

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-08(60)S
Sales Tax
October 15, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080513A

The Department received a petition for an advisory opinion from Petitioner, Petland Discounts, Inc., on May 13, 2008. Petitioner provided additional information relating to the petition on September 10th and 22nd, 2008. Petitioner asks whether shipping and packing supplies it purchases and uses to ship its inventory from its main warehouse to its retail pet stores are subject to sales and use taxes. Since Petitioner uses these supplies itself, and does not actually transfer the supplies to its retail customers, Petitioner's purchases and uses of these supplies are subject to New York State and local sales or compensating use taxes.

Facts

Petitioner conducts business as a chain of retail pet supply stores. It has a main warehouse in Brentwood, New York. It purchases inventory in bulk that is delivered to the Brentwood warehouse. At the warehouse, it repackages the inventory items for delivery to its more than 100 retail stores. Most of the retail stores are in New York; a few are in New Jersey or Connecticut. Petitioner purchases packaging materials, such as bubble wrap, stretch wrap, boxes, tape, labels, and skids. It uses these packaging and shipping materials at the Brentwood warehouse to pack and ship its inventory to its retail stores. Petitioner indicates the packaging and shipping materials are expensive and it passes the costs of these materials on to its retail customers by marking up the prices of the items it sells at retail. Petitioner does not use the subject materials to package or ship merchandise it sells to its customers. Nor does it actually transfer those packaging or shipping materials used at the warehouse to its customers. In the past, Petitioner operated as two separate companies. A wholesale company purchased inventory and used these types of materials to ship products that the wholesale company sold to the affiliated retail chain company. The retail chain stores then sold merchandise to customers. Those two companies merged to become Petitioner.

Issue

Petitioner asks whether its purchase or use of these shipping and packaging materials is subject to sales or compensating use tax. Petitioner also wonders whether it makes a difference for the taxability of the packaging and shipping materials that Petitioner used to be organized as two entities but now is organized as only one.

Analysis

As a retail seller of pet supplies with a warehouse and stores in New York, Petitioner is a "vendor" under section 1101(b)(8) of the Tax Law. Shipping and packaging materials constitute tangible personal property. Retail sales of tangible personal property are subject to state and local sales taxes, unless an exemption applies. Likewise, a purchaser's use in New York of any of these materials it purchased out of state is subject to state and local compensating use taxes, unless an exemption applies. Section 1115(a)(19) of the Tax Law exempts from state and local sales and use taxes cartons, containers, wrapping and packaging materials and supplies, and components of those supplies and materials, for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to the purchaser. "Actually transferred," by regulation, means "physically transferred to the purchaser, for whatever disposition the purchaser wishes" (20 NYCRR 528.20[b][4]).

In this case, Petitioner, the vendor, uses the wrapping and packaging materials and supplies to wrap, pack and ship inventory from its New York warehouse to its retail stores. It does not use those materials and supplies to pack or ship property to customers who purchase the merchandise from its retail stores. Nor does Petitioner actually transfer those packaging and shipping materials to those customers when they purchase the merchandise. Rather, Petitioner purchases and uses the supplies itself – for wrapping, packing and shipping inventory to its stores. Because it does not use the materials to pack or ship the items it sells to the stores' customers, and does not transfer the packaging and shipping materials to its retail customers, the exemption in section 1115(a)(19) does not apply. *See Upstate Farms Co-op. Inc. v. Tax Appeals Tribunal of State*, 290 A.D.2d 896. Petitioner must pay state and local sales tax when it purchases these materials in this state. If it purchases the materials out of state and uses them in this state, it must pay compensating use tax

In the past, when Petitioner consisted of two separate companies, each was a separate “person” for sales tax purposes. At that time, the wholesale company purchased packaging and shipping materials to be used to pack and ship merchandise it sold to the retail company. The wholesale company was able to purchase those materials exempt from tax under section 1115(a)(19) because it actually transferred the materials to a purchaser -- the retail company -- when it sold the merchandise to the retail company. But when the two companies merged to become Petitioner, there was no longer any actual transfer of the materials to another person who purchased merchandise from a vendor, because the retail stores do not purchase the inventory from another person. Rather, one part of Petitioner, the retail stores, receives merchandise from another part of Petitioner, the warehouse.

DATED: October 15, 2008

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.