

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

TSB-H-81 (121) S
Sales Tax
June 22, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S810312A

On March 12, 1981 a Petition for Advisory Opinion was received from Marilyn M. Rieland, 7409 Farmstead Road, Liverpool, New York 13088.

The issue raised is whether Petitioner is due a refund of New York State use tax paid based on the purchase price of "hostess gifts" and "supplies" which Petitioner purchased from Home Interiors and Gifts, Inc. Petitioner did not pay sales tax to the supplier on these purchases, but, rather, remitted use tax based on Petitioner's purchase price paid.

Petitioner awards "hostess gifts" to customers who have sales "parties" at their homes. These customers earn "merits" which may be redeemed by the customers for free merchandise. Petitioner's purchases of supplies include items such as merchandise brochures, order forms, " Home Interiors' " inscribed pencils, tissue paper, paper bags, hostess envelopes, etc.

Section 1105(a) of the Tax Law, contained in Article 28 thereof, imposes a sales tax on the receipts from retail sales of tangible personal property, Section 1110 of the Tax Law imposes a compensating use tax on the use within New York of tangible personal property purchased at retail except to the extent that such property has been or will be subject to sales tax under Article 28. The Sales and Use Tax Regulations provide that the "...compensating use tax is due upon the use of tangible personal property in this State which has been purchased out of state. The applicable tax rate is imposed on the consideration given or contracted to be given for the property, or the use of the property..." 20 NYCRR 531.3(A) (1).

Accordingly, as Petitioner's purchases of hostess gifts and supplies (with the one exception noted below) are purchases at retail, within the meaning of section 1105(a) of the Tax Law, the use of such property is subject to New York State use tax. As Home Interiors and Gifts, Inc. does not collect sales tax at the time of the sale of these items to Petitioner, Petitioner is liable for use tax based on Petitioner's purchase price for the items. Petitioner is therefore not entitled to a refund of use tax remitted with Petitioner's sales tax returns, except as described below.

Section 1115(a) (19) of the Tax Law exempts from the operation of the sales and use taxes "Cartons, containers, and wrapping and packaging materials and supplies, and components thereof for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to the purchaser."

The Sales and Use Tax Regulations provide that "Packaging materials includes ...bags...actually transferred with the product to the purchaser." 20 NYCRR 528.20(b) (1).

JAMES H. TULLY, JR., COMMISSIONER LOUIS M. JACOBSON, DEPUTY COMMISSIONER
FRANK J. PUCCIA, DIRECTOR

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Accordingly, Petitioner's use of bags and other property described in section 1115(a)(19) of the Tax Law and used as described therein, is not subject to use tax. Where Petitioner has made payments of use tax on such uses she is entitled to a refund, upon the timely filing of an application therefor. In order to claim a refund, Petitioner must file an Application for Credit or Refund of State and Local Sales or Use Tax, Form AU-11, with the State Tax Commission. This form must be filed within three years of the 20th day of the month following the end of the quarterly period in which the purchases at issue were made.

DATED: June 8, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau