

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

TSB-A-05(17)S
Sales Tax
May 26, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040413A

On April 13, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Dr. Joan Coff, P.O. Box 92, Meridian, NY. Petitioner, Dr. Joan Coff, provided additional information pertaining to the Petition on June 1, 2004.

The issue raised by Petitioner is whether the services and products she provides to clients in conjunction with workplace wellness programs are subject to sales tax.

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

Petitioner is a corporate health consultant who provides workplace wellness programs which include designing, coaching and implementing the programs. While there are four parts to a program, each program is sold as one package to clients under a yearly service contract.

1. Petitioner consults with the client and assesses its needs. Petitioner follows up by consulting with clients by phone for approximately seven hours per year. Petitioner designs a yearly health calendar and provides clients with one copy. Each month, a package of information related to that month's topic is provided to the client. Clients make copies of the information (approximately five pages) to pass out to employees.
2. Petitioner provides four health workshops which include a one hour slide presentation "class." Attendees receive two pages of printed material relating to the class.
3. Petitioner provides each employee with a textbook for the workshops. Petitioner purchases textbooks from a vendor and currently pays sales tax on these purchases.
4. Petitioner contracts with a massage therapist to provide 12 days of on-site chair massage to wellness client companies. Clients are charged a flat rate per day for this service as part of the yearly contract. Petitioner pays the contracted therapist.

While Petitioner encourages her clients to purchase the entire package, Petitioner will allow clients to purchase textbooks separately without the wellness program services. Petitioner charges her clients a single all-inclusive charge for the wellness program services provided in the program. This charge will vary based on the number of employees receiving such services. Petitioner does not plan to service clients in New York City.

Applicable law and regulations

Section 1101(b)(4)(i) of the Tax Law defines the term “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, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . .

Section 1105(a) of the Tax Law imposes sales tax upon:

The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1105(c) of the Tax Law imposes sales tax upon the receipts from every sale, except for resale, of certain enumerated services.

Section 1115(a) of the Tax Law provides, in part:

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:

* * *

(34) Textbooks purchased by full and part time college students for their courses; provided, however, that upon purchase such a student shall present a valid student identification card, and such a textbook shall be required for a course being taken by such student at an institution of higher education. For purposes of this subdivision the term:

(i) “Textbooks” includes only those books specifically written, designed or produced for educational, instructional or pedagogical purposes.

(ii) “Institution of higher education” shall mean any institution of higher education, recognized and approved by the regents of the university of the state of New York accredited by a nationally recognized accrediting agency or association accepted as such by the regents of the university of the state of New York, which provides a course of study leading to the granting of a post-secondary degree, certificate or diploma.

Section 1212-A(a)(2) of the Tax Law authorizes, and section 11-2002(h) of the New York City Administrative Code imposes, a local sales tax on the receipts from the sale of “massage services and similar services” in the city of New York, excluding charges for such services rendered in conjunction with medical and similar services.

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

(a) The term “*retail sale*” or “*sale at retail*” means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

* * *

(c) *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. See sections 532.4 and 532.6 of this Title.

(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.

* * *

(6) Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3) and (5) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (i) becomes a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

* * *

7) Tangible personal property purchased for use in performing a service not subject to tax is not purchased for resale.

Section 527.1(b) of the Sales and Use Tax Regulations provides, in part:

Taxable and exempt items sold as a single unit. When tangible personal property, composed of taxable and exempt items is sold as a single unit, the tax shall be collected on the total price.

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Petitioner provides workplace wellness programs. Petitioner designs, coaches and implements the programs. For a set fee, a program includes phone consulting, a wellness calendar with monthly handouts, wellness workshops with handouts, a textbook for each employee and 12 days of on-site chair massage. The program materials and text books are typically provided to the employees as part of Petitioner's single all-inclusive charge for the workplace wellness program. However, the textbooks may be purchased by clients separately from the program services.

Petitioner's program offers consulting, instructional, and massage services which are not among the services enumerated as taxable under section 1105(c) of the Tax Law.

Presumably, the primary purpose of the service described in this Opinion is to provide clients with a workplace wellness program. The issue is whether the handouts, wellness calendar, and textbooks are incidental to Petitioner's provision of this nontaxable wellness service.

Factors which would indicate that the handouts, wellness calendar, or textbooks provided by Petitioner to the clients are incidental to the provision of the wellness services include whether: the handouts, wellness calendar, or textbooks are integrally connected to the provision of the services; there is no separate charge for the handouts, wellness calendar, or textbooks; the handouts, wellness calendar, or textbooks may not be purchased without purchasing the other services or the services may not be purchased without the handouts, wellness calendar, or textbooks; the value of the handouts, wellness calendar, or textbooks is less than and incommensurate with the value of the service; and the cost for the services (or substantially equivalent services) that include the handouts, wellness calendars, or textbooks is the same as the cost for services sold without the handouts, wellness calendars or textbooks.

Under the circumstances described in this Opinion, it appears that the handouts and wellness calendars are provided as an incident to the wellness services. They are not sold separately and Petitioner does not appear to sell packages at a lower price in which such materials are not provided to clients. Therefore, the handouts and wellness calendars provided to Petitioner's clients are incidental to the nontaxable wellness services.

Since the handouts and wellness calendars provided by Petitioner to the clients are incidental to the wellness services, the purchase of such handouts and wellness calendars, or raw materials such as paper and ink which become a component of such handouts and calendars, by Petitioner are subject to the tax imposed by section 1105(a) of the Tax Law. Since Petitioner is

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not reselling these items, they are not exempt from tax as purchases for resale. See section 526.6(c)(7) of the Sales and Use Tax Regulations.

However, Petitioner offers the textbooks for sale separately from the rest of the wellness service package. Thus, it appears that the textbooks are not provided as an incidental part of the services but are instead sold to the clients. The sale of a textbook is the sale of tangible personal property subject to tax under section 1105(a) of the Tax Law. Petitioner's textbooks are not sold to college students in a manner which makes them eligible for the exemption provided under section 1115(a)(34) of the Tax Law.

Petitioner is providing clients with textbooks combined with Petitioner's services. Such transaction represents a mixed sale of exempt services and taxable property. When tangible personal property composed of taxable and exempt items is sold as a single unit, the sales tax must be collected on the total price. See section 527.1(b) of the Sales and Use Tax Regulations. The rule has been extended to sales of taxable and exempt services and sales of services with tangible personal property. See *PricewaterhouseCoopers LLP*, Adv Op Comm T&F, March 25, 2003, TSB-A-03(11)S; *Salomon & Leitch CPA's, LLP*, Adv Op Comm T&F, July 23, 1997, TSB-A-97(44)S. Therefore, the entire amount charged to the client would be taxable, unless the amount charged for the textbooks is separately stated and reasonable. If charged separately (and the charge is reasonable) the receipt for the books would be taxable and the charges for services would not be taxable.

As previously mentioned, the sales of the textbooks by Petitioner to her clients are subject to sales tax as retail sales of tangible personal property. As such, the purchases of textbooks by Petitioner are excluded from sales tax as purchases for resale. However, to make purchases for resale Petitioner is required to register as a vendor and Petitioner is required to collect and remit sales tax on her sales of taxable items and services. See section 1134 of the Tax Law.

Although Petitioner currently does not intend to service clients in New York City, it should be noted that massage therapy sessions are subject to New York City sales tax as provided for in section 1212-A of the Tax Law and section 11-2002(h) of the New York City Administrative Code. If Petitioner extended her services to clients within New York City, she would be required to collect the New York City sales tax on such massage services.

DATED: May 26, 2005

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