

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

TSB-A-99(51)S
Sales Tax
November 19, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990610B

On June 10, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Morrison & Foerster LLP, 1290 Avenue of the Americas, New York, New York 10104.

The issue raised by Petitioner, Morrison & Foerster, is whether purchases by a corporation of tangible personal property and services, for use in production of printed promotional materials to be distributed at no cost to its customers and prospective customers, located both within and without New York, are exempt from New York sales and use tax.

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

Corporation X is incorporated in state Z and maintains a place of business in New York. Corporation X actively markets merchandise in retail stores located in New York and elsewhere through advertising campaigns, which include the distribution of printed promotional materials via U.S. mail and common carrier to customers and prospective customers located within and without New York, at no cost to such recipients.

Corporation X contracts with third party designers and printers for the production of its promotional materials and the delivery of the promotional materials to Corporation X's customers and prospective customers. Corporation X purchases, both inside and outside New York, various items of tangible personal property, which it then provides to printers for use in the production process (including paper, ink, photographs and typography). Corporation X also purchases, both inside and outside New York, the services of photographers, models, mailing services and printers, all of which are used in the production of printed promotional materials.

Applicable Law

Section 1101(b)(12) of the Tax Law defines promotional materials as follows:

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

(1) Except as otherwise provided in this subdivision, promotional materials mailed, shipped or otherwise distributed from a point within this state, by or on behalf of vendors or other persons to their customers or prospective customers located outside of this state for use outside this state shall be exempt from the tax on retail sales 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 or four 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.

Example 2 of Technical Services Bureau Memorandum, Expanded Sales and Compensating Use Tax Exemption for Promotional Materials, August 20, 1997, TSB-M-97(6)S, provides:

Example 2. A New York company contracts with a printer/mailer located in New York to produce brochures (promotional materials) to be sent to customers in and out of New York via the U.S. Postal service. Under the agreement, the New

York company furnishes the printer/mailler the paper, ink, and printing plates to print the brochures, and envelopes in which the brochures will be mailed. The New York company also purchases a mechanical (artwork) and color separations for use in producing the printing plates supplied to the printer. The ink will also be used to print the company's logo on the envelopes in which the brochures will be mailed. In addition, the New York company provides the printer/mailler a customer/prospective customer mailing list in the form of address labels. The printer/mailler prepares the brochures, prints the New York company's logo on the envelopes, affixes the address labels, stuffs the brochures into the envelopes, and arranges for mailing with the Postal Service.

The paper, ink, mechanical (artwork), color separations and printing plates used in producing the promotional materials printed for the New York company by the printer are exempt from sales tax. The envelopes and address labels may be purchased exempt from tax by the New York company as these items qualify as exempt promotional materials, based on the use described above. The printer/mailler's charges for printing the brochures, printing the New York company's logo on the envelopes, and affixing the address labels to the envelopes are exempt from sales tax. The printer/mailler's charges for inserting the brochures into the envelopes and for mailing (postage) are not subject to tax.

Opinion

Petitioner's client purchases the tangible personal property and services described above for use in producing printed promotional materials to be distributed at no cost to its customers and prospective customers who are located both within and without New York State. The tangible personal property is provided to third party printers for use in production of the promotional materials. Petitioner's client's purchases of tangible personal property are similar to those described in Example 2 of TSB-M-97(6)S and, therefore, they are exempt from sales and use tax, to the extent that the promotional materials produced are exempt. The promotional materials are exempt if, as described by Petitioner, they are either mailed, shipped or otherwise distributed to Petitioner's client's customers or prospective customers outside the State for use outside the State or delivered via United States Postal Service or common carrier to Petitioner's client's customers or prospective customers in New York State, at no cost to such customers. If, however, some promotional materials were not exempt, Petitioner's client would then have to determine the percentage of exempt promotional materials which will be produced and apply that percentage to its purchases to determine the extent of its exempt purchases. Modeling services and certain mailing services, such as envelope stuffing, sealing, affixing stamps and postage, are not among the enumerated services subject to tax under Section 1105 of the Tax Law. Printing, imprinting and processing services

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performed by photographers or printers are exempt when performed on promotional materials that are exempt from tax under Section 1115(n)(4) of the Tax Law. See Section 1115(n)(5) of the Tax Law.

DATED: November 19, 1999

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

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