

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

TSB-A-99(40)S
Sales Tax
September 17, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990622B

On June 22, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Hutton & Solomon LLP, 342 Madison Avenue, Suite 1210, New York, NY 10173.

The issues raised by Petitioner, Hutton & Solomon LLP, are:

1. Whether the purchase of printed catalogs, which are delivered by mail to customers or potential customers within New York State, are exempt from sales and compensating use tax under Section 1115(n)(4) of the Tax Law.
2. Whether the rental of a mailing list which becomes a critical element of exempt promotional materials is also exempt from sales and compensating use tax.
3. Whether the purchase of photographs, artwork, typography, separations and printing plates used to produce the printed catalogs are exempt from sales and compensating use tax.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner's client is a distributor of books (the "Book Company"). Book Company was incorporated and is existing under the laws of the State of New York. Periodically, Book Company sends updated catalogs, which contain a current listing of the books it sells from inventory, to its customers and potential customers.

Book Company contracts with a printer/mailer in New York for the purchase of the printed catalogs and the mailing of such catalogs to its customers and potential customers located within and without New York State, without charge to such customers. In order to reduce its cost for the purchase and mailing of these catalogs, Book Company will itself perform certain functions in creating the finished catalog.

Book Company purchases photographs, artwork and typography from third parties. Its employees use these items to create camera-ready mechanicals. The mechanicals are then given to a separation house, which uses them to create color separations. The color separations are sold to Book Company. Book Company has the separations delivered to a plate maker. The plate maker

TSB-A-99(40)S
Sales Tax
September 17, 1999

uses the color separations to create printing plates which will be used in the printing of the catalog. The plate maker will deliver the completed plates, on behalf of Book Company, to the printer/mailler. Once the printer/mailler is in possession of the printing plates, it will use them to print the catalogs.

Book Company will have the catalogs mailed to its existing customers as well as to prospective customers. Since it needs assistance in obtaining the names and addresses of prospective customers, Book Company will rent from a third party a mailing list in computer disk form that will be supplied to the printer/mailler. The printer/mailler will use the mailing list rented by Book Company to print the addresses on the catalogs as part of the mailing process and will arrange for mailing with the U. S. Postal Service.

Book Company will provide the third parties from whom it purchased the artwork, photographs, typography, separations and printing plates with a properly completed exemption certificate for the purchase of machinery and equipment. It will also provide the printer/mailler and the third party from whom the mailing list was rented with a properly completed exemption certificate for the purchase of promotional materials.

Applicable Laws

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

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(12) Promotional materials. Any advertising literature, other related tangible personal property (whether or not personalized by the recipient's 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.

Section 1105(a) of the Tax Law imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1115(n) of the Tax Law provides, in part:

(1) . . . promotional materials mailed, shipped or otherwise distributed from a point within the state, by or on behalf of vendors or other persons to their customers or prospective customers located outside this state for use outside this state shall be exempt from the tax imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article.

(2) Services otherwise taxable under paragraph one or two of subdivision (c) of section eleven hundred five of this article relating to mailing lists or activities directly in conjunction with mailing lists shall be exempt from tax under this article if such services are performed on or directly in conjunction with promotional materials exempt under paragraph one or four of this subdivision.

(3) Receipts from the retail sale of promotional materials, receipts from every sale, except for resale, of services described in paragraph one or two of subdivision (c) of section eleven hundred five to such promotional materials and consideration given or contracted to be given for either such materials or such services to such materials shall be exempt from tax under this article to the extent of the vendor's separately stated charge to the purchaser of such materials or services for the vendor's cost to ship or deliver such materials to the purchaser's customers or prospective customers by means of the United States postal service, paid by the vendor to such postal service to ship or deliver such materials, but only where the vendor separately states such charge to ship or deliver (not exceeding the vendor's United States postal service costs) in a written contract with the purchaser or on a written bill rendered to the purchaser.

(4) Notwithstanding any contrary provisions of paragraph one of this subdivision, promotional materials which are printed materials and promotional materials upon which services described in paragraph two of subdivision (c) of section eleven hundred five have been directly performed shall be exempt from tax under this article where the purchaser of such promotional materials mails or ships such promotional materials, or causes such promotional materials to be mailed or shipped, to its customers or prospective customers, without charge to its customers or prospective customers, by means of a common carrier, United States postal service or like delivery service.

(5) Services otherwise taxable under paragraph two of subdivision (c) of section eleven hundred five performed on promotional materials exempt under paragraph four of this subdivision shall be exempt from tax under this article.

Technical Service Bureau Memorandum, Expanded Sales and Compensating Use Tax Exemption for Promotional Materials, August 20, 1997, TSB-M-97(6)S, provides, in part:

Promotional Materials Exempt Under Section 1115(n)(4) of the Tax Law

Printed Promotional Materials

Effective March 1, 1997, printed promotional materials mailed or shipped to destinations in the state are exempt from tax when all of the conditions listed below are met.

- The printed promotional materials are ultimately mailed or shipped to customers or prospective customers of the purchaser of the printed promotional materials.
- The printed promotional materials are mailed or shipped by the purchaser of the materials using a common carrier, the U.S. Postal Service or a like delivery service. (This requirement is also met if the mailing or shipping is arranged by a third party (such as a printer/mailer) on behalf of the purchaser of the promotional materials.)
- There is no charge to the purchaser's customer or prospective customer (ultimate recipient) for the promotional materials, or for mailing or shipping them.
- The purchaser of the promotional materials gives a properly completed Form ST-121.2, Certificate of Exemption for Purchases of Promotional Materials, to the seller of the promotional materials.

* * *

(For purposes of examples 1, 2, 3, 4, 7, and 8 of this TSB-M, it is assumed that the purchaser of the exempt promotional materials or exempt services will furnish the seller of the exempt promotional materials or exempt services a properly completed Form ST-121.2, *Certificate of Exemption for Purchases of Promotional Materials*. It is also assumed that the promotional materials will be delivered to the

purchaser's customers or prospective customers [ultimate recipients] without charge to those customers or prospective customers.)

* * *

Example 2. A New York company contracts with a printer/mailer located in New York to produce brochures (promotional materials) to be sent to customer's in and out of New York via the U. S. Postal Service. Under the agreement, the New York company furnishes the printer/mailer the paper, ink, and printing plates to print the brochures, and envelopes in which the brochures will be mailed. The New York company also purchases a mechanical (artwork) and color separations for use in producing the printing plates supplied to the printer. The ink will also be used to print the company's logo on the envelopes in which the brochure will be mailed. In addition, the New York company provides the printer/mailer a customer/prospective customer mailing list in the form of address labels. The printer/mailer prepares the brochures, prints the New York company's logo on the envelopes, affixes the address labels, stuffs the brochures into the envelopes, and arranges for mailing with the Postal Service.

The paper, ink, mechanical (artwork), color separations and printing plates used in producing the promotional materials printed for the New York company by the printer are exempt from sales tax. The envelopes and address labels may be purchased exempt from tax by the New York company as these items qualify as exempt promotional materials, based on the use described above. The printer/mailer's charges for printing the brochures, printing the New York company's logo on the envelopes, and affixing the address labels to the envelopes are exempt from sales tax. The printer/mailer's charges for inserting the brochures into the envelopes and for mailing (postage) are not subject to tax.

Opinion

With respect to issue 1, the term "promotional materials" as defined in Section 1101(b)(12) of the Tax Law includes catalogs. Catalogs are printed promotional materials. In accordance with Technical Services Bureau Memorandum, Expanded Sales and Compensating Use Tax Exemption for Promotional Materials, TSB-M-97(6)S, supra, printed promotional materials to be delivered by mail to customers or potential customers within New York, without charge to such customers, are not subject to sales and compensating use tax pursuant to Section 1115(n)(4) of the Tax Law. Therefore, the Book Company's purchase of the catalogs will not be subject to tax. The Book Company, however, must furnish its printer/mailer with a properly completed Form ST-121.2, Certificate of Exemption for Purchase of Promotional Materials, within 90 days of delivery.

TSB-A-99(40)S
Sales Tax
September 17, 1999

Concerning issue 2, pursuant to Section 1115(n)(2) of the Tax Law, mailing lists are exempt from sales tax imposed under Section 1105(c) of the Tax Law if such mailing lists are used directly in conjunction with exempt promotional material. The mailing list rented by the Book Company is used directly in conjunction with printing the address labels in order for the catalogs described above to be mailed to customers and prospective customers. Accordingly, the rental by Book Company of the mailing list used to address the catalogs will not be subject to sales and compensating use tax. The Book Company, however, must furnish the third party from which it rented the mailing list with a properly completed Form ST-121.2, Certificate of Exemption for Purchase of Promotional Materials within 90 days of delivery.

As for issue 3, in accordance with Example 2 of Technical Services Bureau Memorandum, Expanded Sales and Compensating Use Tax Exemption for Promotional Materials, TSB-M-97(6)S, supra, the purchase by the Book Company of photographs, artwork, typography, separations and printing plates used to produce the catalogs described above which are exempt promotional materials and which are purchased by the Book Company from a printer/mailer are not subject to sales and compensating use tax. The Book Company, however, must furnish its printer/mailer and the third parties from whom it purchased the photographs, artwork, typography, separations and printing plates with a properly completed Form ST-121.2, Certificate of Exemption for Purchase of Promotional Materials within 90 days of delivery.

DATED: September 17, 1999

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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