

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

TSB-A-03(32)S
Sales Tax
July 18, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S021115B

On November 15, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Holtz Rubenstein & Co., LLP, 125 Baylis Road, Suite 300, Melville, New York, 11747-3823.

The issue raised by Petitioner, Holtz Rubenstein & Co., LLP, is whether its bimonthly newsletter constitutes promotional material qualifying for exemption from sales or compensating use tax under section 1115(n)(4) of the Tax Law.

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

Petitioner is a certified public accounting firm based in Melville, New York, with a satellite office in Manhattan. Petitioner provides a wide variety of accounting, tax and business advisory services to clients throughout the New York metropolitan area.

Petitioner writes a bi-monthly newsletter (hereinafter "*Adviser*") which it distributes by U.S. Mail to its clients and prospective clients in the New York metropolitan area. Petitioner submitted three issues of the *Adviser* with its Petition. The *Adviser* is designed to promote Petitioner and to present matters of general interest relating to accounting, taxation and business management, and items pertaining to Petitioner, its services, and/or its partners and employees. In each issue of the *Adviser* submitted with the Petition, a statement appears as follows: "This publication is designed to present matters of general interest relating to accounting, taxation and business management. It is not intended to constitute accounting or tax advice. Articles were written by the staff of Holtz Rubenstein & Co. Please consult your HR&Co. adviser before taking any specific actions." Each issue of the *Adviser* submitted contains at least one article touting individual employees of the firm. Many of the articles end with a statement to the effect that should a reader have questions or want more details on the subject of the article, the reader should contact a specific employee (by name and title) of Petitioner at that employee's personal business telephone number or e-mail address.

The *Adviser* is mailed free-of-charge to Petitioner's clients and prospective clients and is used by Petitioner for marketing and sales promotion purposes. Generally, the articles contained in the *Adviser* are written by the partners and staff of Petitioner. Every issue of the *Adviser* mentions Petitioner's affiliation with DFK International. DFK International is the worldwide association of independent accounting and business advisory firms in which Petitioner is actively involved. Through Petitioner's affiliation with DFK International, it also provides services to clients throughout the United States and the world. In every issue, the *Adviser* promotes a different international DFK-affiliated Firm.

Petitioner contracts with a printer/mailer in Suffolk County, New York, for the printing and distribution of the *Adviser* to its clients and prospective clients located within and without New York State, and for delivering the remaining copies to Petitioner. Petitioner does not charge the recipients for the *Adviser*. Approximately 84% of the printed copies of the *Adviser* are sent to current or prospective clients via the United States postal service. The balance of about 16% is distributed to employees, left in Petitioner's reception area, or handed to prospective clients.

Applicable Law and Regulations

Section 1101 of the Tax Law provides, in part:

Definitions.

* * *

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

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

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.

* * *

(3) Receipts from the retail sale of promotional 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 such customers or prospective customers, by means of a common carrier, United States postal service or like delivery service.

Section 1119 of the Tax Law provides, in part:

Refunds or credits based on proof of certain uses. (a) 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. . . .

Opinion

Petitioner's bi-monthly newsletter (*Adviser*), which it distributes free-of-charge to its clients and prospective clients located within and without New York State, is designed to promote Petitioner's services and to present matters of general interest relating to accounting, taxation and business management. It also has items pertaining to Petitioner, its services, and/or its partners and employees. Approximately 84% of the printed copies of the *Adviser* are sent to current or prospective clients via the United States postal service. The balance of about 16% is distributed to employees, left in Petitioner's reception area, or handed to prospective clients. The *Adviser* is used by Petitioner for marketing and sales promotion purposes.

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" are exempt from sales and compensating use tax. See section 1115(n)(1) of the Tax Law. In addition, printed promotional materials delivered within New York State to customers or prospective customers of the person purchasing the materials will not be subject to tax when they are delivered by common carrier, the United States postal service or like delivery service, and the customer or prospective customer receives them free of any charge. See section 1115(n)(4) of the Tax Law.

Each issue of the *Adviser* submitted contains articles promoting Petitioner's individual staff members and its affiliates. Many of the articles close with the recommendation that the reader contact a specific member of Petitioner's staff. Each issue contains a recommendation that Petitioner be contacted before a reader takes any action that may be suggested in any of the articles. Based on these factors and the fact that Petitioner's name is prominently displayed on the title page, the *Adviser* appears to be advertising literature intended to promote Petitioner's services to its clients or prospective clients and qualifies as promotional materials as defined under section 1101(b)(12) of the Tax Law. Accordingly, the purchase by Petitioner of those copies of the *Adviser* that are distributed to clients or prospective clients outside New York State is not subject to tax pursuant to section 1115(n)(1) of the Tax Law. Moreover, because the *Adviser* constitutes printed promotional material, the purchase by Petitioner of those copies of the *Adviser* that are distributed to current or prospective clients within New York State via the United States postal service will be exempt from State and local sales and use taxes under section 1115(n)(4) of the Tax Law. However, to the extent that any such promotional materials are distributed to Petitioner's employees or picked up by a customer or prospective customer at Petitioner's offices in New York State, Petitioner's purchase of this portion of the promotional materials will be subject to tax, since they are not distributed, mailed or shipped in accordance with section 1115(n)(4) of the Tax Law.

If Petitioner purchases and stores but does not otherwise use copies of the *Adviser* in New York, Petitioner may apply for the credit or refund authorized in section 1119(a)(2) of the Tax Law for the sales tax paid on those copies that are later shipped outside of the State for use outside New York, notwithstanding that the purchase was not eligible for exemption under section 1115(n) of the Tax Law.

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A vendor's timely acceptance, in good faith, of a properly completed Form ST-121.2, *Certificate of Exemption for Purchases of Promotional Materials*, relieves the vendor from the duty to collect sales tax on its sale of promotional materials to Petitioner. Petitioner may make purchases of promotional materials exempt from tax by giving the supplier a properly completed certificate within 90 days of delivery of the promotional materials. See section 1132(c)(1) of the Tax Law. Petitioner should indicate on the certificate the percentage of the total purchase that qualifies for exemption from sales tax. To the extent that Petitioner indicates an exempt percentage on the certificate higher or lower than is warranted, Petitioner would owe sales or use tax or be entitled to a credit or refund of the tax, as the case may be. See Automobile Club of New York, Inc., Adv Op Comm T & F, April 14, 1998 TSB-A-98(28)S.

DATED: July 18, 2003

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