

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

TSB-A-97(34)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S951124A

On November 24, 1995, the Department of Taxation and Finance received a Petition for Advisory Opinion from Cadett Register Tapes Inc., 141 Lanza Avenue, Garfield, New Jersey 07026.

The issue raised by Petitioner, Cadett Register Tapes Inc., is what the basis for computing compensating use tax is when it provides free cash register tapes containing advertising to supermarkets in New York State.

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

Petitioner sells advertising space to New York businesses and places these ads on cash register tapes. Petitioner purchases paper by the roll in New Jersey. The paper is converted from large rolls to register tapes by cutting and rolling the paper into smaller register size rolls. The ads are printed by Petitioner on the cash register tapes. The conversion and printing processes occur in New Jersey. The tapes are then given free to supermarkets. Some of the tapes are shipped to supermarkets in New York State. Petitioner delivers its register tapes to the supermarkets by common carrier. Petitioner does not sell tangible personal property or services, other than the advertising described above.

Petitioner notes that it does not sell the tapes to the supermarkets and asks what the basis for the compensating use tax is.

Applicable Law and Regulations

Section 1101(b)(7) of the Tax Law defines the term "use" as:

The exercise of any right or power over tangible personal property 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. Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials.

Section 1110 of the Tax Law provides in part:

Imposition of compensating use tax. (a) 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, (B) of any tangible personal property (other than computer software used by the author or other creator) manufactured, processed or assembled by the user, (i) if items of the same kind of tangible personal property are offered for sale by him in the regular course of business or (ii) if items are used as such . . . if items of the same kind are not offered for sale as such . . . in the regular course of business. . . .

(b) For purposes of clause (A) of subdivision (a) of this section, the tax shall be at the rate of four percent of the consideration given or contracted to be given for such property, or for the use of such property, including any charges for shipping or delivery as described in paragraph three of subdivision (b) of section eleven hundred one, but excluding any credit for tangible personal property accepted in part payment and intended for resale.

* * *

(d) For purposes of subclause (ii) of clause (B) of subdivision (a) of this section, the tax shall be at the rate of four percent of the consideration given or contracted to be given for the tangible personal property manufactured, processed or assembled into the tangible personal property the use of which is subject to tax, including any charges for shipping or delivery as described in paragraph three of subdivision (b) of section eleven hundred one.

Section 1118 of the Tax Law provides in part:

Exemptions from use tax. The following uses of property shall not be subject to the compensating use tax imposed under this article:

* * *

(2) In respect to the use of property purchased by the user while a nonresident of this state, except in the case of tangible personal property which the user, in the performance of a contract, incorporates into real property located in the state. A person while engaged in any manner in carrying on in this state any employment, trade, business or profession, shall not be deemed a nonresident with respect to the use in this state of property in such employment, trade, business or profession. (Emphasis added)

Section 526.15(b) of the Sales and Use Tax Regulations defines the term "resident" as:

(1) Any corporation incorporated under the laws of New York, and any corporation, association, partnership or other entity doing business in the State or maintaining a place of business in the State, or operating a hotel, place of amusement or social or athletic club in the State is a resident.

(2) Any person while engaged in any manner in carrying on in this State any employment, trade, business or profession shall be deemed a resident with respect to the use in this State of tangible personal property or services in such employment, trade, business or profession. (Emphasis added)

Opinion

Since Petitioner does not sell tangible personal property or taxable services in New York State, Petitioner is not required to register as a vendor. Petitioner will owe compensating use tax, however, if it uses tangible personal property in New York State.

The cash register tapes produced by Petitioner are used in New York State when Petitioner distributes the tapes to supermarkets in New York. See Section 1101(b)(7) of the Tax Law. By doing business in the State, Petitioner is considered a resident for use tax purposes with respect to the property it uses in its business and, therefore, it is liable for the use tax on the cash register tapes it provides to supermarkets in New York State. See Section 526.15(b) of the Sales and Use Tax Regulations. The rate of tax to be applied to Petitioner's cash register tapes is the rate of tax in effect in the community in which Petitioner delivers them. The use tax is based on the consideration paid by Petitioner for that portion of the paper purchased in New Jersey which is converted into cash register tapes for shipment into New York, including any charges for shipping or delivery of the paper to Petitioner in New Jersey. See Section 1110(d) of the Tax Law.

Petitioner may claim a credit against the compensating use tax due New York State for any sales or use tax paid to New Jersey, without any right to a refund or credit, on Petitioner's purchase or use of the rolls of paper in New Jersey. This credit is only allowed if New Jersey allows a corresponding credit against its tax for sales or use tax paid to New York State. See Section 1118(7) of the Tax Law.

DATED: June 25, 1997

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

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