal property such as layouts, printing plates, catalogs, mailing devices or promotional handouts, tapes or films by an advertising agency for its own account are taxable sales of tangible personal property.

(c) Purchases by persons providing ... advertising service.

(2) All purchases of materials by an advertising agency for use in performing its services are purchases at retail subject to the sales tax.

(3) The purchase of a service subject to tax under section 1105(c)(1) of the Tax Law by a vendor who will resell that service as such or as a part of a service also subject to tax under section 1105(c)(1) is not a purchase at retail and is exempt from the sales tax.

Section 1101(b)(7) of the Tax Law, amended by Chapter 61, Laws of 1989, states as follows:

Use. The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property. Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials.

Section 1101(b)(12) of the Tax Law, added by Chapter 61, Laws of 1989, states as follows:

Promotional Materials. 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, promotional displays and Cheshire labels but does not include invoices, statements and the like.

Section 1115(n) of the Tax Law, added by Chapter 61, Laws of 1989, states as follows:

(1) 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 of this subdivision.

Since the inception of the sales tax, it has been recognized that New York vendors are at a competitive disadvantage if potential New York customers can avoid the tax merely by purchasing from out-of-state vendors, who could not be required to collect the tax. Accordingly, a sales tax is always accompanied by a compensating use tax. Thus, a New York business purchasing goods from an out-of-state vendor for use in New York is required to report such purchases on its sales and use tax return and pay the appropriate use tax directly to the State.

However, in Bennett Brothers, Inc. v. State Tax Commission, (62 AD2d 614 (1978)) the court held that a New York Vendor lacked "real control" over a shipment of catalogs produced by an out-of-state printer once the printer deposited the catalogs with a common carrier outside the State for delivery to the vendor's customers in New York. Thus the vendor was not subject to the compensating use tax on the use of catalogs in this State.

In D.H. Holmes Company, Ltd. v. McNamara (486 US 24, 100 LEd 2d 21) the U.S. Supreme Court in addressing the case of a Louisiana vendor seeking to avoid the use tax in that state in a situation like that in Bennett Brothers, Inc., held that the vendor's contention that it lacked sufficient control over the catalogs distribution in Louisiana to subject it to the use tax verged on the nonsensical. The court pointed out that the vendor ordered and paid for the catalogs and supplied the list of customers to whom the catalogs were sent. The vendor admitted that it initiated the

distribution to improve its sales and name recognition among Louisiana residents. The distribution of catalogs to a large number of in-state customers was directly aimed at expanding and enhancing its Louisiana business.

Petitioner's contention that Company is selling tangible personal property to its clients and not distributing promotional materials within New York State, thereby not incurring a New York State and Local Sales or Use Tax liability is erroneous.

In the instant transaction Company's business activities which consist of providing a post card advertisement for a client and including such advertisement in a package containing similar post card advertisements for other clients, for distribution to potential customers within New York State are considered to result in the performance of an advertising service and not the sale of tangible personal property. The receipts from the charges to clients for such advertising service are excluded from New York State and Local Sales Tax under the provisions of Section 1105(c)(1) of the Tax Law and Section 527(3)(b)(5) of the Sales and Use Tax Regulations.

Whereas Company is performing an advertising service and not making sales of tangible personal property or services whereby title and possession are transferred to Company's clients, Company's purchases of mailing lists, cards, mechanicals and artwork are not considered to be purchases for resale or purchases of physical component parts of tangible personal property for resale. Accordingly, Company's purchases of such items will be subject to New York State and Local Sales or Use Tax where delivery occurs within New York State.

In transactions where the mailing lists, cards, artwork and mechanicals purchased by Company are delivered directly to the out-of-state printer/mailer, delivery is deemed to occur outside New York State. In those instances, Company will not be liable for New York State and Local Sales Tax on such purchases.

However, the advertising packages are deemed to be promotional materials as defined under Section 1101(b)(12) of the Tax Law. When such advertising packages are delivered to potential customers within New York State, Company will be considered to be distributing promotional materials within New York State and such distribution will constitute use of such items within New York State under the provisions of Section 1101(b)(7) of the Tax Law.

Accordingly, Company will be liable for New York State and Local Sales or Use Tax based on the total costs incurred in providing the advertising package to its clients and on the New York State and Local Sales and Use Tax rate in effect for the locality or localities in which the potential customers are located. The total costs incurred will include, but not be limited to, Company's cost of the artwork, mechanicals, mailing lists and the printer/mailer services including any tangible personal property sold to Company by the printer/mailer. However, the printer/mailer charges to

TSB-A-90(14)S
Sales Tax
March 21, 1990

Company for the services of folding written or printed matter for insertion into envelopes, inserting, sealing, affixing stamps, metering and mailing and the cost of postage will not be subject to the tax if such charges are separately stated on the billing rendered to Company.

In those instances where Company enters into "agency" contracts with clients, Company will be considered to be acting on behalf of such clients when entering into any of the transactions enumerated above and as agent for such clients, Company will also be liable for Sales and Use Tax on such transactions as discussed above.

DATED: March 21, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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