

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

TSB-A-99(23)S  
Sales Tax  
April 8, 1999

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980401A

On April 1, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Promex Medical, Inc., 1001 Buffalo Avenue, Niagara Falls, New York, 14303.

The issue raised by Petitioner, Promex Medical, Inc., is whether Petitioner's sales of Medi-Script Starter Units, which are mailed to physicians in New York, qualify for the exemption provided in Section 1115(n)(4) of the Tax Law.

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

Petitioner is a corporation organized and existing under the laws of the State of New Jersey and qualified to do business in the State of New York. Petitioner is in the business of providing direct mail advertising services and materials to pharmaceutical companies.

Under federal law, pharmaceutical drugs may not be purchased without a prescription from a licensed physician. Physicians may prescribe these drugs either for their own use or for that of their patients. While pharmaceutical companies may now lawfully advertise directly to patients, they continue to focus substantial portions of their advertising campaigns on the physicians who are empowered to prescribe these drugs. Such advertising often consists of the distribution of drug samples, as well as the use of printed promotional materials.

A Medi-Script Starter Unit consists of a blister pack which contains a sample of the drug being promoted and a prescription form personalized for use by the physician to whom it is addressed. Each Medi-Script Starter Unit is customized by Petitioner in order for it to properly enclose and display the drug sample provided by the pharmaceutical company. It is assembled so that the prescription blank is placed in front to enable the physician to inscribe on the form the information required (e.g. the patient's name and address) in order for a pharmacy to fill the prescription. The Medi-Script Starter Unit enables the patient to use the samples of the drug included in the pack until the prescription can be filled by a pharmacy. The Medi-Script Starter Unit may also contain other printed promotional materials pertaining to the use of the drug or to other products available from the pharmaceutical company. These units are sent in packets of 24.

In promoting pharmaceutical products, one of the primary objectives is targeting the physicians who potentially, or currently, use or dispense the product. To accomplish this Petitioner may use its own database or the resources of the pharmaceutical company. Since this promotional package will include a drug sample, under the Federal Prescription Drug Marketing Act Petitioner

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is required to obtain signed sample request forms from the targeted physicians. The solicitation of these physicians is often accomplished by a telemarketing campaign.

After obtaining the required sample request form from a physician, Petitioner assembles the items which make up the Medi-Script Starter Unit. The drug samples being promoted are provided by Petitioner's client, the pharmaceutical company. The prescription blank is then customized with the personal information of the targeted physician required by State law (i.e., the physician's name, address, DEA and license numbers). Both the personalized prescription form, as well as any other printed promotional materials included in the blister pack, are provided by Petitioner. Such printed materials are either created in house or purchased for resale by Petitioner from its subcontractors.

Petitioner's charge to its clients for the services and materials that it provides is broken down as follows. There is a separate charge for the telemarketing services employed in the solicitation of physicians and obtaining the signed request forms; a separate charge, at a stated price per unit, to cover the design, printing and assembling of the Starter Units; and a separate charge for the cost of mailing or shipping the Starter Units. There is no charge to the physicians for the Medi-Script Starter Units or for the cost to deliver the units to them. When Petitioner enters into an agreement to produce the Medi-Script Starter Unit for delivery to physicians in New York, it obtains a properly completed Certificate of Exemption for Purchase of Promotional Materials (Form ST 121.2) from the pharmaceutical company purchasing the promotional material.

Petitioner ships the Medi-Script Starter Unit by common carrier to the targeted physician.

A sample Medi-Script Starter Unit was provided with the Petition for Advisory Opinion.

### **Applicable Law and Regulations**

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 on the receipts from every retail sale of tangible personal property, except as otherwise provided.

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Section 1115(n)(4) of the Tax Law 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.

**Opinion**

Petitioner produces Medi-Script Starter Units under contract from pharmaceutical companies to promote the sale of prescription drugs to potential customers. Since a pharmaceutical company cannot sell a prescription drug directly to the general public, these drugs are marketed to potential users by Petitioner through physicians. The pharmaceutical company works in conjunction with Petitioner to obtain the proper authorization to distribute drug samples and promotional literature directly to the physicians who prescribe them.

The packaging and patient education literature are printed materials. The prescription forms constitute a specialized type of order form. These materials are printed promotional materials which, when shipped by or caused to be shipped by the purchaser to its customers or prospective customers via common carrier, without charge to the customers or prospective customers, would be exempt from sales and use tax under Section 1115(n)(4) of the Tax Law. The pharmaceutical company purchases these materials from Petitioner who ships them on behalf of the pharmaceutical company via common carrier to physicians, without charge to the physicians, within New York State. The physicians are not the customers or prospective customers of the pharmaceutical company for purposes of Section 1115(n)(4). Physicians prescribe the pharmaceutical company's drugs to patients who then purchase the drugs, but the prescribing physician is not the purchaser of the drugs. Since the physicians are not the customers or prospective customers of the pharmaceutical company, Petitioner's sales of the Medi-Script Starter Units in this instance are not exempt from sales and compensating use tax under Section 1115(n)(4).

DATED: April 8, 1999

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

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