

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

TSB-A-97(4)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960813A

On August 13, 1996, a Petition for Advisory Opinion was received from Genovese Drug Stores, Inc., 80 Marcus Drive, Melville, New York 11747.

The issue raised by Petitioner, Genovese Drug Stores, Inc., is whether the cost of its "Good News" newsletter is exempt from sales tax.

Petitioner submits the following facts.

Petitioner provides a publication, entitled "Good News," free of charge for its senior customers. This is evidenced in its statement at the bottom of its publication, "Good News." The statement reads, "'Good News' is a monthly calendar designed for and about Seniors and it's FREE! Good News is part of the Genovese Senior Sixty Plus Program. Inside you'll find interesting facts and coupons to help save you money on the items you need."

"Good News" is a four-page monthly publication for and about its senior customers. It consists of brief articles of medical interest, a calendar for the current month that highlights dates when special medical services are available at various store locations for senior customers, house ads advertising the services offered by Petitioner, as well as announcements of medical services offered by third parties, and coupons for items sold in the drug stores. The articles are by different authors, and are lawfully reproduced from different medical journals, societies and organizations. The articles generally take up one page or less of the publication.

The monthly issues of "Good News" do not constitute a book, either singly or when successive issues are put together. "Good News" is available for circulation to the public through Petitioner's stores. An outside printer produces the publication and supplies Petitioner with copies.

Section 1101(b)(4) of the Tax Law provides, in part:

Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . .

Section 1115(i) of the Tax Law provides:

(A) Receipts from the retail sale of a shopping paper to the publisher of such publication shall be exempt from the tax imposed by subdivision (a) of section eleven hundred five and receipts from the sale of printing services performed in publishing such paper shall be exempt from the tax imposed by paragraph two of subdivision (c) of such section.

(B) For purposes of this subdivision, the term "shopping paper" shall mean those community publications distributed to the public, without consideration, for purposes of advertising and public information. To qualify as a shopping paper for purposes of this subdivision, the publication must also:

- (1) be distributed to the public on a community-wide basis,
- (2) be published at stated intervals at least fifty times a year;
- (3) having continuity as to title and general nature of content from issue to issue,
- (4) contain in each issue news of general or community interest and community notices or editorial comment or articles by different authors;
- (5) not constitute a book, either singly or when successive issues are put together;
- (6) contain in each issue advertisements from numerous unrelated advertisers;
- (7) be independently owned in that the publication is not owned by or under the control of the owners or lessees of a shopping center or a merchants association or similar entity or a business which sells property or services (other than advertising) and the advertisements in such publication are not predominantly for the property or services sold by such business; and
- (8) meet the requirement set forth in subparagraph (C) of this subdivision.

(C) The advertisements in such publication shall not exceed ninety percent of the printed area of each issue.

(D) The term "shopping paper" shall not include mail order and other catalogs, advertising fliers, travel brochures, house organs, theatre programs, telephone directories, shipping and restaurant

guides, racing tip and form sheets, shopping center advertising sheets and similar publications. (emphasis added)

Section 1119(a) of the Tax Law provides, in part:

Subject to the conditions and limitations provided for herein, a refund or credit shall be allowed for a tax paid pursuant to subdivision (a) of section eleven hundred five or section eleven hundred ten . . . (2) on the sale or use of tangible personal property purchased in bulk, or any portion thereof, which is stored and not used by the purchaser or user within this state if that property is subsequently reshipped by such purchaser or user to a point outside this state for use outside this state. . . . (emphasis added)

Section 526.6 of the Sales and Use Tax Regulations provides in part:

(a) The term retail sale or sale at retail means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

* * *

(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.

* * *

(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 added)

Section 528.6 of the Sales and Use Tax Regulations provides, in part:

Newspapers and periodicals.-(Tax Law, Sec. 1115(a)(5)). (a) Exemption. The sales of newspapers and periodicals is exempt from sales and compensating use tax.

* * *

(c) Definition of a periodical. (1) In order to constitute a periodical, a publication must conform generally to the following requirements:

(i) it must be published in printed or written form at stated intervals, at least as frequently as four times a year;

(ii) it must not, either singly or, when successive issues are put together, constitute a book;

(iii) it must be available for circulation to the public;

(iv) it must have continuity as to title and general nature of content from issue to issue; and

(v) each issue must contain a variety of articles by different authors devoted to literature, the sciences or the arts, news, some special industry, profession, sport or other field of endeavor.

* * *

(3) Nothing in this section shall be construed to exempt as a periodical the following:

(i) advertising material, such as catalogs, flyers, pamphlets and brochures; . . . (emphasis added)

Section 534.3 of the Sales and Use Tax Regulations provides, in part:

Refunds and credits based on certain uses. (Tax Law, Sec. 1119(a)) (a) Authorization. Where a sales or compensating use tax has been correctly, legally, and constitutionally imposed and paid on the purchase of tangible personal property, a refund or credit of State and local taxes paid pursuant to subdivision (a) of section 1105 or section 1110 of the Tax Law on the sale or use will be allowed to the purchaser or user when, to the satisfaction of the Department of Taxation and Finance, the purchaser shows that such tangible personal property was used in one of the following manners:

* * *

(c) Property purchased in bulk and reshipped. (1) A refund or credit is allowable for tangible personal property, or any portion thereof:

(i) which is purchased in bulk;

(ii) which is stored and not used by the purchaser or a user in New York State;

(iii) which is later reshipped by such purchaser or user outside of New York State for use outside New York State; and

(iv) provided the property is reshipped as required within three years after the date the tax was payable to the Department of Taxation and Finance and that application is made within three years from the date the tax was payable to the Department of Taxation and Finance.

(2) (i) For the purpose of this subdivision only, the phrase purchased in bulk means a single purchase from a single vendor of items of the same kind of tangible personal property, of such quantity that it would require storage of some part for future use.

(ii) For the purpose of this subdivision, the phrase stored and not used means the placement of property in storage for later withdrawal for shipment outside of the State or use outside of the State.

* * *

Example 1: A multi-location firm purchases a truckload of office forms and stationery and stores it in a New York State warehouse. Applicable State and local sales tax is paid by the purchaser. A portion of the forms and stationery is later shipped to several of the firm's locations outside of New York State. A credit or refund is allowable for the tax paid on that portion of the forms and stationery shipped outside of New York State for use outside of New York.

In this case, Petitioner provides a four page, monthly publication free of charge, for its senior customers. The publication is produced for Petitioner by an outside printer. Petitioner's publication contains brief medical articles which are reproduced from different medical journals or publications for its senior customers. Also, the publication provides a calendar of the current month, house ads and announcements of when special services are available to its senior customers at specific store locations, and provides coupons which are redeemable at Petitioner's various stores.

The cost of this publication to Petitioner is not exempt from sales or use tax. First, Petitioner's publication is not offered for sale but is given away free of charge to advertise services and goods provided by Petitioner and third parties. Therefore, this publication is not exempt, as a purchase by Petitioner for resale, as defined in Section 1101(b)(4) of the Tax Law and Section 526.6(c) of the Sales and Use Tax Regulations but is specifically categorized as a retail sale to the Petitioner. See section 526.6(c)(4)(i) of the Sales and Use Tax Regulations.

Second, Petitioner's publication is not a periodical for purposes of Section 1115(a)(5) of the Tax Law. Although Petitioner's publication contains some articles, the publication is designed mainly for advertising purposes. Since the publication is basically advertising material, it does not qualify as a periodical exempt from sales or use tax under Section 1115(a)(5). See Section 528.6(c)(3)(i) of the Sales and Use Tax Regulations. It should also be noted that Petitioner's publication is not a shopping paper as defined in Section 1115(i) of the Tax Law. Therefore, the exemption from sales and use tax for shopping papers under Section 1115(i) of the Tax Law does not apply to Petitioner's publication.

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Accordingly, Petitioner's purchase of the "Good News" publication from an outside printer is subject to the sales and use tax as the purchase at retail of tangible personal property, provided copies of the publication are delivered in New York and distributed at stores located in New York State. However, with respect to that portion of the "Good News" publication which Petitioner subsequently ships to stores located outside of New York State, Petitioner may be entitled to a partial refund of the sales tax paid to the printer on such portion of the "Good News" publications. See Section 1119(a)(2) of the Tax Law.

DATED: January 30, 1997

/s/
JOHN W. BARTLETT
Deputy Director
Technical Services Bureau

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