

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

TSB-A-90 (28)S
Sales Tax
May 29, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900418A

On April 25, 1990 a Petition for Advisory Opinion was received from Richard Martin Associates, Inc., 53 Canterbury Road, Rochester, New York 14607.

The issues raised by Petitioner, Richard Martin Associates, Inc., are whether it must collect sales tax on charges paid by merchants who advertise in Petitioner's discount coupon booklet and whether it must pay sales tax to the printer and others who design and print the booklet.

Petitioner is in the business of providing advertising services to its clients. The clients are merchants and small retail businesses. The clients pay Petitioner a flat fee to design and distribute a discount coupon for the client's goods and services. Petitioner consults with the client as to areas of distribution, the design of the coupon, and the creative aspects of the coupon. After Petitioner and the client agree on these issues, Petitioner creates the artwork and layout and hires a subcontractor to print the coupon and include it in the coupon booklet. Petitioner's subcontractor delivers the booklets to a mailing service, which in turn delivers them to the post office for mailing within the specified distribution area. The booklets are mailed to thousands of recipients, typically at residential addresses, who pay no charge. The client will receive a proof of the coupon for its review and approval before it is mass produced. The proof has no commercial value and is either destroyed by the client or returned to Petitioner. Petitioner retains all of the films, printing materials, and the like used in making the coupon and the booklet. Aside from the proof, the client receives no tangible personal property from Petitioner. Petitioner retains ownership rights to the coupons' layout, artwork and design.

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.

In the instant transaction Petitioner's business activities, which consist of providing advertisements for a client and including such advertisements in a booklet containing similar 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. (Cooperman, Levitt and Winikoff, P.C., Adv Op Comm T & F, March 21, 1990, TSB-A-(90)14S.)

Since Petitioner is performing an advertising service and not making sales of tangible personal property or services whereby title and possession are transferred to Petitioner's clients, Petitioner's purchases of mailing lists, booklets, mechanicals, artwork and the printer/mailer services including any tangible personal property sold to Petitioner by the printer/mailer, are not considered to be purchases for resale or purchases of physical component parts of tangible personal property for resale. Accordingly, Petitioner's purchases of such items will be subject to New York State and Local Sales or Use Tax where the delivery or service occurs within New York State. However, the printer/mailer charges to Petitioner 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 Petitioner. (Cooperman, Levitt and Winikoff, P.C., supra).

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

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However, the advertising booklets 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, Petitioner 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, Petitioner 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 at the New York State and local sales and use tax rate in effect for the locality or localities in New York State where the potential customers who are the recipients of the booklets are located. (Cooperman, Levitt and Winikoff, P.C., supra).

DATED: May 29, 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.