

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

TSB-A-98(74)S
Sales Tax
November 5, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S980410A

On April 10, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from AAA Western and Central New York, Inc., 100 International Drive, Buffalo, New York 14221. Petitioner, AAA Western and Central New York, Inc., provided additional information pertaining to the petition on June 4, 1998.

The issues raised by Petitioner are:

- (1) Whether a certain publication entitled Destinations is exempt from New York State and local sales and compensating use taxes.
- (2) Whether or not Petitioner's cost of producing the publication through an outside printer is subject to sales tax.
- (3) Whether the outside printer's purchases of paper and ink used to produce Petitioner's publication are subject to sales tax.

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

Petitioner is a not-for-profit corporation affiliated with the American Automobile Association ("AAA") and AAA New York State. Petitioner offers its dues paying members automotive, travel and financial services. Petitioner publishes a bimonthly publication, entitled Destinations, six times a year. The publication contains articles regarding travel and tours, automobiles, member discounts, traffic safety, upcoming events and club news. It is mailed to Petitioner's primary members, and \$1 of their membership dues is allocated to Destinations as shown on the membership application. Copies are also on display and available for sale to non-members at Petitioner's fifteen offices throughout Western and Central New York State. Signs posted at or near the displayed copies of the publication state that non-members may purchase a copy for \$1 per copy (or \$6 for a year's subscription). These prices are indicated inside the publication. Petitioner pays a vendor to print the publication. Copies of the publication that are sent to members or subscribers by U.S. mail are sent at the second class periodical postage rate.

As part of its petition, Petitioner submitted the five most recent issues of its publication for review.

Applicable Law and Regulations

Section 1101(b)(4)(i) of the Tax Law defines "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. . . .

Section 1101(b)(12) of the Tax Law defines "promotional materials" 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, promotional displays and Cheshire labels but does not include invoices, statements and the like.

Section 1105(a) of the Tax Law imposes sales tax upon "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1110 of the Tax Law provides, in part:

(a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail. . . .

Section 1115 of the Tax Law provides, in part:

(a) 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:

* * *

(5) Newspapers and periodicals.

* * *

(n)(1) Except as otherwise provided in this subdivision, promotional materials mailed, shipped or otherwise distributed from a point within the state, by or on behalf of vendors or other persons to their customers or prospective customers located outside this state for use outside this state 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 of this article.

* * *

(n)(4) 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.

With respect to the resale exclusion, Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

(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.

* * *

(4) (i) Tangible personal property which is purchased and given away without charge, for promotion or advertising purposes is not purchased for resale. It is a retail sale to the purchaser thereof, and is not a sale to the recipient of the property.

(ii) Tangible personal property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost, or which is not ordinarily sold by that person in the operation of his business, is a retail sale to the purchaser thereof, and not a sale to the recipient of the property.

(iii) A resale certificate may not be used by the person making the purchases described in subparagraphs (i) and (ii) of this paragraph for such purchases.

* * *

Example 3: A vendor purchases catalogs and distributes them to his potential customers for a minimal charge, which does not reflect the cost to him. He is the retail purchaser of the catalog, and is required to pay the tax thereon. He cannot charge his customer tax on the charge for the catalog.

Section 528.6(c) of the Sales and Use Tax Regulations defines "periodical" as follows:

(1) In order to constitute a periodical, a publication must conform generally to the following requirements:

(i) it must be published in printed or written form at stated intervals, at least as frequently as four times a year;

(ii) it must not, either singly or, when successive issues are put together, constitute a book;

(iii) it must be available for circulation to the public;

(iv) it must have continuity as to title and general nature of content from issue to issue; and

(v) each issue must contain a variety of articles by different authors devoted to literature, the sciences or the arts,

news, some special industry, profession, sport or other field of endeavor.

* * *

(3) Nothing in this section shall be construed to exempt as a periodical the following:

(i) advertising material, such as catalogs, flyers, pamphlets and brochures. . . .

Opinion

Petitioner is a not-for-profit affiliate of the American Automobile Association (AAA) and AAA New York State. Petitioner is an automobile club membership organization which receives dues from its members and provides a number of automotive, travel and financial services and savings opportunities to the members.

Petitioner publishes a bimonthly publication entitled Destinations which it mails to its members. The publication is also available to non-members for \$1 per copy. However, an article in the October/November 1997 issue (submitted with the petition) indicates there were no sales through dealers, carriers, vendors or counter sales in the preceding six month period.

Each of the five issues of the publication submitted for review is designed to induce sales and encourage recipients to travel and use Petitioner's services. While each issue contains brief editorials on current happenings with regard to highway and motor vehicle legislation, traffic safety and motoring concerns, of the 19 to 23 pages in each edition, the articles constitute a combined total for each of roughly four pages or less. The articles are generally designed to promote Petitioner's programs, workshops, travel tours, and its dedication and commitment to servicing the needs of its members. The remainder and major portion of each publication is devoted to advertising in the form of self-promotion for Petitioner's automotive, travel and financial services, as well as advertising for other merchants such as car rentals and traveler's checks. Each of the five issues also contains various order forms to request additional information, membership applications and return envelopes with respect to such advertising literature.

Destinations mainly consists of advertising material to promote and advertise Petitioner's business and would not seem to qualify as an exempt periodical under Section 528.6(c) of the Sales and Use Tax Regulations (see 20 NYCRR 528.6(c)(3)(i); Debbie Ann Ascher, Adv Op Comm T&F, March 6, 1992, TSB-A-92(20)S; Genovese Drug Stores, Inc., Adv Op Comm T&F, January 30, 1997, TSB-A-97(4)S). It should also be noted that Destinations is not a shopping paper as defined in Section 1115(i) of the Tax Law and, accordingly, the exemption for shopping papers under that section does not apply to it (Genovese Drug Stores, Inc., supra).

On the other hand, Destinations does constitute promotional materials as defined in Section 1101(b)(12) of the Tax Law. Issues of Destinations sent to members out of state for use outside the state would be exempt from sales and use taxes, pursuant to Section 1115(n)(1). In addition, effective March 1, 1997, the issues of Destinations which are mailed by Petitioner to its members in New York by means of the United States Postal Service or a like delivery service, without charge to these members, are exempt from sales and compensating use tax in accordance with Section 1115(n)(4) of the Tax Law. To avail itself of this

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exemption from sales and use taxes, Petitioner must supply its printer with a properly completed Certificate of Exemption for Purchase of Promotional Materials, Form ST-121.2 (see Technical Services Bureau Memorandum, Expanded Sales and Compensating Use Tax Exemption for Promotional Materials, August 20, 1997, TSB-M-97(6)S).

Petitioner's sales of Destinations to non-members, for \$1 per copy (or \$6 per year), are subject to tax under Section 1105(a) of the Tax Law. Accordingly, Petitioner must collect State and local sales or use tax on such sales. Petitioner may purchase such issues to be sold to non-members from the printer exempt from tax, as purchases for resale. If Petitioner gives copies of Destinations away "over the counter" to members (or non-members), for example, at Petitioner's place of business, Petitioner would be liable for tax, based upon the purchase price from the printer, on the issues which it hands out free of charge.

The printer's sales of Destinations which do qualify as promotional materials are retail sales to Petitioner pursuant to Section 526.6(c)(4)(i) of the Sales and Use Tax Regulations. The printer may purchase for resale, the paper and ink used to produce the issues it sells to Petitioner, in accordance with Section 1101(b)(4)(i) of the Tax Law (see New York State Department of Taxation and Finance Publication 842, Sales Tax Information for Printers).

DATED: November 5, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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