

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-06(4)S  
Sales Tax  
January 19, 2006

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020411B

On April 11, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Marcum & Kliegman LLP, c/o Mark L. Stone, CPA, 10 Melville Park Road, Melville, NY 11747. Petitioner, Marcum & Kliegman LLP, furnished additional information with respect to the petition on January 6, 2005.

The issues raised by Petitioner are:

- (1) Whether a school is required to pay sales or use tax on its purchase of course materials and books that are transferred to students during a class.
- (2) Whether the transfer of these materials and books to the students results in any sales and use tax obligation for either the students or the school.

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

The school qualifies as an institution of higher learning, recognized and approved by the Regents of the University of the State of New York or as an institution that is accredited by a nationally recognized accrediting agency or association accepted as such by the Regents of the University of the State of New York. The school is organized as a for-profit company that offers a course of study leading to a post-secondary degree, certificate or diploma. Students are enrolled in the school either on a part-time or a full-time basis.

The school charges a student a set fee for the program and transfers course materials and books to the student for use in class. The contract with the student states that the fee for the program always includes all required course materials and books (primarily textbooks). If the course materials or books are lost or stolen, the school typically replaces these items for students free of charge. The school does not sell the books or course materials to students separately. The cost of the course materials and books provided are on average 2.5% of the price of the student's total tuition charge (i.e., for every \$1,000 of tuition paid by the student, the cost of the course materials and books averages about \$25). Once these items are turned over to the student, they cannot be returned to the school.

**Applicable law and regulations**

Section 1101(b)(4)(i) of the Tax Law defines the term "retail sale," in part, as follows:

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 where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . .

Section 1105(c) of the Tax Law imposes sales tax upon the receipts from every sale, except for resale, of certain enumerated services.

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

Receipts from the following 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:

\* \* \*

(34) Textbooks purchased by full and part time college students for their courses; provided, however, that upon purchase such a student shall present a valid student identification card, and such a textbook shall be required for a course being taken by such student at an institution of higher education. For purposes of this subdivision the term:

(i) "Textbooks" includes only those books specifically written, designed or produced for educational, instructional or pedagogical purposes.

(ii) "Institution of higher education" shall mean any institution of higher education, recognized and approved by the regents of the university of the state of New York or accredited by a nationally recognized accrediting agency or association accepted as such by the regents of the university of the state of New York, which provides a course of study leading to the granting of a post-secondary degree, certificate or diploma.

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

(a) The term *retail sale* or *sale at retail* means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

\* \* \*

(c) *Resale exclusion.* (1) 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.

\* \* \*

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. See sections 532.4 and 532.6 of this Title.

(3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property. The receipts are subject to tax at the time of the retail sale.

\* \* \*

(6) Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3) and (5) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (i) becomes a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

\* \* \*

(7) Tangible personal property purchased for use in performing a service not subject to tax is not purchased for resale.

Section 527.1(b) of the Sales and Use Tax Regulations provides, in part:

*Taxable and exempt items sold as a single unit.* When tangible personal property, composed of taxable and exempt items is sold as a single unit, the tax shall be collected on the total price.

Technical Services Bureau Memorandum entitled *Sales and Use Tax Exemption For College Textbooks*, June 5, 1998, TSB-M-98(4)S, provides, in part:

### **Definition of Eligible Textbooks**

The exemption applies to new or used textbooks and related workbooks required or recommended for a course at an institution of higher education. The institution of higher education or the instructor of the course must have designated the book as either required or recommended. This includes course-packs and workbooks produced and required or recommended by the institution or instructor. The exemption applies whether the textbooks are printed or are on computer floppy disk or CD-ROM.

The exemption does not apply to any book (fiction or nonfiction) that is not required or recommended for a course of study at an institution of higher education.

## Opinion

The school described by Petitioner charges its students a set fee for a course of study which leads to a post-secondary degree, certificate or diploma. The school's contract with its students states that the fee for the program includes all required course materials and books. Once these course materials and books are turned over to the student, they cannot be returned. The course materials and books are only provided to a student as part of the school's single all-inclusive charge for the chosen course of study.

Presumably, the school's primary function is to provide its students with a course of study. The educational services provided by the school are services that are not included among the enumerated services subject to sales and use tax under section 1105(c) of the Tax Law. In order to address the issues raised by Petitioner, it must be determined whether the transfer of the course materials and books to the students is incidental to the school's provision of a nontaxable educational service.

Factors that may indicate the course materials and books are not incidental to the provision of the educational services include: the course materials and books are not integrally connected to the subject matter of the course, there is a separate charge for the course materials and books, the course materials and books may be purchased without taking the course, the value of the course materials and books is more than or commensurate with the value of the educational service, and the tuition cost for the same course or substantially equivalent course that includes materials and books is higher than for courses where students must buy course materials and books separately.

In the present case, the course materials and books are not sold separately by the school but are only provided to students enrolling in a course, and the cost of the course materials and books are on average 2.5% of the value of the tuition. In addition, there is no separate charge for the course materials and books, and there is no additional charge to replace lost or stolen items. Presumably, the course materials and books offered by the school in conjunction with the courses are integrally connected to the educational objectives of the courses. Therefore, the course materials and books appear to be incidental to the provision of a nontaxable educational service. Essentially, such course materials and books are provided to students as part of the school's all inclusive charge for the provision of its educational service.

With respect to Issue 1, since the course materials and books are not separately sold by the school to the students and are incidental to the school's provision of educational services, the course materials and books are purchased by the school in order for it to provide its educational services. The course materials and books cannot be purchased by the school exempt from tax as purchases for resale. Tangible personal property purchased for use in performing a service not subject to sales tax is not purchased for resale. See section 526.6(c)(7) of the Sales and Use Tax Regulations. Thus, the course materials and books are considered to be purchased at retail by the school for use in providing nontaxable educational services to the students. See also *Atlas Linen*

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*Supply Co., Inc. v Chu*, 149 AD2d 824, lv denied 74 NY2d 616; *Linen Systems for Hospitals, Inc.*, Dec Tax App Trib, August 24, 1989, DTA No. 800201.

The textbook exemption provided in section 1115(a)(34) of the Tax Law only applies to purchases by students of textbooks, including CD-ROM textbooks, and workbooks. See TSB-M-98(4)S, *supra*. Thus, even assuming that the course materials at issue qualified as textbooks within the meaning of section 1115(a)(34), the school's purchases of the course materials and books are not exempt from tax under section 1115(a)(34).

Accordingly, the school's purchases of course materials and books are purchases at retail, and do not qualify for any exemptions from tax. Therefore, the school is required to pay sales tax on its purchases of the course materials and books.

With respect to Issue 2, the transfer of the course materials and books to the students is considered part of the educational services provided by the school. Since the transfer of the course materials and books to the students is incidental to the provision of nontaxable educational services provided by the school, the transfer of these items is not subject to sales and use tax.

DATED: January 19, 2006

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