

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

TSB-A-90 (23)S
Sales Tax
April 16, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S891120B

On November 20, 1989 a Petition for Advisory Opinion was received from Sara Lee - Hanes Hosiery, 5660 University Parkway, Winston-Salem, N.C. 27105.

The issue raised by Petitioner, Sara Lee - Hanes Hosiery, is whether promotional items sent by Petitioner from out of state directly to its New York customers by common carrier are subject to the use tax imposed under Section 1110 of the Tax Law; and if so, what is the basis upon which the tax is imposed.

Petitioner manufactures ladies hosiery in plants outside New York. Wholesale sales are made to retailers for resale in New York. As an inducement to prospective customers, Petitioner places ads in national magazines offering a free pair of hose if the coupon is sent to a fulfillment house address in Minnesota. The free hose are mailed from Minnesota by common carrier to the New York residents responding to the ad. Petitioner also operates retail stores in New York State.

Prior to September 1, 1989 promotional materials which were mailed or shipped by common carrier from outside New York State directly to customers within New York State were exempt from the use tax. See: TSB-M-79(9)S.

Effective September 1, 1989, two amendments to the Tax Law impacted upon the status of promotional materials which were sent from out of state directly to the customers of a vendor located in New York State.

First, a new paragraph (12) was added to Section 1101(b) of the Sales Tax Law which defined promotional materials as any advertising literature, applications, order forms and return envelopes related to such advertising literature, free gifts, complimentary maps or other items given to travel club members, annual reports, promotional displays, cheshire labels and similar items of tangible personal property used for promotional purposes. Promotional materials include property that has been personalized through the use of the recipient's name or other information uniquely related to such person but, does not include invoices, statements and the like.

Second, an amendment to the definition of the term "use" contained in Section 1101(b)(7) of the Tax Law provided that in addition to the existing criteria that constituted use in this state, "use" now included the distribution of tangible personal property, such as promotional materials.

Therefore, subsequent to September 1, 1989 Petitioner's promotional items which it delivers into New York State are subject to the use tax imposed under Section 1110 of the Tax Law.

Section 531.1 of the Sales and Use Tax Regulations provides in part: (a) Imposition. The compensating use tax is imposed on the use within the State of tangible personal property and certain services, except to the extent they have been or will be subject to sales tax.

* * *

(b) Taxable uses. The uses enumerated herein are subject to tax.

(1) Tangible personal property purchased at retail.

(2) Tangible personal property manufactured, processed or assembled by the user if items of the same kind are offered for sale by him in the regular course of business.

(3) Information services which would be subject to tax under subdivision (1) of section 1105(c) of the Tax Law.

Section 531.3(b) of the Sales and Use Tax Regulations provides in part:

(1) A compensating use tax is imposed on the use of any tangible personal property which was manufactured, processed or assembled by the user, if items of the same kind of tangible personal property are offered for sale by him in the regular course of business.

(i) Items of the same kind mean that items belong to an identifiable class, but need not be identical.

* * *

(3) Where the user sells items of the same kind to other persons in the regular course of business, the basis of tax on the use of tangible personal property which is manufactured, process or assembled by the user is the price at which such items are sold as evidenced by a price list, catalog price or record of sales. In the absence of a catalog price or price list, the average of the prices charged various customers will be deemed the price which the user would sell such item to the persons during the regular course of business.

In accordance with said section of the Regulations, since Petitioner manufactured the tangible personal property given away, its basis upon which the tax is calculated, is the price at which it normally sells the hosiery to others.

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Pursuant to Section 525.2 of the Sales and Use Tax Regulations the rate of tax to be applied to Petitioners' promotional items is the rate of tax in effect in the community in which they are delivered, since the point of delivery or point at which possession is transferred by the vendor to the customer controls both the tax incident and the tax rate.

DATED: April 16, 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.