

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

TSB-A-81 (1) S
Sales Tax
July 21, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S810129A

On January 29, 1981 a Petition for Advisory Opinion was received from Ledan, Inc., 167 Lexington Avenue, New York, New York 10017.

The issue raised is whether Petitioner incurs a tax liability under Article 28 of the Tax Law when Petitioner orders artwork from an art or design supplier, under the circumstances described below.

Petitioner is in the business of creating, designing and selling displays to its customers, primarily manufacturers of products sold to the general public. On occasion Petitioner orders artwork from art or design suppliers. In the great majority of these cases the supplier is located outside New York State or New York City, and the customer for whom the artwork is ordered is also located outside New York State or New York City. Petitioner submits such artwork, unaltered, to his customer, for approval or rejection. If the customer approves the artwork and orders a display to be produced by Petitioner the latter will use the artwork in the production of the display. If the customer does not order a display to be produced by Petitioner, Petitioner will bill the customer for the artwork. Petitioner states that in either case the customer becomes the owner of the artwork upon receiving it from Petitioner for approval or rejection.

Section 1105(a) of the Tax Law imposes a tax on the receipts from retail sales of tangible personal property. Section 1101(b)(4) of the Tax Law defines the term "retail sale" to include any sale of tangible personal property to any person "other than (A) for resale as such or as a physical component part of tangible personal property "Section 1110 of the Tax Law imposes a compensating use tax on the use within New York of "tangible personal property purchased at retail", except to the extent that the same has been or will be subject to the sales tax imposed under Article 28 of the Tax Law.

It is the applicability of this use tax provision which is at issue herein where Petitioner purchases the artwork in question outside of New York. Where such purchases are made within New York it is the sales tax which is at issue. In both cases the dispositive question is whether the purchase of the artwork by Petitioner is a purchase for resale, in which case neither tax would be due.

The Sales and Use Tax Regulations provide, in this regard, that:

"(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.

. . .

(2) A sale for resale will be recognized only if the vendor receives a properly completed retail certificate "20 NYCRR 526.6(c).

Accordingly, where Petitioner purchases artwork for the purpose of resale to its customer the sale to Petitioner would not constitute a retail sale and neither sales nor use tax would be due. To establish the sale as a sale for resale it is necessary that unconditional title to the artwork pass to the customer immediately upon delivery to the customer and prior to any use thereof by Petitioner. See Advisory Opinion to D. L. Terwilliger Co. Inc., TSB-H-81(51)S.

Where the conditions establishing the applicability of the "sale for resale" exclusion are not present, an exemption from the State and local sales and use taxes, other than New York City's use tax, may nonetheless be applicable. Thus, where the artwork is used to produce a display for sale, the purchase of the artwork would constitute a purchase of "equipment for use or consumption directly and predominantly in the production of tangible personal property. . . for sale," and would be exempt from State and local sales and use tax pursuant to section 1115(a)(12) of the Tax Law, except for New York City's sales and use taxes.

Petitioner's sales of artwork, and of completed displays produced from its customers' artwork, constitute retail sales and are subject to sales tax if delivered to customers in New York. 20 NYCRR 526.7(e)(2).

The foregoing considerations, with the exceptions noted, are similarly applicable under New York City's sales and use taxes, imposed under Article 28 of the Tax Law.

DATED: July 2, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau