

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

TSB-A-97(36)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970117A

On January 17, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Point O'Woods Historical Society, c/o James M. Bennett, 382 Springfield Avenue, Summit, NJ 07901-2707. Petitioner, Point O'Woods Historical Society, provided additional information pertaining to the Petition on March 31, 1997.

The issues raised by Petitioner are as follows.

- (1) Whether Petitioner is liable for the collection of sales tax on its retail sales of tangible personal property pursuant to Section 1116(b) of the Tax Law.
- (2) If Petitioner is not liable for the collection of sales tax, what is the procedure for canceling its registration for sales tax collection in order to end its tax reporting responsibilities?
- (3) Whether, if Petitioner is not liable for the collection of sales tax, it, or those who purchased items from Petitioner, may obtain a refund of the sales tax which Petitioner has collected.

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

Petitioner, according to Article I of its Constitution, exists to preserve and recover the written and pictorial history of the Hamlet of Point O'Woods, New York, to preserve historical artifacts, to increase community awareness and knowledge of its history, to work with other societies and scholars to advance historical knowledge and to develop a library of written, oral and video histories. Petitioner is exempt from the payment of the New York State and local sales and use taxes pursuant to Section 1116(a)(4) of the Tax Law, and has been issued an Exempt Organization Certificate by the New York State Department of Taxation and Finance.

Petitioner accomplishes its purposes in several ways. They include sponsoring exhibitions, lectures and events to educate the Point O'Woods, New York community about items of historical significance. Petitioner purchases plaques and other appropriate items to mark and preserve objects in the community which are of historical significance. Petitioner reproduces and preserves photographs and documents. It also maintains historical artifacts in space made available to it at a privately-run post office by the Point O'Woods Association, the corporate owner of the land constituting the Point O'Woods community. Petitioner does not pay for this space. The Point O'Woods Association has the right at all times to make Petitioner vacate that space. Petitioner has no permanent space which it owns or leases. The Point O'Woods community has 129 houses.

To raise money for these objectives, Petitioner does sell items from time to time. Such items, in the past, have been designed by members of the community and include artistically drawn community maps, which also have been made into table place mats, a book with photographs depicting the history of homes in the community, specially prepared glasses, and an inventory of remaining books donated by their author (who is one of the members) about the history of Fire Island. All of the proceeds from such sales go to support the not-for-profit goals of the Petitioner.

These fundraisers take place on an occasional basis. Point O'Woods is a summer community and all of the sales are seasonal. The season is from June to mid-September. When the items are sold out, they are not necessarily replaced or reproduced.

Sales take place in several ways. Some have been from card tables set up in front of the community's privately-run post office. During the season, Petitioner may set up a card table once or twice, for several days to a week at a time. Some summers they may not set up a card table at all, but the sales of the same items would be made from other places.

Petitioner also makes sales from two other fixed locations. One location is a store owned by the Point O'Woods Association popularly known as the "candy store." Petitioner has placed in the "candy store" a small supply of soft-bound (acetate cover) photographic collections of Point O'Woods homes entitled 100 Years of Beach Houses. The "candy store" displays a sign stating that this work is available. The sales of these items are not made from a separate table or booth in the store. Petitioner's items are mixed in with the other store merchandise. The "candy store" collects the proceeds and hands them over to Petitioner. These proceeds are kept separate. The customer generally writes a check to Petitioner for Petitioner's item and pays the store separately for anything else. The store does not collect sales tax on Petitioner's items, as it does for its own items which it sells.

The "candy store" receives no commission on these sales. Petitioner pays no rent or other fee to the "candy store" for its services; its role with the "candy store" is entirely passive. Petitioner does not in any way direct the "candy store" as to how it should go about selling this work. None of Petitioner's directors, officers or members participate in the sales activity. The Point O'Woods Association has the right at all times to return the remaining supply at the "candy store" and stop its activities with respect to the work. Petitioner does not own or lease any space in the "candy store." It does not in any way operate the "candy store." It is anticipated that when current supplies of this work run out they will not be replaced, as most homes in Point O'Woods will have a copy of the work.

The other location is a thrift shop, to which space is made available by the Point O'Woods Association at a dock house. The arrangement is analogous to that of the "candy store."

Sales are also made by word-of-mouth from supplies stored in members' houses. Occasionally a member will request an item during the winter, and if available it will be sold out of someone's house.

