

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

TSB-A-95 (16)S
Sales Tax
May 23, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S941020B

On October 20, 1994, a Petition For Advisory Opinion was received from The American Tobacco Company, 281 Tresser Boulevard, Stanford, CT 06901-3222.

The issue raised by Petitioner, The American Tobacco Company, is whether the inclusion of a cigarette lighter or other premium with a pack of cigarettes is a sale for resale for sales tax purposes.

Petitioner manufactures cigarettes for sale to registered wholesalers and large direct account retailers with registered wholesaler status. In New York State, registered wholesalers are termed "agents" as they receive cigarette tax stamping authorization from the Department of Taxation and Finance. Wholesalers in turn sell the products to jobbers (middlemen) and retailers.

Petitioner supports the selling of products through the advertising media, solicitation by the sales force and promotional schemes. All these efforts are employed to maintain sales, to increase market penetration and to increase brand awareness.

Promotional campaigns include items attached to the products for sale. These items can range from cigarette lighters to playing cards and are packaged together with products in blister packaging or adhesive packaging concepts. The trade refers to these items as premiums.

Section 1101(b)(4)(i) of the Tax Law defines a retail sale as "[A] sale of tangible personal property to any person for any purpose, other than (A) for resale as such ..."

Section 1105(a) of the Tax Law imposes sales tax upon "[T]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 526.6(c) of the Sales and Use Tax Regulations define the resale exclusion as follows:

(c) Resale exclusion. (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

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(4) (i) Tangible personal property which is purchased and given away without charge, for promotion or advertising purposes is not purchased for resale. It is a retail sale to the purchaser thereof, and is not a sale to the recipient of the property. (Emphasis supplied)

(ii) Tangible personal property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost, or which is not ordinarily sold by that person in the operation of his business, is a retail sale to the purchaser thereof, and not a sale to the recipient of the property.

(iii) A resale certificate may not be used by the person making the purchases described in subparagraphs (i) and (ii) of this paragraph for such purchases.

Petitioner's purchases of cigarette lighters, playing cards and other items which accompany the sale of its cigarettes are purchases of the types of tangible personal property described in section 526.6(c)(4)(i) of the Sales and Use Tax Regulations and thus, do not qualify for the resale exclusion set forth in Section 1101(b)(4)(i) of the Tax Law. Therefore the Petitioner's purchase of such items are subject to the sales tax imposed pursuant to Section 1105(a) of the Tax Law.

DATED: May 23, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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