

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

TSB-A-90 (26)S
Sales Tax
May 14, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900312C

On March 12, 1990 a Petition for Advisory Opinion was received from Morten L. Coren, P.C., 638 Meadow Court, Westbury, N.Y. 11590.

The issue raised by Petitioner, Morten L. Coren, P.C., is whether charges to Petitioner's client for color separations are subject to New York State and Local Sales or Use Tax, when such color separations are produced by and delivered by an advertising agency to a printer located outside New York State?

Petitioner's client operates a business in New York State. It has entered into a contract with an advertising agency wherein the advertising agency will provide services relating to print advertising and catalogues. The advertising agency will provide it with project consultation, concept development, creative execution, mechanical preparation and the production of color separations.

The advertising agency will send the color separations directly to a printer located outside New York State. The color separations will be used in the production of catalogues and print advertisements, such print advertisements to be placed in media publications, consisting of newspapers and magazines. The catalogues will be distributed both in and out of New York State.

Petitioner's client will not receive any tangible personal property from the advertising agency.

Section 1105 of the Tax Law states, in part:

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

- (a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.
- (c) The receipts from every sale, except for resale, of the following services:
 - (1) the furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other matter ... but ... excluding the services of advertising ... agents
 - (2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale upon which such services are performed....

Section 1110 of the Tax Law states is part:

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state ... (A) of any tangible personal property purchased at retail, ... (c) of any of the services described in paragraph (1) of subdivision (c) of section eleven hundred five, and (D) of any tangible personal property, however acquired, where not acquired for purposes of resale, upon which any of the services described under paragraphs (2) ... of subdivision (c) of section eleven hundred five have been performed....

Section 525.2 of the Sales and Use Tax Regulations states, in part:

Nature of tax.

(a)(1) The sales tax is imposed on the receipts, unless specifically exempt, from every retail sale of tangible personal property, ... from every retail sale of ... specifically enumerated services.... Each of the various types of transactions has statutory exemptions, exceptions and limitations.

(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....

(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 1101(b)(7) of the Tax Law 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.

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Section 1101(b)(12) of the Tax Law states as follows:

Promotional materials. Any advertising literature, other related tangible personal property (whether or not personalized by the recipients 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.

Accordingly, since the sales tax is a "destination tax", the point of delivery by the vendor to the purchaser or designee controls both the tax incident and tax rate. The advertising agency's charges to Petitioner's client for color separations used in producing print advertising or catalogues will not be subject to New York State or Local Sales and Use Tax when the advertising agency delivers such color separations to a printer located outside New York State.

However, it is noted that catalogues fall within the definition of promotional materials as provided under Section 1101(b)(12) of the Tax Law. Since the distribution of promotional materials within New York State falls within the definition of use as provided under Section 1101(b)(7) of the Tax Law, Petitioner's client will be liable for New York State and Local Use Tax on the total cost of the catalogues which are distributed within New York State.

DATED: May 14, 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.