

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-11(15)S
Sales Tax
May 6, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO S100618A

Petitioner [REDACTED] asks whether its receipts from its sales of personalized U.S. Postage Stamps are subject to the New York State and local sales tax. Petitioner also asks about the taxability of its charge for creating a stitch file used to convert a customer-designed image into machine readable instructions allowing the replication of the design onto clothing, which Petitioner then sells. We conclude that Petitioner's charge for the sales of customized postage stamps is not subject to sales tax. With regard to the charge for the creation of the stitch file, if that charge is made in conjunction with the sale of clothing, the charge is part of the receipt from the sale of the clothing and is taxable to the extent that those receipts are taxable. Where the charge for the stitch file is made on a stand-alone basis (i.e., not in conjunction with the sale of clothing or other tangible personal property), the charge is for a non-enumerated service, and thus not taxable.

Facts

Pursuant to a license obtained from the United States Postal Service, Petitioner sells personalized United States postage stamps. Customers place an order with Petitioner to purchase stamps that contain an image or picture selected by the customer imprinted on the face of the stamp. In creating the stamps, Petitioner does not imprint an image on an existing stamp, but rather manufactures the stamp *in toto*.

Petitioner's website provides stock images for many types of cards, including holiday and birthday cards, and monogrammed wedding invitations. The stock images may also be customized (e.g., insertion of date for wedding, anniversary or other event invitation; addition of names of engaged couples, etc.). In addition, stamps may be purchased imprinted with business designs, college and university designs, sports team designs, cartoon and comic characters, personal photographs, and other images selected or supplied by the customer.

Petitioner believes the stamps are typically used as postage by the customer for mailings such as birthday party invitations or other social announcements. The stamps may be used for any type of mailing for which regular postage stamps are used, and Petitioner believes most of the stamps are indeed used for postage.

Stamps are sold in sheets of 20 stamps per sheet at prices "marked up" beyond the face value of the postage reflected thereon.

Petitioner is also engaged in the business of selling customized products containing designs or images that are selected, and in many cases designed, by customers ("embroidered products"). These products include t-shirts, shoes, mugs, pet clothing, bumper stickers, ties, business cards, and posters. Customers may also place on-line orders for products that contain customized embroidered designs created by the customer. To create an embroidered product, Petitioner needs a stitch file, which is a data file that contains machine readable instructions for Petitioner's stitching machines to replicate the logo.

Customers may provide Petitioner with a stitch file for its use in producing an embroidered product for purchase by the customer. In such instances, the only charge by Petitioner to the customer is for the cost of the item(s) as embroidered.

Alternatively, if a customer doesn't own a stitch file for the design, Petitioner will provide one. Specifically, the customer uploads the design to Petitioner's website. Petitioner, through a third-party, develops a stitch file for the design, and loads it on to the customer's individual image library on Petitioner's website. Under the terms of use of Petitioner's website, the customer grants Petitioner the right to create the stitch file for purposes of printing the design on Petitioner's products. Petitioner owns the stitch file, but the customer owns the copyright to the image.

Where a customer has ordered a product embroidered with the customer's own design, and Petitioner has created the stitch file, the customer pays two charges, one for the cost of creating the stitch file and another for the embroidered product. A customer incurs no additional stitch file charge on subsequent product orders that are embroidered with the same design.

Petitioner offers a customer the option of posting his or her design on Petitioner's website for use by others. If another customer chooses to use the design on an embroidered product purchased from Petitioner, the customer who owns the design receives a commission. Petitioner will remove the design from its website at the request of the customer who owns the copyright to the design. If a customer submits a design to Petitioner for use by other customers without buying any product from Petitioner, the customer pays only a stitch file charge.

Analysis

The Tax Law imposes sales tax on all sales of tangible personal property and certain enumerated services unless purchased for resale or otherwise exempt (*see* Tax Law § 1105[a], [c]).

Personalized Postage Stamps

The Sales Tax Regulations provide that "[p]ostage stamps, when purchased for purposes other than mailing" are considered tangible personal property and are thus taxable (20 NYCRR section 526.8[a]). That regulation means postage stamps are only to be treated as tangible personal property when they are purchased for some purpose other than mailing, the idea being that a stamp purchased for use as postage is the purchase of the right to receive postal delivery services, i.e., an intangible. The facts here indicate that Petitioner believes that its customers are buying the stamps for mailing purposes, such as a personalized stamp on a birthday party invitation. Accordingly, under the sales tax regulations, the full price of the personalized stamps sold by Petitioner is exempt as attributable to an intangible. If the Petitioner has reason to believe that the stamps will not be used as postage for mailing purposes, the personalized stamps are taxable.

Embroidered Products

Petitioner asks what its taxable receipts are in regard to its sales of embroidered products. Petitioner's retail sale of non-clothing embroidered products are taxable, unless an exemption applies (*see* Tax Law § 1105[a]). With regard to Petitioner's sale of embroidered clothing, pursuant to Chapter 57 of the Laws of 2010, for the period April 1, 2011, through March 31, 2012, clothing and footwear sold for less than \$55 per item or pair are exempt from the State's 4% sales tax and the state-imposed 3/8% sales

tax in the Metropolitan Commuter Transportation District (MCTD) (*see* Changes to the Sales Tax Exemption for Clothing and Footwear, TSB-M-10[16]S).¹ Thus, Petitioner’s charge for embroidered clothing may or may not be subject to sales tax, depending on the price at which the clothing is sold.

As for the charge for the production of the stitch file, that charge does not entitle the customer to any tangible personal property. Thus, when a customer pays only that charge (i.e., the customer does not buy any embroidered product), the charge appears to be for an unenumerated service and is not taxable. Where the customer pays the charge for the creation of the stitch file in connection with the purchase of an embroidered product, the question is whether the charge for the stitch file should be considered part of the receipt from the sale of the embroidered product. “Receipt” for sales tax purposes is the sale price of any property and the charge for any taxable service, “without any deduction for expenses . . . regardless of whether such charges are separately stated” (Tax Law §1101[b][3]). A vendor may not deduct from its receipts subject to tax charges to recoup expenses that the vendor incurs in making the taxable sale (*see* Sales and Use Tax Regulations, 20 NYCRR §526.5[e]; *Artex Systems, Inc. v. Urbach*, 252 A.D.2d 750 [3d Dept 1998]; *Matter of Zagoren Group Inc.*, Tax Appeals Tribunal, May 19, 1994). Given that Petitioner requires the stitch file in order to produce the embroidered product, and the customer never receives the stitch file, the charge for the stitch file, in conjunction with the sale of clothing, is an expense item includible in Petitioner’s receipts from the sale of the clothing. To the extent that the price of the clothing, together with the charge for the creation of the stitch file, exceeds \$55, the clothing exemption does not apply and the stitch file charge (as well as the charge for the clothing) is subject to tax.

DATED: May 6, 2011

/S/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.

¹ Under Chapter 57, localities have a number of options as to whether to provide a clothing exemption (*see* Changes to the Sales Tax Exemption for Clothing and Footwear, TSB-M-10[16]S, *supra*). Also, on and after April 1, 2012, the original less-than-\$110-per-item clothing and footwear exemption will be restored. It will apply to the State’s 4% sales tax and also the 3/8% sales tax in those localities in the MCTD that provide the less-than-\$110 exemption (*see Id.*).