Applicable Law and Regulations

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

Section 1116 of the Tax Law provides, in part:

(a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

* * *

(4) Any corporation, association, trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes

* * *

(b) Nothing in this section shall exempt:

(1) retail sales of tangible personal property by any shop or store operated by an organization described in paragraph (4) . . . of this section.

Section 1139 of the Tax Law provides, in part:

(a) . . . the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article . . . Such application shall be in such form as the tax commission shall prescribe. No refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission, under such regulations as it may prescribe, that he has repaid such tax to the customer

Section 529.7(i)(2) of the Sales and Use Tax Regulations provides, in part: Retail sales of tangible personal property made by any shop or store operated by an exempt organization described in section 1116(a)(4), (5) or (6) are subject to the sales and use tax. A shop or store as used in this section includes any place or establishment where goods are sold from display with a degree of regularity, frequency and continuity as well as any place where sales are made through a temporary shop or store located on the same premises as persons required to collect tax . . . (Emphasis added)

Opinion

Petitioner is an exempt organization as described in section 1116(a)(4) of the Tax Law. To raise money to carry out its not-for-profit purposes, Petitioner has been selling items of tangible personal property from "time to time" since its inception several years ago. Petitioner states that the sales take place in several ways. They have been from card tables in front of a privately-run post office, from two stores owned and operated by third parties which sell items for Petitioner and by word-of-mouth from supplies stored in members' houses.

Sales made by organizations described in section 1116(a)(4) are generally not subject to tax. However, if such organizations make sales of tangible personal property through a shop or store, the exemption does not apply (see Matter of Jung Foundation for Analytical Psychology, Inc., Adv Op Comm T&F, June 24, 1985, TSB-A-85(24)S).

The term "shop or store" is construed to be any place where goods are sold from a display with a degree of regularity and continuity. Petitioner's sales which are made through the "candy" and thrift stores take place in areas devoted exclusively to selling tangible personal property. These are sales made from the premises of persons required to collect tax. The fact that the sales are made by a representative of Petitioner who receives no compensation for its efforts, rather than Petitioner itself, is not material (see Matter of Rochester Philharmonic Orchestra, Inc., Adv Op Comm T&F, November 27, 1981, TSB-A-81(56)S). Accordingly, sales of Petitioner's items by the "candy" and thrift stores are taxable. It should be noted that the store operators and Petitioner are acting as co-vendors pursuant to the provisions of Section 1101(b)(8)(ii)(A) of the Tax Law and Section 526.10(e) of the Sales and Use Tax Regulations. As such, they are jointly responsible for the collection and payment of the sales tax on all sales of Petitioner's property made from the stores.

In contrast, the other two methods of sale made on behalf of Petitioner, from the temporary card tables and from members' houses, fail to occur with the same regularity, frequency and continuity as the sales made at the stores. Sales from members' houses are sporadic and infrequent and are not made from a display, as described by Petitioner. Therefore, these sales are not considered to be made through a shop or store within the meaning and intent of Section 529.7(i)(2) of the Sales and Use Tax Regulations, and are not subject to sales tax (see Matter of St. Pauls G.O. Church, Adv Op Comm T&F, December 10, 1986, TSB-A-86(53)S).

The sales from card tables will not be considered sales from a shop or store if these sales are sporadic and infrequent, e.g., occurring only a few days during the summer, as described by Petitioner. However, if Petitioner were to sell its wares from displays such as the card tables at more continuous and scheduled intervals or at events where vendors required to collect tax offer merchandise for sale, such sales would be taxable because each of these locations would be deemed a shop or store pursuant to the Tax Law (see Rochester Philharmonic Orchestra, Inc., supra; St. Pauls G.O. Church, supra).

Since it has been determined that some of Petitioner's sales are taxable, issue "2" is moot, and need not be addressed in this opinion.

With respect to issue "3", pursuant to Section 1139 of the Tax Law, Petitioner may claim a refund of tax collected by Petitioner, which has been remitted to the Department of Taxation and Finance, on any sale not made from a shop or store, as discussed above. Petitioner must repay such tax to its customers prior to claiming a refund and establish to the satisfaction of the Department that it has in fact repaid such tax. A refund or credit of such tax may be claimed by filing Form AU-11, Application for Credit or Refund of State and Local Sales or Use Tax. Alternatively, claims for refund may be filed by the individuals who paid the tax that was erroneously collected by their completing a Form AU-11 and mailing such form with appropriate documentation to the State of New York Department of Taxation and Finance, Sales Tax Central Office Audit Bureau, W.A. Harriman Campus, Albany, NY 12227. Any request for refund must be made within the applicable period as provided in Section 1139 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.