

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

TSB-A-85(40)S
Sales Tax
September 3, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S840130A

On January 30, 1984 a Petition for Advisory Opinion was received from Miss Chocolate Company, Inc., 482 Sunrise Highway, Rockville Centre, New York 11570.

The issue raised is whether sales made by Petitioner to fund-raising organizations are exempt from tax.

Petitioner is a distributor of chocolates, confectionery and other novelty items. Petitioner states that nearly all of its sales are made to organizations such as schools, PTA's etc. who resell the products to raise funds.

An organization desiring to raise funds through the sale of Petitioner's products signs an agreement with Petitioner. Pursuant to the agreement, Petitioner provides the organization with sales aids needed by the organization to assist its members in making sales. Additionally, Petitioner provides the organization with prizes which are to be offered to members of the organization as an incentive to achieve greater sales. A specified prize or number of prizes are included in the purchase of a specified quantity of confectionery. However, if the organization desires prizes in excess of the specified quantity, these may be ordered at additional cost to the organization. Alternatively, the organization may elect to receive a purchase discount in lieu of the sales incentive prizes.

Organization members solicit sales from the general public. Typically, the customer pays in advance for its purchase and receives delivery at some future date. Once the organization has determined the quantities of items for which it has solicited sales, it places an order with Petitioner. Orders are accepted by Petitioner for complete case amounts only. Once shipped, the organization is obligated to pay for the merchandise shipped. Returns are not accepted by Petitioner unless for reasons of defective quality or incorrect merchandise shipment. If the organization is left with unsold merchandise (cancelled sales, opened cases, etc.) it must absorb the cost of such merchandise.

Petitioner states that it bills the organization for its purchases, title is transferred to the organization and the organization remits payment directly to Petitioner. The difference between the amount paid by the organization to Petitioner and the amount collected by the organization from product sales represents funds raised by the organization.

Section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property unless otherwise exempted or excluded from tax.

Section 1101(b)(4) of the Tax Law defines a retail sale as a sale ". . . of tangible personal property to any person for any purpose other than (A) for resale as such. . .".

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Section 1116(a) of the Tax Law provides that, with certain exceptions, sales by or to organizations enumerated in section 1116 of the Tax Law are not subject to sales or compensating use tax.

Section 1132(c) of the Tax Law provides that ". . . it shall be presumed that all receipts for property are subject to tax until the contrary is established, and the burden of proving that any receipt. . . is not taxable hereunder shall be upon the person required to collect tax or the customer. Unless (1) a vendor shall have taken from the purchaser a certificate in such form as the Tax Commission may prescribe. . . to the effect that the property . . . was purchased for resale or . . . (2) the purchaser . . . furnishes to the vendor: any affidavit . . . which the Tax Commission may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen . . . the sale shall be deemed a taxable sale at retail. The vendor shall not be required to collect tax from purchasers who furnish a certificate of resale or an exempt organization statement in proper form. . . ."

Critical to the determination of the sales tax status of the subject transaction is the determination of whether title to the products has been actually and unequivocally transferred to the organization. If the organization does not acquire title to the products sold but merely collects the proceeds of the sale from the consumer, such a transaction will require that sales tax be collected upon the sale to the consumer and remitted by Petitioner to the State Tax Commission. Matter of Poly Graphic Gallery, Inc., State Tax Commission, August 22, 1977, TSB-H-84(100)S; Matter of David E. Robb, State Tax Commission, February 6, 1985, TSB-H-85(106)S. In the alternative, if Petitioner can demonstrate (e.g. in a contract between the parties) that title to the products passes absolutely to the organization and there exists a correlative obligation to pay the purchase price, the transaction will constitute a retail sale of tangible personal property to the organization. Matter of Friedman, 91 Misc. 2d 201. Such a retail sale is subject to the tax imposed by section 1105(a) of the Tax Law unless Petitioner receives a properly completed exemption document from the purchaser in accordance with section 1132(c) of the Tax Law.

DATED: August 14, 1985

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth herein.