

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

TSB-H-81 (27) S
Sales Tax
February 27, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S801030A

On October 30, 1980 a Petition for Advisory Opinion was received from Irvin Simon Photographers, Inc., c/o George Shimmerlik, 29 West 34th Street, New York, New York 10001.

The issue raised by Petitioner is whether its sale of photographs to non-profit organizations under the circumstances described below constitutes a transaction subject to the sales tax.

Petitioner states that it "sells" photographs of students to parent-teacher associations on a consignment basis, for resale to the parents of the students. Unsold photographs are returned to Petitioner and the balance paid for by the organization at a rate of 20% below selling price.

Section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property. Section 1101(b)(5) of the Tax Law defines the term "sale" to include any "...transfer of title or possession or both...for a consideration...."

Where goods are placed on consignment such transaction constitutes not a sale but the creation of an agency relationship wherein the consignee becomes the agent of the consignor for the purpose of making sales of the consignor's property, and is obligated to account to the consignor for the proceeds. See, in this regard, Estate of Friedman, 91 Misc. 2d 201 (1977), wherein the court stated that "It is axiomatic that a consignment for sale is quite distinct, in principle, from a sale. On the one hand, if the provisions of a contract are such that title to the subject matter passes absolutely from one party to the other and a correlative obligation to pay the purchase price is imposed, the contract should be construed to be a contract of sale On the other hand, even though a contract contains a recitation denoting passage of title and payment of purchase price, if it appears from all the terms of the contract that the buyer is required to act in a fiduciary capacity and as such account to the other party for the proceeds of a sale, the contract is one of consignment for sale " Cf., Matter of Friedman, 64 AD 2d 70 (1978); In Re Majority of Directors of James Chambers, 17 App, Div, 340 (1897).

Petitioner's stated reliance on the Sales Tax Newsletter, Vol. 4, No. 1, was misplaced. It was stated therein that " Photographers are required to collect the applicable sales tax from the purchasers of student pictures. An organization, even a non-profit organization which has established its exempt status with the Sales Tax Bureau, acting as an agent for a photographer (i.e. distributing the pictures and collecting receipts) must collect sales tax on the total selling price of the pictures and remit it to the photographer.

"In the unusual case where an exempt organization is not acting as an agent for the photographer but is the actual purchaser of all the pictures and the payer of record, the taxable status of its subsequent sales of student pictures is as follows:

- 1) Sales of student pictures by a public school are subject to sales tax because a governmental entity must collect sales tax whenever it sells tangible personal property or services of a kind ordinarily sold by private persons.

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- 2) Sales of student pictures by other qualifying non-profit organizations, which have received Exempt Organization Certificates from the Sales Tax Bureau, such as a PTA, church, or nonpublic school, are not required to collect sales tax unless the sale is made through a shop or store."

Where there is a consignment for sale, as Petitioner states the case to be in the present instance, an agency is created and it is the first paragraph of the quoted material that is applicable. That is, Petitioner's sales of school photographs to the parents of students constitute retail sales the receipts from which are subject to the tax imposed under Section 1105(a) of the Tax Law, and the parent-teacher associations through which Petitioner sells the photographs are required to collect that tax at the time of sale.

DATED: January 29, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau