

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

TSB-A-98(79)S  
Sales Tax  
December 2, 1998

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980527A

On May 27, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Jones, Day, Reavis & Pogue, 599 Lexington Ave., New York, NY 10022. Petitioner, Jones, Day, Reavis & Pogue, submitted a modified Petition on October 15, 1998.

The issue raised by Petitioner is whether in-state purchases by an advertising firm of promotional materials and related services, and transfers of title, for a consideration, to the promotional materials to affiliated clients of the advertising firm, are exempt from sales and use taxes where the promotional materials are distributed to the New York addresses of customers or potential customers of such affiliated clients.

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

Parent is a corporation and is the parent of a group of wholly owned subsidiaries engaged in national retail businesses. Parent is incorporated in State A with its principal place of business in New York. Members of the group actively market merchandise in retail stores located in New York and numerous other states through extensive advertising campaigns which include the distribution of printed promotional materials via U.S. mail and common carrier to customers and potential customers, at no cost to such recipients, in the states from which the retail stores draw their customers.

Members of the group desire to consolidate the advertising and promotional activities of the group in a newly formed subsidiary of Parent ("Adco"). Adco will be incorporated in a state other than New York and will have its principal office located in New York. Adco will hire a full-time staff of employees and will engage in the advertising business in New York. Adco will provide advertising services and promotional materials to one or more members of the group pursuant to written contracts, for an arm's length fee (each such member that contracts with Adco being herein referred to as "Client"). Pursuant to its contracts, Adco will handle all aspects of producing promotional materials, from the creation and design stage through delivery of the promotional materials to the Client's customers or potential customers.

Contracts with photographers, models, color separators, printers, mailing services, media and the like, who are retained in connection with production of promotional materials will be negotiated by Adco and will be in Adco's name. Adco will pay all of its expenses to create the promotional materials for its Clients, such as printing costs, postage, design costs, etc. Charges for Adco's advertising services and for the cost of producing "store copies" of promotional materials will be separately stated on invoices sent to Clients by Adco. All employees performing work with respect to the promotional materials prepared for the Clients will be employees of Adco. Promotional

materials (other than store copies) will be mailed or shipped by Adco to Client’s customers or potential customers, without charge to such customers or potential customers, by means of a common carrier, United States postal service or like delivery service. Pursuant to its contracts with Clients, Adco will not be the agent of, nor will its activities be controlled by, Parent or any member of the group. Although in some cases title to finished promotional materials produced by Adco will be transferred to Clients, in most cases Adco will retain title to the materials. However, it is anticipated that, with respect to the promotional materials distributed to Clients’ New York customers and potential customers, title to promotional materials will be transferred to Clients by Adco, for a consideration, before the materials are sent to Clients’ customers or prospective customers.

Adco will own, or have a license agreement to use, all mailing lists owned or used by its Clients and will, as needed for each Client engagement, acquire such additional mailing lists as the Clients may direct. Once Adco has produced promotional materials for a Client and sold them to the client, Adco will arrange for the distribution of the materials to the customers or potential customers of the Client through mailing service providers, without charge to such customers. Promotional materials will be distributed to the Client’s customers or potential customers that are located both inside and outside of New York. The Client will never take possession of the promotional materials, with the exception of a limited number of “store copies” shipped to Clients for use in their retail stores. The Client will pay applicable sales or use taxes to Adco with respect to such “store copies,” and Adco will remit such taxes to the Department.

**Applicable Laws and Regulations**

Section 1101(b) of the Tax Law provides, in part:

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:

\* \* \*

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property . . .

\* \* \*

(12) Promotional materials. Any advertising literature, other related tangible personal property (whether or not personalized by the recipient’s 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, promotional displays and Cheshire labels but does not include invoices, statements and the like.

Section 1105(a) of the Tax Law imposes sales tax on the receipts of every retail sale of tangible personal property, except as otherwise provided.

Section 1115(n) of the Tax Law provides, in part:

(1) 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 imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article.

(2) Services otherwise taxable under paragraph one or two of subdivision (c) of section eleven hundred five of this article relating to mailing lists or activities directly in conjunction with mailing lists shall be exempt from tax under this article if such services are performed on or directly in conjunction with promotional materials exempt under paragraph one of this subdivision.

\* \* \*

(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 its customers or prospective customers, by means of a common carrier, United States postal service or like delivery service.

(5) Services otherwise taxable under paragraph two of subdivision (c) of section eleven hundred five performed on promotional materials exempt under paragraph four of this subdivision shall be exempt from tax under this article.

Section 526.6(c)(1) of the Sales and Use Tax Regulations provides:

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.

### **Opinion**

Technical Service Bureau Memorandum, Expanded Sales and Compensating Use Tax Exemption for Promotional Materials, August 20, 1997, TSB-M-97(6)S, provides, in part:

#### Promotional Materials Exempt Under Section 1115(n)(4) of the Tax Law

##### Printed Promotional Materials

Effective March 1, 1997, printed promotional materials mailed or shipped to destinations in the state are exempt from tax when all of the conditions listed below are met.

- The printed promotional materials are ultimately mailed or shipped to customers or prospective customers of the purchaser of the printed promotional materials.
- The printed promotional materials are mailed or shipped by the purchaser of the materials using a common carrier, the U.S. Postal Service or a like delivery service. (This requirement is also met if the mailing or shipping is arranged by a third party (such as a printer/mailer) on behalf of the purchaser of the promotional materials.)
- There is no charge to the purchaser's customer or prospective customer (ultimate recipient) for the promotional materials, or for mailing or shipping them.
- The purchaser of the promotional materials gives a properly completed Form ST-121.2, Certificate of Exemption for Purchases of Promotional Materials, to the seller of the promotional materials.

In this case, pursuant to its contracts, Adco will handle all aspects of producing promotional materials, from the creation and design stage, through sale to the Client and delivery of the promotional materials to the Client's customers or potential customers. Such promotional materials will be mailed or shipped to the Client's customers or potential customers located inside and outside New York, without charge to such customers or potential customers, by means of a common carrier, United States Postal Service or like delivery service. Adco will pay all of its expenses to create the promotional materials for its Clients, such as printing costs, postage, design costs, etc. Adco will own, or have a license agreement to use, all mailing lists owned or used by its Clients and will, as needed for each Client engagement, acquire such additional mailing lists as the Clients may direct.

Pursuant to its contracts with Clients, Adco will not be the agent of, nor will its activities be controlled by, Parent or any member of the group of subsidiaries owned by Parent.

Adco will, for a consideration, transfer title to its Clients to those promotional materials which Adco will distribute to Clients' customers in New York. Such a transfer, for consideration, constitutes a sale of tangible personal property. Since Adco will sell the promotional materials to its Clients, Adco may purchase the promotional materials for resale. Accordingly, in such instances, Adco's purchases of the promotional materials will not be subject to sales and compensating use taxes. See Section 1101(b)(4)(i) of the Tax Law and Section 526.6(c) of the Sales and Use Tax Regulations.

Adco's sales to its Clients of those promotional materials which Adco will distribute, on its Clients' behalf, to Clients' customers or potential customers in New York, without charge to such customers or potential customers, by means of common carrier, United States Postal Service or like delivery service will be exempt from sales and compensating use taxes under Section 1115(n)(4) of the Tax Law, if the promotional materials are printed promotional materials or have had services described in Section 1105(c)(2) of the Tax Law performed directly upon them. Likewise, Adco's sales of such promotional materials to its Clients will be exempt where such promotional materials are delivered outside New York for use outside New York.

In addition to Adco purchasing the promotional materials exempt from sales and compensating use taxes, Adco may also purchase the services described under Section 1105(c)(2) of the Tax Law consisting of producing, fabricating, processing, printing, or imprinting exempt from sales tax under Section 1115(n)(5) of the Tax Law, when these services are performed on such exempt promotional materials. Mailing lists and mailing list services relating to such exempt promotional materials are exempt from tax under Section 1115(n)(2).

In order for Adco to purchase the promotional materials for resale, Adco should present a properly completed Resale Certificate (Form ST-120) to the vendor within 90 days of delivery of the property. In order for Adco to purchase promotional materials and related services exempt from tax in cases where all of the conditions for exemption under Section 1115(n) of the Tax Law have been met, Adco should present a properly completed Certificate of Exemption for Purchases of Promotional Materials (Form ST-121.2) to the vendor within 90 days of the purchase. Adco's Clients should present a properly completed Form ST-121.2 to Adco on their purchases of exempt

TSB-A-98(79)S  
Sales Tax  
December 2, 1998

promotional materials from Adco. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations.

DATED: December 2, 1998

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

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