

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(1)S
Sales Tax
January 23, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S011219B

On December 19, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from AdvantEdge Television Advertising, Inc., 50 Main Street - 4th Floor, White Plains, NY 10606. Petitioner, AdvantEdge Television Advertising, Inc., provided additional information pertaining to the Petition on January 17, 2002.

The issues raised by Petitioner are:

(1) Whether its purchases of videotape catalogs that have printed promotional labels permanently affixed to them and are mailed to its prospective customers qualify for exemption from sales and compensating use tax as printed promotional materials under Section 1115(n)(4) of the Tax Law.

(2) Whether its purchases of plastic videotape cases that have printed promotional materials *permanently affixed to them* and are used to house and mail the videotape catalogs likewise qualify for exemption from sales and compensating use tax.

(3) Whether its purchases of plastic videotape cases that have printed promotional materials *inserted into plastic sleeves* on the cases are exempt from tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion. As part of its Petition, Petitioner submitted a sample videotape catalog for review.

Petitioner sells television commercials. The commercials were previously made and Petitioner has obtained the rights to lease these commercials to other businesses. Petitioner maintains a large inventory of commercials for many different types of industries. For example, Petitioner has approximately 200 commercials that promote different types of medical services that could be offered by hospitals, such as specialized maternity services.

Petitioner markets its library of commercials by sending out free videotape catalogs of the commercials to the different businesses that might have a need for these commercials. For example, Petitioner might send its videotape catalog of hospital commercials to the director of a hospital with the hope that the director would play the videotape and then call Petitioner and lease one of its commercials. Petitioner has hundreds of commercials geared toward dozens of different industries.

The videotape catalogs purchased by Petitioner have printed labels with Petitioner's name and phone number on them. The videotape catalogs are housed in plastic cases. The plastic cases have printed material, either adhered to the cases or inserted into plastic sleeves attached to them,

which is comprised of Petitioner's advertising messages, postage, and a designated space for a mailing label. The plastic cases containing the videotape catalogs are sealed in clear plastic shrink-wrapping when Petitioner receives them. All Petitioner needs to do is attach a mailing label in the designated space provided. Petitioner uses various mass mailing techniques to identify to whom the videotape catalogs should be sent, and mails them to its prospective customers with the hope of generating the lease of a television commercial.

There is no charge to the person who receives the videotape catalog.

Applicable Authority

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:

* * *

(7) Use. The exercise of any right or power over tangible personal property or over any of the services which are subject to tax under section eleven hundred ten of this article or pursuant to the authority of article twenty-nine of this chapter, 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 or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine. Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials, or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine.

* * *

(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, prospectuses, promotional displays and Cheshire labels but does not include invoices, statements and the like. Promotional materials shall also include paper or ink furnished to a printer for use in providing

the services of producing, printing or imprinting promotional materials or in producing, printing or imprinting promotional materials, where such paper and ink become a physical component part of the promotional materials and such printer sells such services or such promotional materials to the person who furnished the paper and ink to such printer.

Section 1105(a) of the Tax Law imposes a tax on “[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article.”

Section 1105(c) of the Tax Law imposes sales tax, in part, upon:

The receipts from every sale, except for resale, of the following services:

* * *

(2) . . . 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 services are performed.

Section 1110(a) of the Tax Law provides, in 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 . . . except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail. . . .

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

(1) Except as otherwise provided in this subdivision, 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 on retail sales 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.

* * *

(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 such customers or prospective customers, by means of a common carrier, United States postal service or like delivery service. (Emphasis added)

(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.

* * *

(7) Mechanicals, layouts, artwork, photographs, color separations and like property shall be exempt from tax under this article where such property is purchased, manufactured, processed or assembled by a person who furnishes such property to a printer and the printer uses such property directly and predominantly in the production of promotional materials exempt under paragraph four of this subdivision, or in performing services exempt under paragraph five of this subdivision, for sale by such printer to the person who furnished such property to the printer.

(8) Nothing in this subdivision shall be construed to exempt tangible personal property (i) purchased by a person (other than exempt promotional materials described in paragraph four of this subdivision) or (ii) manufactured, processed or assembled by the manufacturer, processor or assembler, who furnishes such property to the vendor of promotional materials exempt under paragraph one or four of this subdivision to be included as free gifts with such exempt promotional materials to be mailed or shipped to such purchaser's or such manufacturer's, processor's or assembler's customers or prospective customers or who otherwise uses such property in this state, for example, by giving or donating the property as free gifts to another person, unless such tangible personal property is mailed, shipped or otherwise distributed from a point within this state to such customers or prospective customers located outside this state for use outside this state.

Technical Services Bureau Memorandum entitled 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.

* * *

Certain Promotional Materials Continue to be Taxable or Exempt Without Regard to the Above Provisions, Under Section 1115(n)(7)[renumbered paragraph 8 by Chapter 220, Laws of 2000] of the Tax Law

Section 1115(n)(7) of the Tax Law provides that the exemptions in section 1115(n)(4), (5), and (6) described above do not apply to tangible personal property where the purchaser of the property furnishes it to a promotional materials vendor to be included as free gifts with exempt promotional materials which are to be mailed or shipped to the purchaser's customers or prospective customers. However, if these free gifts furnished by the purchaser to the exempt promotional materials vendor are themselves printed promotional materials or promotional materials upon which section 1105(c)(2) services have been performed, then they would be exempt if they

are mailed or shipped with the other exempt promotional materials purchased from the vendor, as described in section 1115(n)(4).

Section 1115(n)(7) of the Tax Law also provides that the section 1115(n)(4), (5), and (6) exemptions do not apply to tangible personal property which is manufactured, processed, or assembled by the manufacturer, processor, or assembler where the manufacturer, processor, or assembler furnishes the property to a vendor of exempt promotional materials to be included as free gifts (such as a manufacturer's product sample) with other exempt promotional materials which are to be mailed or shipped to the manufacturer's, processor's, or assembler's customers or prospective customers. Likewise, if the manufacturer, processor, or assembler otherwise uses the property in this state, such as by giving or donating it as free gifts to someone, such use would not be exempt from tax.

*	*	*
<u>Promotional Materials</u>	<u>Before</u>	<u>As of</u>
	<u>3/1/97</u>	<u>3/1/97</u>
Mailing Lists (Purchase or Rental)	T - based on	E ⁷
– List received in NY or outside NY	percentage	
	of NY	
	mailings	
*	*	*

7. Exempt based on percentage of promotional materials that are mailed or shipped by means of a common carrier, the U.S. Postal Service or like delivery service.

Technical Services Bureau Memorandum entitled The Sales and Use Tax and Promotional Materials, July 7, 1992, TSB-M-92(4)S provides, in part:

* * *

II. . . subdivision (n) was added to section 1115 of the Tax Law to provide that promotional materials mailed, shipped or otherwise distributed from a point within this 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, are exempt from sales and compensating use taxes. This new subdivision also provides that certain services relating to mailing lists or to activities directly in conjunction with mailing lists are exempt from such taxes when the services are performed on or directly in conjunction with exempt promotional materials.

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Before the addition of this exemption . . . [s]ervices performed on mailing lists in this state were taxable without any right to refund. Accordingly, this new exemption with respect to mailing list services represents a major change in the taxability of such services in that, among other things, the exemption can be claimed in the first instance, rather than through a refund claim.

* * *

Services performed on mailing lists used to distribute promotional materials are subject to the sales or use tax in the same proportion that New York State addresses contained in the mailing list bear to the total number of addresses contained in such list.

Opinion

Petitioner purchases promotional videotapes of television commercials it desires to sell to prospective customers. The videotapes display Petitioner's company logo and phone number on printed labels attached to them. Petitioner also displays its advertising messages on printed paper attached (permanently or not) to the outside of the plastic videotape cases in which the tapes are held and mailed to the prospective customers.

The videotape catalogs and their cases with advertising messages attached to them (permanently or not) qualify as "promotional materials" as defined in Section 1101(b)(12) of the Tax Law. Petitioner's purchases of such promotional materials which are mailed, without charge, to its prospective customers located outside New York State, for use outside the state, are exempt from sales and compensating use tax. See Section 1115(n)(1) of the Tax Law. Likewise, that portion of Petitioner's purchases of mailing lists or services related to mailing lists which are for the videotape catalogs and cases mailed to points outside New York State are exempt from sales and compensating use tax. See Section 1115(n)(2) of the Tax Law. The above described purchases may be made without payment of tax provided Petitioner furnishes its supplier with a properly completed Form ST-121.2, *Certificate of Exemption for Purchases of Promotional Materials*, not later than 90 days after delivery of the property or the rendition of the service. See TSB-M-97(6)S, supra.

Effective March 1, 1997, *printed* promotional materials and promotional materials upon which services subject to tax under Section 1105(c)(2) of the Tax Law (e.g., printing and imprinting) have been *directly* performed that are mailed to prospective customers within New York State (as well as prospective customers outside New York State) by U.S. Postal Service or common carrier, free of charge to the recipient, are exempt from sales and compensating use tax. See Section 1115(n)(4) of the Tax Law. The videotape catalogs and their plastic cases are not *printed* promotional materials for purposes of this exemption. The exemption applies to items printed in the traditional sense, such as printed annual reports, brochures, paper, and envelopes. See TSB-M-97(6)S, supra. When the Tax Law was amended by Chapter 220 of the Laws of 2000 (and

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deemed effective retroactive to March 1, 1997) to expand the definition of promotional materials and to clarify the scope of the exemption for promotional materials, the amendments only included items furnished to or items used by a “printer” to produce promotional materials, such as paper and ink furnished to a printer and used to produce *printed* promotional materials. See Technical Services Division Memorandum, Summary of Recently Enacted Sales and Use Tax Legislation, February 8, 2001, TSB-M-01(4)S. While the videotape catalogs and their plastic cases do constitute promotional materials, no service subject to tax under Section 1105(c)(2) of the Tax Law has been *directly* performed on them as required by Section 1115(n)(4) of the Tax Law. Therefore, the exemption for printed promotional materials does not apply to the videotape catalogs and plastic cases described in this Opinion which have labels or printed material affixed to them or inserted into them.

Therefore, Petitioner’s purchases of the videotape catalogs of television commercials embodied in tangible format, i.e., videotapes, and their plastic cases are subject to State and local sales and compensating use taxes as purchases of tangible personal property when delivered by Petitioner or its designee to customers or prospective customers located in New York State. The amount subject to tax is the total charge to Petitioner, including the cost of producing the videotape catalogs and other expenses. The applicable sales or compensating use tax rate is the rate in effect in the locality (city or county) where Petitioner or Petitioner’s designee takes delivery of the videotape catalog. However, as noted above, the portion of such videotapes and plastic cases subsequently mailed and delivered out of New York State are eligible for exemption from tax upon Petitioner providing the vendor with a properly completed Form ST-121.2, *Certificate of Exemption for Purchases of Promotional Materials*, not later than 90 days after delivery of the property. See TSB-M-97(6)S, supra.

DATED: January 23, 2003

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