

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

TSB-A-99(55)S
Sales Tax
November 30, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990629B

On, June 29, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Henry Goldwasser, 135 West 50th Street, New York, New York 10020.

The issues raised by Petitioner, Henry Goldwasser, are:

- (1) Whether the fee for running the sweepstakes described below is subject to sales tax.
- (2) Whether Petitioner's client may purchase tickets and prizes, in connection with the sweepstakes, for resale.
- (3) Whether the costs of printing the sweepstakes entry blanks and other promotional materials is exempt from sales tax.

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

Petitioner's client (Company A) designs a sweepstakes for a client in which sports tickets or other prizes will be given away to customers. The sweepstakes entry blanks are often placed in supermarkets near the place where the products of Company A's client are displayed. No purchase is required to enter the sweepstakes. Company A provides the tickets or prizes, does not claim a resale exemption when purchasing them and pays sales tax to the vendor where required. Company A pays for printing all promotional materials used in connection with the sweepstakes. Company A does not transfer title or possession of the tickets, prizes or promotional materials to its client. Company A charges its client a prearranged fee for running the sweepstakes.

Applicable Law & 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, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five....

* * *

(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 of the Tax Law provides, in part:

Imposition of sales tax. - On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

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 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 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.

* * *

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

Section 1119(a) of the Tax Law provides, in part:

Subject to the conditions and limitations provided for herein, a refund or credit shall be allowed for a tax paid pursuant to subdivision (a) of section eleven hundred five or section eleven hundred ten . . . (2) on the sale or use of tangible personal property purchased in bulk, or any portion thereof, which is stored and not used by the purchaser or user within this state if that property is subsequently reshipped by such purchaser or user to a point outside this state for use outside this state

Opinion

Company A's fee solely for the services of designing and running a sweepstakes, where Company A does not make any sale of tangible personal property, is not taxable, since such services are not among the specifically enumerated services subject to sales tax under Section 1105(c) of the Tax Law. Any tangible personal property, service or other item purchased by Company A which it uses or consumes in conjunction with providing the services of designing and running the sweepstakes, such as the tickets and prizes, is not purchased for resale; and Company A is required to pay any sales or compensating use tax that may be due at the time of purchase or use. Based on Petitioner's fact that Company A does not transfer title or possession of any property to Company A's client, Company A's charge to its customers for the services of designing and running the sweepstakes is not subject to sales or use tax, even where such charge is calculated to cover Company A's expenses to purchase the materials that Company A uses to provide such services.

Promotional materials which are printed materials and promotional materials upon which Section 1105(c)(2) services have been directly performed are exempt from sales or use tax under Section 1115(n)(4) of the Tax Law where the purchaser of the promotional materials mails or ships the promotional materials, or causes them to be mailed or shipped, to the purchaser's customers or prospective customers, without charge to the customers or prospective customers, via common carrier, U.S. postal service or like delivery service. In this instance, where the sweepstakes entry blanks and other printed promotional materials are purchased at retail by Company A, not by Company A's client, and Company A places such materials in supermarkets and other retail outlets for use by the customers and prospective customers of Company A's client when they enter the store, the promotional materials do not qualify for exemption under Section 1115(n)(4), since they are not

TSB-A-99(55)S
Sales Tax
November 30, 1999

mailed or delivered to Company A's customers or prospective customers. Accordingly, Company A's purchases of such promotional materials are subject to sales and use tax. Petitioner does not indicate what Company A does with sweepstakes entry blanks and other promotional materials which are not placed in supermarkets. Thus, this Advisory Opinion cannot provide guidance with respect to these promotional materials in such other circumstances.

Company A may be entitled to a refund or credit under Section 1119(a)(2) of the Tax Law of sales tax paid on the sweepstakes entry blanks and other promotional materials, as well as prizes, purchased in bulk in this State if they are stored and not used by Company A in this State and they are then reshipped to locations outside of New York State for use outside the State.

DATED: November 30, 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.