

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(10)S
Sales Tax
June 3, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S001107A

On November 7, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from KPMG LLP, 345 Park Avenue, New York, NY 10154. Petitioner, KPMG LLP, furnished additional information with respect to the Petition on January 18, 2001.

The issue raised by Petitioner is whether the documents described herein are promotional materials that may qualify for exemption from sales and use tax under Section 1115(n)(4) of the Tax Law.

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

XYZ is a New York limited liability company with its principal place of business located in New York City. XYZ offers its clients an integrated way to design and manage their information flows to take advantage of the latest technologies for creating, storing, moving, presenting and utilizing information in any combination of paper and electronic forms. Specifically, XYZ prints, on paper furnished by XYZ to its client, and/or creates an electronic file of a variety of corporate documents that are ultimately delivered to XYZ's clients or to the Securities and Exchange Commission ("SEC"). XYZ may be engaged by a corporation that desires to disseminate information, by underwriters acting on behalf of a corporation, or by law firms hired by a corporation or underwriter. (Unless otherwise specified, the term "client" referred to herein means a corporation, underwriter or law firm.) XYZ may deliver the printed documents directly to a client which will distribute the documents to current or prospective shareholders of the corporation, or XYZ may distribute the documents to current or prospective shareholders upon the direction of the client. All of the printed documents are sent to current or prospective shareholders via the United States Postal Service or common carrier at no cost to the shareholder. The clients, as well as the current and prospective shareholders, are located within and without New York State. In the case of documents required to be filed with the SEC, XYZ may send such documents electronically to the SEC on behalf of a client.

Petitioner provided the following description of the types of documents that XYZ prepares, the method of delivery of such documents, and the recipient(s) of such documents.

A. Prospectus

The prospectus contains the basic business and financial information on an issuer with respect to a particular securities offering. An investor uses a prospectus to help appraise the merits of the offering and make educated investment decisions. XYZ may either mail the prospectus to the client or send it directly to current and prospective shareholders.

B. Red Herring Prospectus

A prospectus in its preliminary form is frequently called a "red herring" prospectus and is subject to completion or amendment before the registration statement becomes effective, after which a final prospectus is issued and sales can be consummated. The red herring prospectus is delivered to clients, current shareholders, and prospective shareholders in the same manner as a final prospectus.

C. Proxy Solicitation Materials

State law governs the circumstances under which shareholders are entitled to vote. When a shareholder vote is required and a corporation solicits proxies with respect to securities registered under Section 12 of the Securities Act of 1934 (the "1934 Act"), that corporation generally is required to furnish a proxy statement containing the information specified by Schedule 14A of the 1934 Act. The proxy statement is intended to provide security holders with the information necessary to enable them to vote in an informed manner on matters intended to be acted upon at security holders' meetings, whether the traditional annual meeting or a special meeting. Typically, a security holder is also provided with a "proxy card" to authorize designated persons to vote his or her securities on the security holder's behalf in the event the holder does not vote in person at the meeting. Copies of definitive (final) proxy statements and proxy cards are filed with the SEC at the time they are sent to security holders.

XYZ delivers the proxy materials described above to current and prospective shareholders, clients, and to the SEC in the manner previously described.

D. Offering Circulars

An offering circular details the terms and conditions for the sale and issue of marketable securities. This document, which is sent to prospective shareholders, contains a description of the securities offered, a business description, and financial statements.

E. Tender Offer

A tender offer is an offer to purchase shares of stock of a corporation, up to a specific number, tendered by shareholders within a specified period at a fixed price, usually at a premium above the market price. Tender offers are usually made by a party seeking to take control of a corporation, and are often followed by a merger proposal.

F. Form 144

Form 144 must be filed as notice of the proposed sale of restricted securities or securities held by an affiliate of the issuer in reliance on Rule 144 when the amount to be sold during any three month period exceeds 500 shares or units or has an aggregate sales price in excess of \$10,000.

XYZ files this form electronically with the SEC on behalf of a client and XYZ sends copies of Form 144 to clients and to current shareholders at the client's direction.

G. Form S-1

Form S-1 is the basic registration form. It can be used to register securities for which no other form is authorized or prescribed, except securities of foreign governments or political subdivisions thereof.

XYZ files this form electronically with the SEC on behalf of a client and XYZ sends copies of Form S-1 to the client and to current shareholders (where applicable) at the client's direction.

H. Form S-3

Form S-3 is a simplified registration form and it may only be used by companies that have been required to report under the 1934 Act for a minimum of twelve months and have met the timely filing requirements set forth under Form S-2. Also, the offering and issuer must meet the eligibility test prescribed by the form. The form maximizes incorporating by reference information from 1934 Act filings.

Similar to Form S-1, XYZ files this form electronically with the SEC on behalf of the client and XYZ sends copies of Form S-3 to the client and to current shareholders (where applicable) at the client's direction.

I. Private Placement Memorandum

This document provides for the sale of securities in a corporation not subject to registration requirements under the Securities Act of 1933. A private placement memorandum is similar to an offering plan which is distributed to a limited group of people. The offering generally involves a placement with large institutional investors such as insurance companies and pension funds, securities issued to key employees of a company, and securities issued to acquire the stock of a closely held corporation. The private placement memorandum explains to current or prospective shareholders the risks and expected returns of investment.

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XYZ may either mail the private placement memorandum to a client or send it directly to current or prospective shareholders.

J. Form 10-K/Annual Report

This is the annual report that most reporting companies file with the SEC. It is also included in the proxy materials sent to a shareholder. It provides a comprehensive overview of the registrant's business. The report must be filed within 90 days after the end of the company's fiscal year.

XYZ files this form electronically with the SEC on behalf of a client and XYZ sends copies of Form 10-K to clients and to current and prospective shareholders at the client's direction.

K. Form 10-Q

Form 10-Q is a report filed quarterly by most reporting companies. It includes unaudited financial statements and provides a continuing view of the company's financial position during the year. The report must be filed for each of the first three fiscal quarters of the company's fiscal year and is due within 45 days of the close of the quarter.

XYZ files this form electronically with the SEC on behalf of a client and XYZ sends copies of Form 10-Q to clients and to current and prospective shareholders at the client's direction.

Applicable Law

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(12) Promotional materials. 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. Promotional materials shall also include paper or ink furnished to a printer for use in providing

the services of producing, printing or imprinting promotional materials or in producing, printing or imprinting promotional materials, where such paper and ink become a physical component part of the promotional materials and such printer sells such services or such promotional materials to the person who furnished the paper and ink to such printer.

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

Opinion

Printed promotional materials delivered to customers or prospective customers of the person buying the materials will not be subject to tax when they are delivered by common carrier, the United States postal service or like delivery service, and the customer or prospective customer receives them free of any charge. The prospectuses, red herring prospectuses, offering circulars, tender offers, private placement memorandums, and Forms 10-K and 10-Q, as described herein, are promotional materials under Section 1101(b)(12) of the Tax Law because they qualify as advertising literature, or other related tangible personal property such as annual reports or prospectuses. Accordingly, to the extent these documents are distributed in printed form at no cost to XYZ's clients' current and prospective shareholders located within and without New York by means of a common carrier, United States postal service or like delivery service, the sale of such documents by XYZ will be exempt from state and local sales and use taxes under Section 1115(n)(4) of the Tax Law.

A vendor's timely acceptance, in good faith, of a properly completed Form ST-121.2, *Certificate of Exemption for Purchases of Promotional Materials*, relieves the vendor from the duty to collect sales tax on the sale of promotional materials.

The proxy solicitation materials, Form 144, Form S-1, and Form S-3, as described herein, are not promotional materials under Sections 1101(b)(12) and do not qualify for the exemption provided by Section 1115(n) of the Tax Law. Therefore, the sale of these documents by XYZ may be subject to state and local sales and use taxes if delivered in New York.

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It should be noted that only envelopes used exclusively to deliver promotional materials are considered promotional materials eligible for the exemption provided in Section 1115(n) of the Tax Law. See Section 1101(b)(12) of the Tax Law.

DATED: June 3, 2002

/s/
Jonathan Pessen
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Technical Services Division

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