

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

TSB-A-13(16)S
Sales Tax
July 15, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S120427A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether, pursuant to Tax Law § 1115(n)(4), printed promotional materials, including signs and displays, provided to its members and displayed at retail outlets throughout the state are exempt from sales and use tax.

We conclude that these promotional materials are not exempt from sales and use tax under Tax Law § 1115(n)(4).

Facts

Petitioner is a not for profit corporation formed under Chapter 1702 of the Ohio Revised Code. The members of the Petitioner are [REDACTED] (the franchisor), and the franchisee restaurants of [REDACTED]. [REDACTED] is the only voting member of the Petitioner. Petitioner establishes and administers promotion and advertising programs for the benefit of the franchisor and the franchisees. Petitioner collects funds from its member restaurants and expends those funds for promotional and advertising purposes. Petitioner's activities include, but are not limited to, television and radio advertising production, merchandising and promotions in retail outlets, direct mail and sponsorships. The promotional materials are put on view at the franchisee restaurants. Petitioner does not charge a specific amount to its members for the promotional materials, but the materials are paid for through the funds that it collects from the members. The funds collected are based on a percentage of the members' restaurant food and beverage sales. The charge does not vary based upon the quantity of materials that is provided.

Some of the promotional materials are delivered by Federal Express. Other items are delivered by a distributor in its own trucks.

Analysis

Tax Law § 1101(b)(12) defines promotional materials in relevant part as:

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, prospectuses, promotional displays and Cheshire labels but does not include invoices, statements and the like.

Tax Law § 1105(a) imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided. Tax Law § 1115(n)(4) provides:

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 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 common carrier, United States postal service or like delivery service.

In addition, TSB-M-97(6)S, *Expanded Sales and Compensating Use Tax Exemption for Promotional Materials*, sets forth the four conditions that must be met for printed promotional materials mailed or shipped to destinations in the state to be exempt from tax. The four conditions are:

- The printed promotional materials are ultimately mailed or shipped to customers or prospective customers of the purchaser of the printed promotional materials.
- The printed promotional materials are mailed or shipped by the purchaser of the materials using a common carrier, the U.S. Postal Service or a like delivery service. (This requirement is also met if the mailing or shipping is arranged by a third party [such as a printer/mailer] on behalf of the purchaser of the promotional materials.)
- There is no charge to the purchaser's customer or prospective customer (ultimate recipient) for the promotional materials, or for mailing or shipping them.
- The purchaser of the promotional materials gives a properly completed Form ST-121.2, *Certificate of Exemption for Purchases of Promotional Materials*, to the seller of the promotional materials.

The promotional materials, including the signs and displays, provided by Petitioner constitute promotional materials as defined in § 1101(b)(12) of the Tax Law. However, the promotional materials do not meet the statutory conditions necessary to qualify for the exemption under Tax Law § 1115(n)(4).

The customer requirement: The printed promotional materials are being delivered to Petitioner's members. The members of the Petitioner are not the Petitioner's customers or prospective customers as contemplated by the statute.

The delivery requirement: Only some of the printed promotional materials are shipped by the purchaser of the materials using a common carrier to customers and prospective customers. The materials delivered by a distributor in its own trucks do not satisfy the statutory delivery requirement.

The “without charge” requirement: The printed promotional materials that are shipped by common carrier still do not meet the “without charge” requirement of the statute. Because the franchisee restaurants actually pay funds to the Petitioner which the Petitioner then uses to purchase the printed materials supplied to the members, the printed materials are not being provided, shipped or delivered to the franchisee restaurants without charge as required.

Since the promotional materials are not exempt under Tax Law § 1115(n)(4), Petitioner cannot use Form ST-121.2, *Exemption Certificate for Purchases of Promotional Materials*, to make exempt purchases of those materials from third party vendors.

DATED: July 15, 2013

/S/

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