

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

TSB-A-03(29)S
Sales Tax
July 16, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020708A

On July 8, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Institutional Financing Services, 5100 Park Road, Benicia, CA 94510. Petitioner, Institutional Financing Services, provided additional information pertaining to the Petition on July 23, 2002.

The issue raised by Petitioner is whether its purchases of prizes included as part of its fund-raising incentive programs qualify for exemption from sales and compensating use taxes as purchases for resale.

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

Petitioner sells its products through schools, school or student groups (such as parent-teacher associations), or booster groups (hereinafter “school or school groups”). The schools or school groups participate in these sales for fund-raising purposes. The schools or school groups keep a percentage of the sales proceeds and remit the balance to Petitioner. One of the options Petitioner offers the schools or school groups is the option to provide prizes to the students or sponsors as part of an “award incentive program.” The prizes are the incentives that are expected to increase sales and, therefore, revenues for the school or school group. The prizes are provided to the students or sponsors based on the quantity of their sales. For example, students who sell one-to-five items might choose prizes from category A, while students who sell six-to-ten items would choose from category B, etc.

Petitioner adjusts the cost of its programs to schools or school groups based on the desired profit level of the school or school group. The percentage of sales proceeds that a school or school group is entitled to keep is lower for a school or school group who chooses the award incentive program than for a school or school group choosing no award incentive program. The higher the percentage of sales proceeds that a school or school group chooses to keep, the lower the award incentive program, i.e., number and value of prizes the school or school group receives. For example, a school or school group may be allowed to keep 50 percent of gross sales, with the remaining 50 percent going to Petitioner, if it does not participate in the award incentive program, or may be allowed to keep 30, 35, 40, or 45 percent of gross sales in accord with a suitable award incentive program.

Applicable Law and Regulations

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:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article . . . valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery. . . . (Emphasis added)

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such. . . .

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

* * *

(7) Use. The exercise of any right or power over tangible personal property or over any of the services which are subject to tax under section eleven hundred ten of this article or pursuant to the authority of article twenty-nine of this chapter, by the purchaser thereof, and includes, but is not limited to . . . any consumption of such property or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine. Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials, or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine.

* * *

(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. . . .

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

Section 1110(a) of the Tax Law provides, in part:

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 . . . except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail. . . .

Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

Resale exclusion. (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.

* * *

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. . . .

(3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property. The receipts are subject to tax at the time of the retail sale.

* * *

(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.

Section 526.7 of the Sales and Use Tax Regulations provides, in part:

* * *

(b) *Consideration.* The term *consideration* includes monetary consideration, exchange, barter, the rendering of any service, or any agreement therefor. *Monetary consideration* includes assumption of liabilities, fees, rentals, royalties or any other charge that a purchaser, lessee or licensee is required to pay.

* * *

(d) *Barters or exchanges.* The transfer of tangible personal property or services to a person in consideration for tangible personal property or services received is a “sale” under the Tax Law.

Opinion

In Matter of House of Lloyd, Inc., Dec Tx App Trib, November 13, 1998, TSB-D-98(14)S and Matter of Popular Club Plan, Inc., Dec Tx App Trib, May 11, 1995, TSB-D-95(23)S, it was determined that the transfer of merchandise by direct marketing companies to “direct sellers” who made the companies’ products available for sale to customers through parties and catalogs was an exchange of tangible personal property for specific services performed, and constituted a barter within the meaning of section 1101(b)(5) of the Tax Law. The issuance of the reward credits (redeemable for merchandise) by the companies was a noncash form of compensation in exchange for the direct sellers’ services rendered on the companies’ behalf.

Although Popular Club Plan, Inc., *supra*, involved a two-stage transaction where the reward credits were first earned and later redeemed for merchandise, the essence of the transaction is the same as the award incentive program Petitioner offers to schools or school groups. The schools or school groups earn prizes by making sales. They solicit customers, transmit orders, collect money, and submit payment to Petitioner. The prizes are items of value given to the schools or school groups in exchange for these services. The consideration received by Petitioner for the prizes is an amount equal to the reduction in the percentage of sales proceeds that goes to the school or school group. The reduction in this percentage of sales proceeds is the equivalent of a payment by the school or school group to Petitioner. For example, assume a school or school group would keep 50 percent of the proceeds from sales of Petitioner’s products if the school or school group did not choose to receive prizes from Petitioner under an award incentive program, but the school or school group would keep 40 percent of the proceeds if it chose to receive prizes from Petitioner. Assuming that the school or school group sold \$1,000 of Petitioner’s products, the reduction in the amount of sales proceeds kept by the school or school group under the award incentive program would be \$100 (i.e., the difference between \$500 and \$400). Petitioner in such case would be considered to have sold the prizes to the school or school group for an amount of \$100.

Accordingly, to the extent that the schools or school groups are bartering a part of the sales proceeds to which they might otherwise have been entitled in exchange for receipt of the prizes, the

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schools or school groups are deemed to be purchasing and Petitioner is deemed to be selling the prizes. Therefore, Petitioner is purchasing the prizes for resale and does not owe sales tax on such purchases. See section 1101(b)(4)(i)(A) of the Tax Law.

The transfer of the prizes to the school or school group is a sale and does not constitute a promotional use of such items within New York State by Petitioner. See Matter of J.C. Penney Co. Inc., Dec Tx App Trib, April 27, 1989, TSB-D-89(25)S; Jeffrey J. Coren, CPA, P.C., Adv Op Comm T&F, January 28, 1999, TSB-A-99(8)S.

This Opinion only addresses the taxability of Petitioner's purchases of prizes as described above, and makes no determination whether the purchases of the prizes by the schools or school groups are subject to sales tax. This Opinion also does not address whether the schools or school groups are purchasers or sellers of Petitioner's products, or whether sales of the products by Petitioner are to the actual consumer, and makes no determination whether sales of Petitioner's products are subject to tax.

DATED: July 16, 2003

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