

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

TSB-A-06(10)S
Sales Tax
March 9, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030811B

On August 11, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Goldenthal & Suss CPA's & Consultants P.C., 2791 Richmond Avenue, Staten Island, NY 10314.

The issue raised by Petitioner, Goldenthal & Suss CPA's & Consultants P.C., on behalf of its client (Company), is:

1. Whether charges to customers and prospective customers designated as a charge for shipping and handling are subject to sales tax when there is otherwise no additional charge to the customer for the cost of the trial product being delivered.
2. If the shipping and handling charges for the trial product are not subject to sales tax, whether use tax is due on such trial product.

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

Company is organized as an LLC in the state of New York and sells beauty products via the Internet. Company is starting a promotion which allows customers, or prospective customers, to receive its product free of charge. The only charge Company makes to its customers is for shipping and handling. There is no charge for the product itself. If the customer is satisfied with the free trial product, Company will send another shipment of the product for a charge.

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 . . . 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)

* * *

(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, the receiving, storage or any keeping or retention for any length of time, *withdrawal from storage*. . . . 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. (Emphasis added)

Section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property, except as otherwise provided.

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 . . . except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail, (B) of any tangible personal property . . . manufactured, processed or assembled by the user, (i) *if items of the same kind of tangible personal property are offered for sale by him in the regular course of business or* (ii) if items are used as such . . . if items of the same kind are not offered for sale as such . . . in the regular course of business, . . . (Emphasis added)

* * *

(b) For purposes of clause (A) of subdivision (a) of this section, the tax shall be at the rate of . . . percent of the consideration given or contracted to be given for such property, or for the use of such property, *including any charges for shipping or delivery*. . . (Emphasis added)

(c) For purposes of subclause (i) of clause (B) of subdivision (a) of this section, the tax shall be at the rate of . . . percent of *the price at which items of the same kind of tangible personal property are offered for sale by the user*, and the mere storage, keeping, retention or withdrawal from storage of tangible personal property by the person who manufactured, processed or assembled such property shall not be deemed a taxable use by him; provided, however, that if the user uses such an item itself on its own premises (*not including making a gift of such tangible personal property*), solely in the conduct of the user's own business operations, and the item retains its characteristic as tangible personal property when so used, the tax shall be at the rate, and on the consideration, described in subdivision (d) of this section. (Emphasis added)

(d) For purposes of subclause (ii) of clause (B) of subdivision (a) of this section, the tax shall be at the rate of . . . percent of the consideration given or contracted to be given for the tangible personal property manufactured, processed or assembled into the tangible personal property the use of which is subject to tax, including any charges for shipping or delivery as described in paragraph three of subdivision (b) of section eleven hundred one.

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

(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.

* * *

(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 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.

* * *

(8) Nothing in this subdivision shall be construed to exempt tangible personal property (i) purchased by a person (other than exempt promotional materials described in paragraph four of this subdivision) or (ii) manufactured, processed or assembled by the manufacturer, processor or assembler, who furnishes such property to the vendor of promotional materials exempt under paragraph one or four of this subdivision to be included as free gifts with such exempt promotional materials to be mailed or shipped to such purchaser's or such manufacturer's, processor's or assembler's customers or prospective customers or who otherwise uses such property in this state, for example, by giving or donating the property as free gifts to another person, unless such tangible personal property is mailed, shipped or otherwise distributed from a point within this state to such customers or prospective customers located outside this state for use outside this state.

Section 526.5(g) of the Sales and Use Tax Regulations provides, in part:

Shipping or delivery. (1) Shipping or delivery charges by a vendor to its customer for the cost of transporting tangible personal property to the customer are part of the vendor's receipt subject to tax where the sale of the property is subject to tax or where taxable services were performed on the property. This is so regardless of whether the vendor separately states such charges in a written contract or on an invoice and regardless of whether the vendor ships or delivers the property itself or hires a third party to ship or deliver the property. Similarly, charges by a vendor to its customer for picking up the customer's property upon which the vendor is to perform taxable services are part of the vendor's receipt from the sale of the service subject to tax.

(2) A charge by a vendor to its customer for the cost of transportation of the property from a supplier, manufacturer, warehouse or catalog or other distribution point to the vendor's place of business is also part of the vendor's receipt from the sale of the property to the customer subject to tax, whether the charge is designated as transportation, shipping, handling or in some other manner.

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.

Opinion

Company sells beauty products via the Internet. Company is starting a promotion whereby its customers and prospective customers will receive its product "free of charge" except for a charge to Company's customers and prospective customers for shipping and handling.

A shipping and handling charge does not, by itself, convert a nontaxable promotional giveaway into a taxable sale of tangible personal property for consideration. Company's provision of trial samples of its product to customers and prospective customers in New York State upon receipt of a payment by the customer of a fee designated as a charge for shipping and handling is not subject to sales tax if such fee reflects Company's actual shipping and handling costs.

If Company's charge to send the product is reflective of its actual shipping and handling costs, Company will not be considered to be making a retail sale of its product to the customer. Company is considered to be using the product for advertising and promotional purposes. See section 526.6(c)(4)(i) of the Sales and Use Tax Regulations. Company is liable for sales or use tax on product which is withdrawn from inventory and not sold but distributed to customers or prospective customers in New York. The product in such case is used and consumed by Company in its advertising and sales promotion program. See sections 1101(b)(7) and 1110 of the Tax Law; and section 526.6(c)(4)(i) of the Sales and Use Tax Regulations.

The computation of the amount of sales and use tax owed by Company will depend on whether Company is a manufacturer of the beauty products or a reseller of such products. If Company purchased the beauty products from the manufacturer or other vendor and did not pay tax on the products at the time of sale, the tax will be computed on the purchase price, including any charges for shipping or delivery, which Company paid to obtain the beauty products. See section 1110(b) of the Tax Law. If Company is the manufacturer of the beauty products, and the same kind of property as the promotional product is offered for sale by Company in the regular course of business, the use tax is to be computed on the price at which items of the same kind are offered for sale by Company. See section 1110(c) of the Tax Law.

Printed promotional materials and promotional materials upon which services described in section 1105(c)(2) of the Tax Law have been performed are exempt from sales and use tax where the purchaser of such promotional materials mails or ships them to customers or prospective customers *without charge*, by means of common carrier, United States Postal Service or like delivery service. The exemption does not apply, however, to free manufacturers' samples mailed or shipped to customers or prospective customers in New York State. See section 1115(n)(4) and (8) of the Tax Law; and Technical Services Bureau Memorandum entitled *Expanded Sales and Compensating Use Tax Exemption for Promotional Materials*, August 20, 1997, TSB-M-97(6)S. It does not appear in the present case that the trial samples shipped by Company to customers or prospective customers in New York would qualify for exemption under section 1115(n) since the samples and any related promotional materials are not provided to customers and prospective customers without charge. Company charges the customers or prospective customers for shipping and handling. Promotional materials, printed or otherwise, mailed or shipped by Company to customers or prospective customers outside New York might qualify for exemption from tax. See section 1115(n)(1) of the Tax Law.

It should be noted that if the fee designated by Company as a charge for shipping and handling exceeds ordinary and reasonable shipping and handling costs based on prevailing industry rates and actually reflects Company's cost of the product plus the cost of shipping and handling, the transaction will be considered to be a retail sale to Company's customer. See *Jeffrey J. Coren, CPA, P.C.*, Adv Op Comm T&F, January 28, 1999, TSB-A-99(8)S. For example, shipping and handling charges for the "free" product that are significantly greater than the shipping and handling charges for the same item when the item is purchased by the customer are an indicator that the transaction is a retail sale. Such sale will be subject to sales or use tax

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when delivered to a customer in New York State. The designation of the charge as one for shipping and handling in such case would not affect such determination. The definition of the taxable receipt for the purchase of property and services includes charges to the customer for shipping and transportation whether such charges are separately stated or not. See section 1101(b)(3) of the Tax Law. Similarly, handling charges are also subject to tax as part of the receipt for the purchase of taxable goods and services. See *Brooklyn Metropolitan Real Estate News*, Adv Op St Tx Comm, Nov 14, 1985, TSB-A-85(57)S; section 526.5(g) of the Sales and Use Tax Regulations.

DATED: March 9, 2006

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